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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1901~~ 1902.

No. ~~218~~ 94.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

SALLIE E. HILLMON.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED MAY 10, 1901.

(18,147.)

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Note Levi Baldwin to J. W. Hillmon, $3100.00, September 2, 1878	2353	1889
Receipt Levi Baldwin to J. W. Hillmon, $1700, October 2, 1878	2353	1889
James W. Green, Recalled	2369	1900
Recital that Record Contains All the Evidence	2374	1904
Defendants' Requests for Instructions and Exceptions to Court's Rulings Thereon	2376	1904
Court's Charge to the Jury	2390	1916
Defendants' Exceptions to Charge to the Jury	2402	1925
Certificate of Judge to Bill of Exceptions	2404	1926
Notice of Motion to Amend Judgment and Receipt of Service	206	1927
Amended Judgment, April 9, 1900	208	1929
Petition for and Order Allowing Writ of Error	210	1929
Assignment of Errors	212	1930
Clerk's Certificate to Transcript	304	2007
Caption to copy from U. S. circuit court of appeals		2009
Motion as to bill of exceptions		2009
Order of circuit court as to original exhibits		2010
Order of Judge Thayer as to bill of exceptions		2012
Appearance of Mr. Green for plaintiff in error		2013
Appearance of Seddon & Blair for plaintiff in error		2014
Certified copy of bond on writ of error		2014
Appearance of Mr. Isham for plaintiff in error		2016
Appearance for defendant in error		2016
Appearance of Mr. McKeighan for plaintiff in error		2017
Argument commenced		2017
Order of submission		2017
Opinion of U. S. circuit court of appeals		2018
Dissenting opinion of Sanborn, J.		2027
Judgment of U. S. circuit court of appeals		2030
Clerk's certificate		2030
Writ of certiorari		2033
Order of Supreme Court as to return to certiorari		2033

The United States of America, to Sallie E. Hillmon—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the District of Kansas, wherein The Connecticut Mutual Life Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Amos M. Thayer, Judge of the Circuit Court of the United States for the Eighth Circuit this 11th day of May in the year of our Lord one thousand nine hundred.

AMOS M. THAYER,
Judge of the Circuit Court of the United States,
For the Eighth Circuit.

No. 1224. Civ. 2. Folio 7. No. 3149. United States Circuit Court, District of Kansas. Sallie E. Hillmon vs. The Conn. Mutual Life Ins. Co. Citation on Writ of Error. Filed 11" day of May, 1900. Geo. F. Sharitt, Clerk.

U. S. Marshal's Return.

Received this writ, at Topeka, Shawnee County, Kansas, May 15th, 1900, and at 5 miles S. W. of Leavenworth, Leavenworth County, Kansas, May 15th, 1900, I executed this writ by delivering a true and certified copy of same to Sallie E. Hillmon personally, whose real name is Mrs. J. A. Smith.

And so on the same date at Leavenworth, Leavenworth County, Kansas, I executed the same by delivering a true and certified copy of this writ to L. B. Wheat, personally, as Attorney for the within named Sallie E. Hillmon.

W. E. STERNE,
U. S. Marshal.
By E. A. PRESCOTT, Deputy.

Marshal's Fees:

Service on 2 persons.....$4 00
Travel 66 miles at 6c..... 3.96

$7.96

b United States of America—ss.

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States for the First Division of the Judicial District of Kansas—Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, at the June Term, 1899, thereof, between Sallie E. Hillmon, plaintiff, and the Connecticut Mutual Life Insurance Company of Hartford, Conn., defendant, a manifest error hath happened, to the great damage of the said Connecticut Mutual Life Insurance Company, defendant, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 11th day of July, 1900, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11" day of May, in the year of our Lord one thousand nine hundred.

Seal of the Circuit Court of the United States, District of Kansas.

Issued at office in the City of Topeka with the seal of the Circuit Court of the United States for the First Division of the Judicial District of Kansas, dated as aforesaid.

GEO F. SHARITT,
Clerk Circuit Court United States,
First Division of the Judicial District of Kansas.

Allowed by
AMOS M. THAYER, Judge.
May 11, 1900.

No. 3149. United States Circuit Court, First Division of the Judicial District of Kansas. Sallie E. Hillmon vs. The Conn. Mutual Life Ins. Co. Writ of Error to the Circuit Court of the United States for the First Division of the Judicial District of Kansas. Filed 11" day of May, 1900. Geo. F. Sharitt, Clerk.

Return to Writ.

United States of America,
First Division of the Judicial District of Kansas—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals for the Eighth Circuit, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

Seal of the Circuit Court of the United States, District of Kansas.

In witness whereof, I hereto subscribe my name, and affix the seal of said Circuit Court, at office in the City of Topeka this 20" day of June, A. D. 1900.

GEO. F. SHARITT,
Clerk of said Court.

1 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs. Petition.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

The said Sallie E. Hillmon, who is a citizen of the State of Kansas and the plaintiff in the above entitled action complains of The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, the defendant herein, which said defendant is a citizen of the State of Connecticut and is and was at the several times herein mentioned an existing corporation with power and authority among other things to contract as such and to make and enter into such contracts and agreements as are hereinafter mentioned, and to make and execute the policy of insurance hereinafter mentioned, which said corporation was created and organized and exists in said State of Connecticut and under and [—] virtue of the laws thereof.

And said plaintiff further avers that heretofore to wit, on the fourth day of March, A. D. 1879, said defendant by Jacob

L. Greene its president, and D. H. Wells, its assistant secretary, its agents in that behalf by it thereunto duly appointed and authorized for certain considerations and premiums including the annual premium of one hundred and sixteen and 45/100 dollars to it paid and to be paid, made, executed and delivered to said plaintiff, its certain written instrument of that date commonly called a policy of insurance of which said policy a copy is herewith filed hereto attached marked "Exhibit No. I" and made part hereof.

And said plaintiff further avers that the John W. Hillmon in said policy mentioned was at the time of the execu-
2 tion thereof and until his death the husband of said plaintiff and said plaintiff then had and until the death of said John W. Hillmon continued to have a valuable and insurable interest in his life.

And said plaintiff further avers that said defendant did in and by said policy of insurance insure the life of said John W. Hillmon for the term of his natural life in the sum and to the amount of Five thousand dollars for the sole use and benefit of said plaintiff to be paid at the office of said defendant in Hartford, Connecticut, to said plaintiff or to her legal representatives thirty days after due notice and satisfactory evidence of the death of said John W. Hillmon, while that contract, that is the contract shown by said policy was in full force and effect should have been received at said office in Hartford, Connecticut, or if the said plaintiff should be not then living that said sum insured should be payable as above to her children or to their guardian if under age any balance of the years premium when not all paid at the beginning of the year and any other indebtedness to said defendant on account of that policy being first deducted therefrom as shown by that policy and said copy thereof, is referred to for a more full description of the same.

And said plaintiff further avers that afterwards and heretofore "to wit"; on the seventeenth day of March, A. D. 1879, said John W. Hillmon died and his natural life and the term thereof ended during the continuance of said policy and while the aforesaid contract was in full force and effect and he did not die because of any excepted or objectional cause in said policy specified or referred to.

And said plaintiff further avers that said John W. Hillmon in his lifetime duly performed all and singular the conditions and requirements on their or either of their part and all the conditions in or by said policy of insurance made, shown or referred to on their said plaintiff and John W. Hillmon or either of their part to be done or performed including the

giving of due notice and furnishing of satisfactory evidence by said plaintiff to said defendant of the death of said John
W. Hillmon while said contract was in full force and
3 effect and which was duly received by said defendant at its office in Hartford aforesaid more than ninety days before the time of the commencement of this action and during the continuance of said policy.

Yet said defendant though often requested has not as yet ever paid to said plaintiff the sum of money above mentioned nor any part thereof nor any interest thereon, but on the contrary to pay the same or any part thereof said defendant has hitherto and still does wholly neglect and refuses.

Wherefore said plaintiff prays and demands judgment against said defendant in the sum of five thousand dollars with interest thereon at the rate of seven per cent per annum from the nineteenth day of August A. D. 1879 and for costs of suit etc.

L. B. WHEAT,
R. J. BORGHOLTHAUS,
SAMUEL A. RIGGS,
JOHN HUTCHINGS,
Attys. for Plaintiff.

Praecipe:

The clerk of the above named court will please issue summons for the defendant in this action directed to the Superintendent of Insurance of the State of Kansas returnable according to law. Action brought for the recovery of money. Amt. claimed Five thousand dollars with interest thereon from the Nineteenth day of August, A. D. 1879 at the rate of seven per cent per annum.

L. B. WHEAT,
R. J. BORGHOLTHAUS,
SAMUEL A. RIGGS, &
JOHN HUTCHINGS,
Attys. for Plaintiff.

4 EXHIBIT No. 1.

No. 153614. $5000.

The Connecticut Mutual Life Insurance Company of Hartford, Conn.

Age	Premium
31	$116.45

In consideration of the application for this insurance which is a part of this contract and a copy whereof is hereunto annexed and of the several answers therein contained and [and] that the application doth warrant the same to be in all respects true and of the annual premium of one hundred & sixteen dollars and forty-five cents to be paid them on or be-

fore the fourth day of March in every year during the continuance of this Policy.

Do hereby insure the Life of John W. Hillmon the insured of Lawrence, county of Douglas and State of Kansas, for the term of his natural life, subject to the conditions and agreements upon the second page of this policy which are hereby referred to and made a part of this contract the same if they were recited at length over the signatures hereto affixed.

In the sum of Five Thousand Dollars for the sole use and benefit of Sallie E. Hillmon (the assured wife of the said insured the said sum insured be paid at the office of this company in Hartford, Conn. to the said assured or to her legal representatives, ninety days after due notice and satisfactory evidence of the death of the said Insured while this contract is in full force and effect, shall have been received at said office in Hartford, Conn., or if the said Assured be not then living, the said sum insured shall be payable as above to her children, or to their guardian, if under age any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this company on account of this Policy being first deducted therefrom.

In witness whereof, the said Connecticut Mutual Life Insurance Company have by their President and Secretary signed and delivered this contract in the city of Hartford, State of Connecticut this Fourth day of March A. D. One thousand eight hundred and seventy-nine.

5 D. H. WELLS, Asst. Secretary.

Wife. JACOB L. GREENE, President.

Ann. Life.

This policy is issued and accepted upon the following express conditions and agreements referred to on the first page and made a part of this contract.

1st. That this contract between this company and the insured is wholly expressed and contained in this Policy and the application therefor, which is a part of said contract and a copy whereof is hereto annexed and that the several answers contained in or indorsed upon the said application are warranted by the insured and assured to be true in all respects and that if this policy has been obtained by or through any fraud misrepresentations evasion or concealment then the same shall be absolutely null and void; and further that no statement or declaration made to any agent solicitor canvasser, examiner or any other person and not contained in said application shall be taken or considered as having been made to or brought to the notice or knowledge of this company and this company shall be held and considered as hav-

ing no notice or knowledge of such statement or declaration and as having no liability by reason thereof; and the said application, a copy of which is hereto annexed, shall be taken and held to be and contain the only answers, or statements or declarations made to this company in behalf of this insurance.

6 Payment of Premiums.

2d. That this policy shall not be in force and binding on this company until the advance premium hereon shall have been actually paid, during the lifetime of the Insured; and that if any subsequent premium or instalment of premium on this policy be not paid when due, then this policy be not paid when due, then this policy shall cease and determine and become and be null and void; and this company shall not be liable for the payment of the sum insured herein, nor of any part thereof; and that no premium on this Policy shall be considered as paid unless a receipt shall be given therefor signed by the President or Secretary of the company and such receipt is the sole evidence of the authority of any agent to receive any premium on account of this policy.

Residence, Travel, Occupation, Duelling, Violation of Law.

3d. That the said insured is under this Policy fully permitted to reside in any civilized abode in the Western Hemisphere lying north of thirty-second parallel (excepting from the First day of July to the First day of November) and in the Eastern Hemisphere lying north of the forty-second parallel of north latitude and west of the fortieth meridian of longitude east from Greenwich; and he may also pass as a passenger, by usual routes and means of public conveyance to and from any part or place within the foregoing limits but if [—] shall, at any time during the continuance of this policy, pass beyond or be without the foregoing limits; or shall be personally engaged in making any aeronautic voyage or excursion, or in blasting, mining or in any submarine operations, or in the manufacture, handling, use, custody, or transportation of highly inflammable or explosive substances, or as an employe in any capacity upon service on any ocean sea, sound, inlet river, lake or railroad or if he shall enter into any military or naval service whatsoever, whether voluntarily or otherwise (the militia when not in actual service alone excepted) or become or be a member of any paid fire department without the consent of this company, previously given in writing in each and every of the foregoing
7 cases this policy shall be convicted of felony; then, in each and every of the foregoing cases, this policy shall become and be null and void.

Suicide.

4th. That the self-destruction of the insured whether voluntary or involuntary, and whether he be sane or insane at the time thereof is not a risk assumed by this company under this contract; but in every such case the company will pay in manner and form as hereinbefore provided only the then net reserve upon this policy according to the combined experience table of [morality] assuming four per centum compound interest, deducting therefrom any indebtedness on account of this policy, and shall not be deemed or held liable for any greater sum or payment of said sum shall be a full discharge of all liability by reason of this contract.

Intemperance and Delirium Tremens.

5th. That if the insured shall die in a state of drunkenness, or from any disease in any degree produced by or resulting from the occasional or habitual use of alcoholic or shall thereby injure or impair his health, whether permanently or temporarily, or shall die from any accident or violence received while in a case of intoxication, or in consequence thereof or shall have delirium tremens, then in each and every of the foregoing cases, this policy shall become and be null and void.

Assignments.

6th. That no assignment of this policy shall be valid; but the company shall have power but at its own discretion, to accept a surrender and discharge of the same by the assured.

Paid-up Insurance.

7th. That if after the payment of three or more full annual premiums upon this policy the same shall cease and determine by default in the payment of any subsequent premium when due, then this company will grant a paid-up policy, payable as above for an amount to be determined as follows: from the net reserve on account of this policy at the time of such default, there shall be deducted any indebtedness on account of this policy at the time of such default, there shall be deducted any indebtedness on account of this policy,
8 and in addition the difference for the year following such default between the normal cost of insurance under this policy and the normal cost of insurance under the paid-up policy to be issued; the computations to be based upon the actuaries or combined experience table of [morality] and four per centum compound interest, the remainder of said reserve shall be used as a single premium for paid-up insurance, at the then present age of the insured, according to the published single premium tables of this company; provided

that this policy shall be released and surrendered to and received by this company and written application made for such paid-up policy during the lifetime of the said insured, and within one year after default in the payment of premium hereon shall first be paid.

Forfeiture of Premiums.

8th. That in every case in which this policy shall cease and determine or shall become and be null and void, all premiums paid and moneys or credits held on account of the same be forfeited to this company.

Authority of Agents.

9th. That agents of the company have no power or authority to make alter, change or modify any of the terms, conditions or agreements of this policy or to waive forfeitures thereof; and no alteration, change modification, waiver or subsequent agreement whatever respecting this policy shall be binding on said Company unless made in writing signed by the executive officers thereof.

Premium Credit.

10th. That the sum of ..... dollars of first annual premium hereon is acknowledged as an indebtedness against this policy, with interest at six per cent per annum, payable annually until paid, and that said indebtedness unless sooner demanded shall be due and payable at the maturity or other settlement of this policy.

Indorsed: No. 3149. Circuit Court of the United States. District of Kansas. Sallie E. Hillmon vs. The Connecticut Mutual Life Insurance Company, of Hartford, Conn. Petition. L. B. Wheat, R. J. Borgholthaus, Samuel A. Riggs & John Hutchings, attys. for Plaintiff. Filed July 13, 1880. A. S. Thomas, Clerk.

9 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon,
vs.
The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut.

I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by her, I hereby agree and stipulate that

execution may issue against my property for any costs taxed against her.

Dated 22 day of May, 1880.

ALLEN J. PHILLIPS.

No. 3149. Sallie E. Hillmon, vs. Connecticut Mutual Life Ins. Co., of Hartford. Security for Costs. Filed July 13, 1880. A. S. Thomas, Clerk. Approved July 13, 1880. A. S. Thomas, Clerk.

10

State of Kansas,
Insurance Department.

I, Orrin T. Welch, Superintendent of Insurance for the State of Kansas, do hereby certify that I received the annexed Summons, in case of

Sallie E. Hillmon,
versus.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Issued by the Clerk of the Circuit Court of the United States, District of Kansas, Dated the 13th day of July A. D. 1880.

On the 13" day of July, A. D. 1880, at three o'clock p. m., and that on the 14" day of July A. D. 1880, I forwarded two duly certified copies of the same by depositing them in the United States mail, postage paid, addressed as follows:

John M. Taylor, Sec'y of the Connecticut Mutual Life Ins. Co., Hartford, Conn.

James G. Graham, General Agent Conn. Mutual Life Ins. Co., Leavenworth, Kans.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the City of Topeka, this 14" day of July A. D. 1880.

[Seal]

ORRIN T. WELCH,
Superintendent.

Indorsed on back:

Fees.

Making copy for Secy. of Co.....	.25
" certificate on same	.25
Certifying the same.....	1.00
Making certificate of return	.25
Certifying the same	1.00
Making copy for Gen. Agent of Co.....	.25
" certificate on same	.25
Certifying the same.....	1.00
Total	$4.25

11 Circuit Court of the United States of America,
District of Kansas—ss.

The United States of America, to Orrin T. Welch, Superintendent of Insurance of the State of Kansas—Greeting:

You are hereby commanded to notify the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, that it has been sued by Sallie E. Hillmon in the Circuit Court of the United States for the District of Kansas, and that unless it answer by the twenty-second day of August, A. D. 1880, the petition of the said Sallie E. Hillmon against it filed in the Clerk's office of the said Court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ according to law.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said District, this 13th day of July, A. D. 1880.

12 [Seal] A. S. THOMAS, Clerk.

Suit brought for the recovery of money. Amount claimed $5000.00 with interest from the 19th day of August, A. D. 1879, at the rate of 7 per cent per annum.

L. B. WHEAT,
R. J. BORGALTHAUS,
SAMUEL A. RIGGS and
JOHN HUTCHINGS,
Attorneys for Plaintiff.

No. 3149. Circuit Court of the United States, District of Kansas. Sallie E. Hillmon vs. The Connecticut Mutual Life Insurance Company of Hartford, Connecticut. Summons issued July 13, 1880, returnable according to law filed July 14, A. D. 1880. A. S. Thomas, Clerk. L. B. Wheat, R. J. Borgalthaus, Samuel A. Riggs & John Hutchings, Attorneys for Plaintiff

13 United States of America,
District of Kansas.

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

And now at this day comes the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, and moves the

court here for an order requiring said plaintiff, Sallie E. Hillmon, to give additional security for costs, in said action, for the following reasons, to wit:

1st. That the security Allen J. Phillips is insolvent.

2nd. That the said Allen J. Phillips is insufficient financially as a security for costs in said action.

J. W. GREEN and
GEO. J. BARKER,
Attys. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon, vs. The Connecticut Mutual Life Insurance Company. Motion requiring additional security for costs. Filed Aug. 21, 1880. A. S. Thomas, clerk. J. W. Green and Geo. J. Barker, attys. for deft.

14 United States of America,
District of Kansas.

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

And now at this day comes the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, and moves the court here for an order requiring said plaintiff, Sallie E. Hillmon, to make her said petition filed herein more definite and certain in this, to wit:

That said plaintiff be required to state specifically of what particular disease, injury or cause said John W. Hillmon died.

J. W. GREEN and
GEO. J. BARKER,
Attys. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon, vs. The Connecticut Mutual Life Insurance Company. Motion to make Petition more definite and certain. Filed Aug. 21, 1880. A. S. Thomas, clerk. J. W. Green and Geo. J. Barker, attys. for Deft.

15 Circuit Court of the United States for the District of Kansas

Sallie E. Hillmon, Plff.,
vs.
The Connecticut Mutual Life Insurance Company, Defendant.

United States of America,
State and District of Kansas—ss.

Sallie E. Hillmon, being duly sworn, says I am the plaintiff in the above entitled action, and I do solemnly swear that the

cause of action set forth in the petition filed herein is just and I do further swear that by reason of my poverty I am unable to give security for costs in said action.

SALLIE E. HILLMON.

Subscribed and sworn to before me this 29th day of November, A. D. 1880.

[Seal] CHAS. CHADWICK,
Notary Public, Douglas Co. Kansas.

No. 3149. Sallie E. Hillmon, vs. The Connecticut Mutual Life Insurance Company. Affidavit of Poverty. Filed Dec. 3, 1880. A. S. Thomas, clerk.

16 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday, the 22nd day of November, A. D. 1880, proceedings were had and appear of record in words and figures, as follows, to wit:

Friday, December 3, 1880.

Sallie E. Hillmon,
3149 vs.
The Connecticut Mutual Life Insurance Company.

Now come the parties hereto by their attorneys, and thereupon the defendant's motions for additional security for costs, and to make petition more definite and certain came on to be heard and were argued by counsel, on consideration whereof it is ordered by the court, that the sureties herein do justify within ten days from this date, and the motion to make petition more definite and certain is overruled, to which ruling defendant excepts, leave is given defendant to file answer in thirty days and action continued to the next term of this court.

17 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday, the 22nd day of November, A. D. 1880, proceedings were had and appear of record in words and figures as follows, to wit:

Saturday, Dec. 18, 1880.

Sallie E. Hillmon,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

The defendants motion for additional security for costs

came on to be heard and was argued by counsel on consideration whereof it is ordered by the court that the same be and is hereby overruled.

18 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant.

Answer.

The defendant, The Connecticut Mutual Life Insurance Company, for its first defense, represents and shows to the court, that it denies all and singular the allegations and averments contained and set forth in said plaintiff's petition filed herein, and for a further and second defense said defendant shows that on or about the .... day of ....., A. D. 1879, a dispute, difference and controversy subsisted between said plaintiff and defendant, in this, to wit: said plaintiff claimed that one John W. Hillmon, the person mentioned in the insurance policy in said plaintiff's petition, set forth, died near Medicine Lodge in Barbour county, State of Kansas, on or about the .... day of ....., A. D. 1879, from a gunshot wound received from a gun then and there accidentally discharged by one John S. Brown, and that by reason thereof a cause of action had accrued to her, this plaintiff; while the said defendant denied that the said John W. Hillmon was dead, and that any cause of action had accrued to said plaintiff.

That for the purpose of ending said dispute and controversy said plaintiff for a good and valuable consideration to her by said defendant paid, made, executed and to said defendant delivered her certain release and satisfaction in writing, of which the following is a true copy, to wit:

"Leavenworth, Kansas, Sept. 15, 1879.

In consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby acknowledge satisfaction in full and release and surrender all claims under and by reason of Policy No. 153614, dated March 4th,
19 1879, for five thousand dollars, issued by the Connecticut Mutual Life Insurance Company of Connecticut, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full and order the dismissal of any and all suits or proceedings commenced or that may hereafter be

begun by any person or persons in my name and behalf for the collection of the same.

(Signed) S. E. HILLMON.

Attest:
W. J. BUCHAN,
JOHN H. BROWN.

Wherefore defendant asks judgment for costs herein.

J. W. GREEN and
GEO. J. BARKER,
Attys. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon, Plff., vs. The Connecticut Mutual Life Insurance Company of Connecticut, Deft. Answer. Filed Jan. 3, 1881. A. S. Thomas, clerk. J. W. Green and Geo. J. Barker, Attys. for Deft.

20 Circuit Court of the United States, District of Kansas.

Sallie E. Hillmon, Plff.,
vs.
The Connecticut Mutual Life Insurance Company, Deft.

Reply.

The plaintiff for her reply to the answer of the defendant herein filed says:

I. That she denies each and every allegation in said answer contained.

II. The said so-called release and satisfaction in writing in the second defence in defendant's said answer set out was obtained from the plaintiff without any consideration whatever and was and is inoperative and void.

III. That at the county of Barbour in the State of Kansas, on or about the 17th day of March, A. D. 1879, John W. Hillmon, the husband of this plaintiff and the person whose life was insured in and by the policies set out in plaintiff's petition, died from a gun shot wound produced by the accidental discharge of a gun in the hands of one John H. Brown; that on or about the 15th day of September, A. D. 1879, the date of the so-called release and satisfaction set out in defendant's second defence the said defendant by its duly authorized agents and other persons by the procurement of said defendant, falsely and fraudulently represented to this plaintiff that her husband the said John W. Hillmon, was then still living and the said John H. Brown would so testify on the trial of any action brought to recover the amount due under said policies and that he would testify that the body which had been produced and identified by her as the body of her said hus-

band was not the body of the said John W. Hillmon, but was the body of another and different person and to induce the plaintiff to believe the said false and fraudulent representations procured the said John H. Brown, upon whose
21 testimony the plaintiff relying to establish the fact of the death of her said husband and her right to recover the amount of said policy, to make a statement in writing to the effect that the said John W. Hillmon was still living as aforesaid, and that the body which had been produced and identified by her as the body of her said husband was not the body of said John W. Hillmon but was the body of another and different person; that the said representations at the time the same were made, and at the time the so-called release and satisfaction was signed by this plaintiff, were false and were known to be false by said defendant, its agents and the persons making the same, and the same were made for the purpose and with the intention of deceiving and defrauding this plaintiff of the right to recover the amount due her on and under the said policy.

That the said plaintiff by means of said false and fraudulent representations and the said statement of said John H. Brown and being thereby led and influenced to believe that the said Brown would testify as the defendant and its agents had represented, contrary to the truth and facts in the premises, was induced by said defendant and its agents and other persons acting in its behalf to sign and deliver without consideration the so-called release and satisfaction set out in defendants second defense.

L. B. WHEAT,
SAML. A. RIGGS,
R. J. BORGHOLTHAUS &
JOHN HUTCHINGS,
Attys. for Plaintiff.

The time to file the foregoing reply is hereby extended to and including March 21st, A. D. 1881.

GEO. J. BARKER,
J. W. GREEN,
Attys. for Defendant.

Indorsed: No. 3149. Circuit Court of the United States, District of Kansas. Sallie E. Hillmon vs. Connecticut Mutual Life Insurance Company. Reply. L. B. Wheat, S. A. Riggs, R. J. Borgholthaus & John Hutchings, Attys. for Plff. Filed Mar. 21, 1881. A. S. Thomas, Clerk.

22 In Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant.

To said plaintiff and her attorneys of record:

You are hereby notified that on Tuesday the 7th day of June A. D. 1881 at ten (10) o'clock a. m. or as soon thereafter as counsel can be heard the defendant will apply to the court for leave to file an amended answer in said action.

J. W. GREEN &
GEO. J. BARKER,
Attys. for Deft.

Lawrence, Ks., June 6th, 1881.

Service accepted on day above named.

State of Kansas,
County of Leavenworth.

Geo. J. Barker, being duly sworn says that he is one of the attorneys for record for the defendant in within mentioned action and that he served the within notice upon the plaintiff by delivering to John Hutchings, Esq., one of her attorneys of record a true copy thereof on the 6th day of June A. D. 1881 at the city of Lawrence, Kansas.

GEO. J. BARKER.

Subscribed and sworn to before me this 7th day of June 1881.
[Seal] A. S. THOMAS, Clerk.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Insurance Co. Notice. Filed June 7, 1881. A. S. Thomas, Clerk. J. W. Green, Geo. J. Barker, Attys. for Deft.

23 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs. Answer.
The Connecticut Mutual Life Insurance Company, Defendant.

1st. The defendant, The Connecticut Mutual Life Insurance Company, for its first defense represents and shows to the court that it denies all and singular the allegations and averments contained and set forth in said plaintiff's petition, filed herein.

2nd. Said defendant further answering, says that on and before the 30th day of November A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons, to the defendant unknown, unlawfully and fraudulentlyl, confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillman, to wit: in the New York Life Insurance Company, by its policy numbered 134,418 and dated November 30th, 1878, for the sum of ten thousand dollars; in the Mutual Life Insurance Company of New York, by its policy numbered 195,132 and dated Dec. 10th, 1878, for the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy numbered 153,614 and dated March 4th, 1881, for the sum of five thousand dollars.

That thereafter and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin did falsely and fraudulently pretend and represent unto this defendant and others that said Hillmon was dead and did, on or about the months of March and April A. D. 1879, and thereafter for the purpose of securing the payment of said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the
24 said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consumating the conspiracy entered into as aforesaid.

That no premium or payment of any kind has ever been made on or on account of said policy and that said policy is void.

3rd. Said defendant, further answering, says that on or about the .... day of ...., A. D. 1879, a dispute, difference and controversy subsisted between said plaintiff and defendant in this, to wit: said plaintiff claimed that one John W. Hillmon, the person mentioned in the policy of insurance, set forth in said plaintiff's petition, died near Medicine Lodge, in Barbour county, state of Kansas, on or about the .... day of ...., A. D. 1879, from a gunshot wound then and there accidentally discharged by one John S. Brown and that by reason thereof a cause of action had accrued to her, this plaintiff; while the said defendant denied that the said John W. Hillmon was dead and that any cause of action had accrued to said plaintiff.

That for the purpose of ending said dispute and controversy, said plaintiff for a good and valuable consideration to her by said defendant paid, made, executed and delivered to said defendant her certain release and satisfaction in writing, of which the following is a true copy, to wit:

"Leavenworth, Kansas, Sept. 15, 1879.

In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the

Connecticut Mutual Life Insurance Company

by reason of policy No. 153614, issued by said company, dated March 4, 1881, and for the sum of five thousand dollars, on the life of my husband John W. Hillmon, and hereby enter satisfaction in full and order the dismissal of any and all
25 suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.

Attest: (Signed) SALLIE E. HILLMON.
W. J. BUCHAN,
JOHN H. BROWN."

Wherefore defendant asks judgment that said policy be declared null and void for costs.

J. W. GREEN,
GEO. J. BARKER,
Attys. for Defendant.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Insurance Company. Amended answer. J. W. Green, Geo. J. Barker, Attys. for deft. Filed June 7, 1881. A. S. Thomas, clerk.

26 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Leavenworth in said District, on Monday, the 6th day of June, 1881, proceedings were had and appear of record in words and figures as follows, to wit:

Tuesday, June 7, 1881.

Sallie E. Hillmon
3149 vs.
The Connecticut Mutual Life Insurance Company.

Now comes the defendant by J. W. Green and Geo. J. Barker its attorneys and on its motion, it is ordered by the court, that leave be and is hereby given it to file amended answer.

27 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon
vs.
The Connecticut Mutual Life Insurance Company.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the plaintiff shall have thirty days in which to file a reply to defendant's amended answer filed herein and that this cause stand continued until the November term, A. D. 1881 of this court.

S. A. RIGGS,
JNO. HUTCHINGS,
R. J. BORGHALTHAUS,
Attys. for Plaintiff.
GEO. J. BARKER &
J. W. GREEN,
Attys. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Conn. Mutual Life Ins. Company. Stipulation. Filed June 14, 1881. A. S. Thomas, clerk.

28 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant.

Amended Reply.

The plaintiff for her amended reply to the amended answer of the defendant herein filed says:

1st. That she denies each and every allegation in said amended answer contained.

2nd. The said so-called release and satisfaction in writing in the third defense in defendant's said amended answer set out was obtained from the plaintiff without any consideration whatever and was and is inoperative and void.

3d. That at the County of Barbour, State of Kansas on or about the 17th day of March A. D. 1879 John W. Hillmon the husband of this plaintiff and the person whose life was insured in and by the policy set out in plaintiffs petition died from a gun shot wound produced by the accidental discharge of a gun in the hands of one John H. Brown. That on or about the 15th day of September A. D. 1879 the date of the so-

called release and satisfaction set out in the defendants 3d defense in its amended answer the said defendant by its duly authorized agents and other persons by the procurement of said defendant falsely and fraudulently represented to this plaintiff that her husband the said John W. Hillmon was then still living and had been seen alive since his alleged death on or about the 17th day of March A. D. 1879 and that they could produce him the said Hillmon alive as aforesaid. That the said John H. Brown would testify in the trial of any action brought to recover the amount due under or upon said policy that the said Hillmon was not dead but was still living and that the body which had been produced and identified by her the said plaintiff as the body of her said husband was not the body of said John W. Hillmon, but was the body of
29 another and different person; and to induce the plaintiff to believe the said false and fraudulent representations and that the said Brown would testify as aforesaid and to prevent her from suing on the policy mentioned in the petition herein and to induce her to surrender the same, procured the said John H. Brown upon whose testimony the plaintiff was relying to establish the fact of the death of her said husband and her right to recover the amount of said policy to make a statement in writing to the effect that the said John W. Hillmon was still living as aforesaid and that the body which had been produced and identified by her as the body of her said husband was not the body of said John W. Hillmon but was the body of another and different person who had been murdered by the said John W. Hillmon and procured the said John H. Brown to state to this plaintiff that he would in any action brought on or under said policy testify as aforesaid and that he would testify that the whole transaction relating to the procurement of said policy and the alleged death of her said husband was a fraud and that she was a party to said fraud; that on or about the said 15th day of September 1879 the said defendant by its duly authorized agents and other persons by its procurement fraudulently represented to this plaintiff that unless she executed and delivered the release of the policy which is set out in the 3d defense of defendants amended answer, they would prosecute her for conspiring with divers other persons to defraud said defendant out of the amount of said policy, and that upon the said testimony of said Brown she would be convicted, but they would save her from such prosecution if she made and delivered the release aforesaid. That the said plaintiff being in ill health was overcome by the said false and fraudulent statements and threats so made as aforesaid and relying upon the said false and fraudulent statements as to what the said Brown would swear to and being thereby led and influenced to believe that the said Brown would testify as the defendant

its agents and other persons by its procurement had represented, contrary to the truth and facts in the premises, and that she could not against such testimony of said Brown recover the amount due her on said policy, was induced by said defendant its agents and other persons acting in its behalf, to sign and deliver without consideration the so-called release and satisfaction set out in the third defense of the defendants amended answer.

That the said representations so made by the said defendant its agents and other persons by the procurement and in behalf of the said defendant at the time and times the same were made and at the time the said so-called release and satisfaction was signed by this plaintiff were false and were known to be false by the said defendant and its said agents and the said other persons making the same and the same were made for the purpose and with the intent of defrauding this plaintiff of her right to recover the amount due her on and under the said policy.

L. B. WHEAT,
JOHN HUTCHINGS,
R. J. BORGHOLTHAUS &
SAML. A. RIGGS,
Attys. for Plff.

Indorsed: No. 3149. Sallie E. Hillmon, Plaintiff, vs. The Connecticut Mutual Life Insurance Company, Defendant. Amended Reply to Amended Answer. Filed Jany. 2, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, Deputy.

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon,
vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

And now comes the defendant and move the court here for an order requiring the plaintiff and her attorneys of record to wit, L. B. Wheat, John Hutchings, R. J. Borgolthaus and Samuel A. Riggs to give further and additional security for costs herein, for the reason

First. That the security heretofore given is wholly inadequate and insufficient. That A. J. Philips, security for costs therein is wholly insolvent.

Second. Because the said Attorneys are directly and pecuniarily interested in the result of said suit and are abundantly able to give security for costs herein.

That since the decision of the application heretofore made in this action for additional security for costs a large amount of costs have already accrued and much more costs and expenses will necessarily be incurred by the defendant in the preparation and trial of this action.

GEO. J. BARKER &
J. W. GREEN
Attys. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Life Insurance Company of Hartford, Connecticut. Motion for additional security for costs. Filed June 13, 1882. A. S. Thomas, clerk. By Geo. N. Holmes, Deputy.

32 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon
vs.
The Connecticut Life Insurance Company of Hartford, Connecticut.

United States Circuit Court,
District of Kansas.

H. B. Munn being duly sworn on oath says: that he is now and was at the time and times hereinafter mentioned the duly authorized agent of the defendant in this matter.

That on or about the 20 day of September, A. D. 1879, the said plaintiff Sallie E. Hillmon, delivered to him through her agent the release and satisfaction mentioned and set forth in the defendant's answer in this action and also an order which had been duly executed by her on her attorneys a copy of which is as follows:

Leavenworth, Kansas, Sept. 15, 1879.

Messrs. Clough and Wheat,
Samuel A. Riggs and Borgolthaus.

Gentlemen: I have adandoned my claim against the Insurance Companies on the life of my husband and desire you to surrender to the respective companies or their attorney at once the respective policies.

And oblige,
SALLIE E. HILLMON.

That on or about the 22nd day of September, A. D. 1879, at the city of Leavenworth, Kansas, he presented to the Hon. L. B. Wheat one of the attorneys of record in this case the said order and requested a delivery of the policies as directed by said plaintiff.

That said Wheat admitted said policies were in his possession but refused to deliver the same or either of them to this

affiant and told him substantially that he and his asso-
33 ciates were then and for some time past had been engaged in preparing to bring suit on said policies—that they had a claim on said policies for 40 per cent of the amount thereof and that some person must pay them before he would surrender them.

H. B. MUNN.

Sworn to and subscribed before me this 13th day of June, A. D. 1882.

[Seal] A. S. THOMAS, Clerk.
By GEO. N. HOLMES, Deputy.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Life Insurance Company of Hartford, Connecticut. Affidavit. Filed June 13, 1882. A. S. Thomas, Clerk. By Geo. N. Holmes, Deputy.

34 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Leavenworth in said District, on Monday the 5th day of June, 1882, proceedings were had, and appear of record in words and figures as follows, to wit:

Wednesday, June 14, 1882.

Sallie E. Hillmon
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

The defendants motion to require the plaintiff to give additional security for costs came on to be heard and was argued by counsel on consideration whereof it is ordered by the court that said motion be and is hereby overruled, to which ruling of the Court the defendants then and there excepted.

35 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Leavenworth, in said district on Monday the 5th day of June, A. D. 1882, proceedings were had, and appear of record in words and figures as follows, to wit:

Present: Hon. Cassius G. Foster, Judge.

Wednesday, June 14, 1882.

Sallie E. Hillmon

3147. vs.

The Mutual Life Insurance Company of New York.

Sallie E. Hillmon

3148. vs.

The New York Life Insurance Company.

Sallie E. Hillmon

3149. vs.

The Connecticut Mutual Life Insurance Company.

Now comes the plaintiff in the above entitled actions by L. B. Wheat, John Hutchings, S. A. Riggs and R. J. Borgalthaus her attorneys and the defendants by J. W. Green, and Geo. J. Barker, their attorneys, and it appearing to the Court that the above entitled actions are of like nature and relative to the same question, and to avoid unnecessary cost and delay and that it is reasonable to do so, it is ordered by the Court that said actions be, and the same are hereby consolidated for trial, to which ruling and decision of the Court the defendants then and there duly excepted. And to try the issues joined comes a jury, to wit: R. B. McClure, Thomas White, James M. Walthal, William Stockbrand, E. H. Hutchings, Leonard Bradbury, J. T. Fulton, Daniel Hor Ville, W. M. Lyons, J. S.
Todd, John P. Gleich and Samuel Keiser, twelve good
36 and lawful men of the body of the District of Kansas,
who being duly empaneled and sworn to well and truly try the matters submitted to them in this action and a true verdict give according to the law and evidence, and thereupon the trial of this case is proceeded with, and the trial not being concluded at the time of adjournment the jurors are admonished by the Court as to their duties herein and the further
hearing postponed until to-morrow.

37 In Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon

vs.

The Connecticut Mutual Life Insurance of Hartford, Conn.

And now at this day comes the defendant and moves the court here for an order requiring the plaintiff to give additional security for costs in this action for the reasons following:

1st. That the sureties on the undertaking for costs in said action as well also said plaintiff are wholly insolvent and the security given wholly inadequate.

2d. Because said sureties are all non-residents of the state of Kansas.

3d. Because the attorneys of record of said plaintiff own an interest therein and are pecuniarily interested therein and in the result thereof.

GEO. J. BARKER &
J. W. GREEN,
Attys. for Deft.

Indorsed: No. 3149 Sallie E. Hillmon vs. The Connecticut Mutual Life Ins. Company. Motion for additional security for costs. Filed Nov. 29, 1882. A. S. Thomas, clerk. By F. E. McCrary, D. C.

38 In Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon
vs.
The New York Life Insurance Company.

Sallie E. Hillmon
vs.
The Connecticut Mutual Life Insurance Company.

To the above named plaintiff and her attorneys of record:

Please take notice that on Monday, the 27th day of November, A. D. 1882, at one o'clock p. m. of that day or as soon thereafter as counsel may be heard the defendants in each of the above entitled cases will move the court for an order requiring the plaintiff in each of said cases to give additional security for costs therein.

That said motions will be heard at the Court room of said court at the city of Topeka in said state and that upon the hearing of such motions affidavits will be offered in support thereof.

GEO. J. BARKER &
J. W. GREEN,
Attys. for Defendant in each of said cases.

Copy of the within notice served on me this 23d day of November, A. D. 1882. R. J. BORGHOLTHOUS,
Atty. for plaintiff in each of said cases.

Indorsed: No. 3147. Sallie E. Hillmon vs. The Mutual Life Insurance Company of New York and others. Notice of Motion. Filed Nov. 29, 1882. A. S. Thomas, Clerk. By F. E. McCrary, D. C.

39 In the Circuit Court of the United States for the District and State of Kansas.

No. 3137. Sallie E. Hillmon, Plff.,
No. 3148.
No. 3149. vs.
The Mutual Life Insurance Company of New York, Dft.

To said plaintiff and Messrs. Riggs, Hutchings, Wheat et al., her attorneys:

You are hereby notified that at ten o'clock a. m. on Thursday, the 7th day of June, A. D. 1883, or as soon thereafter as counsel can be heard, the defendants attorneys will call up for disposition by the court the motion in said action and in cases No. 3148 & 3149 heretofore filed requiring said plaintiff to give additional security for costs in said actions. That affidavits, record and oral evidence will be used on said hearing.

J. W. GREEN,
GEO. J. BARKER,
Attys. for said Dft.

June 5th, 1883.

Indorsed: No. 3147, 3148, 3149. Sallie E. Hillmon vs. The Mutual Life Ins. Co. of New York. Notice.
U. S. Marshal's return. District of Kansas, ss. I hereby certify that I served this notice on the within named plaintiff, Sallie E. Hillmon, at Leavenworth county, state and district of Kansas, June 5th, 1883, by delivering to Sam'l Riggs a true and certified copy of the same, he, the said Saml. Riggs being then and there the atty. of record of the within named plaintiff. B. F. Simpson, U. S. M. Fees $2.00. Filed June 6, 1883. A. S. Thomas, clerk. By Frank J. Thomas, Deputy. J. W. Green, Geo. J. Barker, attys. for defts.

40 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Leavenworth, in said district, on Monday, the 4th day of June, A. D. 1883, proceedings were had, and appear of record in words and figures as follows, to wit:

Friday, June 8, 1883.

Sallie E. Hillmon
3147 vs.
The Mutual Life Insurance Company of New York.

Sallie E. Hillmon
3149 vs.
The New York Life Insurance Company.

Sallie E. Hillmon
3148 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

The defendants motion for additional security for costs in said actions, came on to be heard and was argued by counsel, on consideration whereof it is ordered by the court that plaintiff within ninety days from this time give security for future costs of the officers of this court to be approved by the clerk.

Continued.

41 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant.

To A. S. Thomas, clerk of the above named court:

Please take notice that the defendant above named desires to be present and to be permitted to examine the security for costs offered by the plaintiff at such time as plaintiff shall present additional security for costs in said cause, in obedience to the order of said court at the June term, A. D. 1883.

J. W. GREEN and
GEO. J. BARKER,
Attorneys for said defendant.

Indorsed: No. 3941. Sallie E. Hillmon vs. The Conn Mut Life Ins. Co. Notice to A. S. Thomas. Filed July 18, 1883 A. S. Thomas, clerk. By Frank J. Thomas, Deputy. J. W Green and Geo. J. Barker.

42 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of Amer ica for the District of Kansas, began and held at the city o Leavenworth, in said district, on Monday, the 4th day of June A. D., 1883, proceedings were had, and appear of record i words and figures as follows, to-wit:

Tuesday, Oct. 9, 1883.

Sallie E. Hillmon
3147 vs.
The Mutual Life Insurance Company, of New York.

Sallie E. Hillmon
3148 vs.
The New York Life Insurance Company.

Sallie E. Hillmon
3149 vs.
The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut.

Now comes said plaintiff herein by L. B. Wheat, her attorney, and on her motion the time in which she was heretofore required to give security for certain costs herein is extended to the first day of November next.

43 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Pltff.,
No. 3147 vs.
Mutual Life Insurance Company of New York, Defendant,

Sallie E. Hillmon, Pltff.,
No. 3149 vs.
Conecticut Mutual Life Insurance Company, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3148 vs.
New York Life Insurance Company.

I hereby enter myself as security for and promise to pay all costs in the above entitled actions which may accrue to any of the officers of this court subsequent to the 8th day of June, A. D., 1883. And in default of payment by the plaintiff of said costs I hereby agree and stipulate that execution may issue against my property for any such costs taxed against said plaintiff.

Dated this eighth day of October, A. D., 1883.

WM. T. SINCLAIR.

Approved: A. S. THOMAS, Clerk.

Indorsed. Nos. 3147, 3148, 3149. Sec. for costs. Filed Oct. 10, 1883. A. S. Thomas, Clerk.

44 United States of America,
District of Kansas—Sct.

In U. S. Circuit Court.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Co., Defendant.

Sallie E. Hillmon, Plaintiff,
vs.
The Conecticut Mutual Life Ins. Company, Defendant.

Sallie E. Hillmon, Plaintiff,
vs.
The New York Life Insurance Co.

State of Kansas,
County of Douglas—Sct.

William T. Sinclair, being duly sworn on his oath, deposes and says that he is security for costs in the above consolidated cases under the order made at the June term, A. D., 1883, of said court, and that he is worth the sum of ten thousand dollars over and above his debts, liabilities and exemptions. And that said values are in real estate in the county of Douglas and State of Kansas. And further he saith not.

WM. T. SINCLAIR.

Subscribed and sworn to before me this 1st day of November, A. D. 1883.

[Seal.] CHAS. CHADWICK,
Notary Public, Douglas County.

Com. expires Sept. 7, 1887.

Indorsed: No. 3147, 3148, 3149. Sallie E. Hillmon vs. The Mutual Life Ins. Co. of New York et als. Justification of surety. Filed Nov. 1, 1883. A. S. Thomas, clerk, by Frank J. Thomas, Deputy.

45 November Term, A. D. 1883.

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The New York Life Insurance Company, Defendant.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant.

It is hereby stipulated and agreed that the above cases be and the same are hereby continued until the next term of the said court.

SALLIE E. HILLMON, Plff.,
By R. J. BORGHOLTHAUS,
S. J. RIGGS,
L. B. WHEAT &
JNO. HUTCHINGS,
Her attys.
J. W. GREEN and
GEO. J. BARKER,
Attys. for Said Defendants.

Indorsed: No. 3147. Sallie E. Hillmon vs. The N. Y. Ins. Co. et al. Stipulation for continuance. Filed Nov. 26, 1883. A. S. Thomas, clerk. By Frank J. Thomas, Deputy.

46 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon
vs.
The Connecticut Mutual Life Insurance Company.

Now, at this day comes the said defendant, and moves the court for an order setting aside and vacating an order heretofore made in this cause, to wit: at the June term of this court, A. D. 1882, consolidating the said cause with that of Sallie E. Hillmon vs. The Mutual Life Insurance Company of New York, being cause No. 3147 on the docket of this court, and Sallie E. Hillmon vs. the New York Life Insurance Company, being cause No. 3148 on the docket of this court, for the reason that said causes cannot by law be consolidated.

The said defendant also demands a separate trial of its action herein.

J. W. GREEN.
Atty. for Plaintiff.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Insurance Company. Motion. Filed June 4, 1885. A. S. Thomas, clerk.

47 In the Circuit Court of the United States, District of Kansas.

Sallie E. Hillmon
vs.
The Connecticut Mutual Life Insurance Company.

Objections to Deposition.

On page 4 of the deposition of Mrs. Mary Judson, all of the defendants object to the question: "Could he have had a missing upper front tooth, the absence of which was noticeable when talking or laughing and you not have known it?" for the reason that the same is leading and suggestive.

On page 7 of said deposition to the question: "State what, if any, conversation you heard at that time between Mrs. Hillmon, the plaintiff, and Mr. Tillinghast or Mr. Selig?" and the answer thereto: "The subject that was being discussed was whether Mrs. Hillmon should see the body of her husband when it was brought to Lawrence. Mr. Tillinghost spoke and said that he had lost a child and had taken it up—that he wanted to see it—and was always sorry afterwards that he had had it done, and then he said to her that he would rather not see the body, but remember him as she had last seen him" is objected to on behalf of the defendants because said question and answer is incompetent as evidence.

1st. Because said Tillinghast was not the agent of either of these defendants.

2nd. The statement was not made in connection with the performance of any duty for the companies for which he might have been agent for the transaction of certain business.

3rd. Because said statement is mere hearsay.

Said defendants also object to and ask to have stricken out the following statement on page 8 of said deposition, to wit: "I think Mr. Selig advised her the same as Mr. Tillinghast" for the reason that the same is incompetent as against all
48 of the defendants particularly as against the defendant with which Mr. Selig had no connection whatever.

On page 8 of said deposition to the question: "Why did you not see it?" State the conversation," and the answer thereto: "Mrs. Hillmon, her mother, my son and myself came down to see the body while it was at Bailey & Smith's, the undertakers. The undertaker, Mr. Smith, refused to let us see him. He said the body was not in proper condition for us to see him." The defendants object for the reason that the same is incompetent as testimony against each of the defendants.

GEO. J. BARKER &
J. W. GREEN &
C. S. GLEED,
Attorney- for Defendant.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Conn. Mutual Life Insurance Co. Objections to deposition. Filed June 6, 1885. A. S. Thomas, clerk. By Frank H. Holt, Deputy.

49 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Leavenworth, in said District on Monday the 1st day of June A. D. 1885, proceedings were had and appear of record in words and figures as follows, to wit:

Present: Hon. Samuel F. Miller, Judge,
Present: Hon. David J. Brewer, Judge.

Friday, June 5, 1885.

Sallie E. Hillmon
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

The defendant's motion herein filed June 4, 1885, to set aside and vacate an order made in this cause, consolidating it with other causes, therein named for trial, and for a separate trial came on to be heard and was argued by counsel, on consideration whereof the court doth overrule said motion to which ruling and decision of the court the defendant duly excepted and excepts.

50 EXHIBIT "A."

Leavenworth, Kansas, June 3, 1885.

George A. Barker & J. W. Green, Esqs.,
Lawrence, Ks.

Gentlemen: The cases of Hillman vs. Ins. Cos. will come on for trial to-morrow Thursday morning and as I understand

it the trial of the same must then be proceeded with, therefore of course you will want to be here early.

Yours, &c., L. B. WHEAT.

51 In the District Court of the United States for the District of Kansas.

Sallie E. Hillmon
vs.
The Mutual Life Ins. Co. of New York.

Sallie E. Hillmon
vs.
The New York Life Insurance Co.

Sallie E. Hillmon
vs.
The Connecticut Mutual Life Ins. Co.

Affidavit.

George J. Barker and J. W. Green being duly sworn, say:

That they are attorneys for the defendants in the above entitled actions and the only attorneys for said defendants residing in Douglas county, Kansas; that about ten days before the commencement of the present term of this court they each received notice from A. S. Thomas, Esq., clerk of said court, that the above entitled cases were set for trial on the 5th day of June, A. D. 1885 specially; that they received no notice whatever of the change of such setting of said cases until on the afternoon of the second day of June, 1885, which was a friendly dispatch from W. W. Guthrie of Atchison; that on the same afternoon George J. Barker was informed by John Hutchings that Mr. Wheat had notified him that said cases were set for trial and would be called for trial on the 4th day of June, 1885; that on the afternoon of said 2nd day of June both of these parties were also informed by Mr. Riggs that Mr. Borgalthaus had received a letter from Mr. Wheat which letter is hereto attached marked Exhibit A notifying him that said cases would be called for trial on the 4th day of June, 1885, and requesting him to notify the attorneys for the defendant to that effect; that on the morning of the 3d day of June said Green received a letter from L. A. Wheat one of the attorneys for the plaintiff informing him that said cases would be called for trial on the 4th day of June; that up to
52 the time of receiving notice from Mr. Hutchings these affiants did not intend to leave Lawrence until the 4th day of June; that upon receiving said telegrams and letters affiants immediately began to prepare to attend this court on the 4th day of June; that at the time Mr. Riggs came to the

office of George J. Barker and informed him that Dr. Fuller was at his office waiting to give his deposition, both said Barker and Green were busily engaged in arranging their papers and other matters in this case so as to enable them to leave Lawrence for Leavenworth on the afternoon train of that day; that they were so busily engaged in that case during the entire day of the 3d day of June 1885 up to the time of leaving for Leavenworth upon the 4 o'clock train that they could not, nor could either of them, have attended to the taking of this deposition on that day; that when Mr. Riggs came to the office of said Barker he was informed by him that they could not attend upon the taking of the deposition they did not believe; that if they could they would but that it was not worth while to keep the doctor waiting but to go on and take the deposition. Not only did neither of these attorneys have any time on the 3d day of June in which to attend upon the taking of depositions, but they did not have sufficient time to properly arrange their papers and books on that day and get ready to come to Leavenworth; that by being compelled to go to Leavenworth sooner than they had expected, they left behind several books and papers for which they have been compelled to send or go after since that time.

That at the time the notice to take this deposition was served on said affiants they fully intended to waive the insufficiency of time and attend the taking of said deposition but owing to the telegram and letters of said Wheat they were led to believe they could not spare the time before the cases in which it was to be taken would be called for trial.

That said Fuller has been living in the city of Lawrence, Kansas, for many years; that on the 2d day of June, 1885, he was not more feeble in health than he has been for many months past as they believe in fact affiants are informed and believe that he is in a better state of health now than he has been for several months past; that Sam Riggs also
53 lives in Lawrence and is well acquainted with said Fuller. That said Riggs is a relative of the family of said Fuller by marriage.

GEO. J. BARKER,
J. W. GREEN.

Subscribed and sworn to before me this eighth day of June A. D. 1885.

[Seal] A. S. THOMAS, Clerk,
By FRANK J. THOMAS, Deputy.

Indorsed: Nos. 3147, 3148, 3149. Sallie E. Hillmon vs. The Mutual Life Insurance Co. of N. Y. Affidavit. Filed June 8, 1885. A. S. Thomas, Clerk. By Frank J. Thomas, Deputy.

54 In the Circuit Court of the United States for District of Kansas.

Sallie E. Hillmon, Plaintiff,
No. 3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3148. vs.
The New York Life Insurance Company, Defendant.

State of Kansas,
County of Douglas—ss.

William T. Sinclair, being first duly sworn, says that he is a resident of the County of Douglas and State of Kansas, and by virtue of a bond entered into by him in each of the foregoing cases on the 8th day of October, 1883, he is security for all costs in each of the above entitled actions, which may accrue to any of the officers of said court subsequent to the 8th day of June, 1883.

Affiant further says that at the time of signing the undertaking for costs in said actions, as above referred to, the said Sallie E. Hillmon, Plaintiff, was a resident of the City of Lawrence, in said county of Douglas and State of Kansas, and that affiant entered into said bond at the urgent request of the attorneys of record for said plaintiff, and that no indemnity has at any time been given to affiant to protect or secure him in any way against any costs which he may be required to pay, by virtue of such undertaking.

55 Affiant further says that since the giving of said undertaking for costs, the said Sallie E. Hillmon, as affiant is informed and believes, has removed from the county of Douglas and state of Kansas, and is no longer within the jurisdiction of this court; that the said Sallie E. Hillmon has become and is utterly insolvent, and has no property either exempt from execution or not exempt from execution from or out of which she, the said Sallie E. Hillman, might or could pay any costs adjudged against her in any of the foregoing suits.

Affiant further says that since the execution of said undertaking for costs by this affiant, the said Sallie E. Hillmon has assigned and parted with all of her interest in and to the several causes of action above set forth, and is no longer the owner of the same, as affiant is informed and believes.

Affiant further says that since the execution of said undertaking by affiant, the said Sallie E. Hillmon has assigned and transferred all of her interest in said several suits to John Hutchings, Esq., S. A. Riggs, Esq., L. B. Wheat, Esq., R. J. Borgholthaus, Esq.,and H. S. Clark, and that all of said several parties are citizens of the state of aKnsas, except R. J. Borgholthaus, Esq., who is a citizen of the State of Minnesota and are possessed of sufficient means to give such undertakings and security for costs in each of the foregoing actions, as may be properly required therein.

Affiant further says that at the time of the execution of said Bond he was informed and did verily believe that the said several actions would be speedily terminated, either by a compromise, which affiant understood was then under consideration between the various parties thereto, or by a trial thereof at the November term of said court next ensuing, and affiant verily believes that none of said actions will soon be terminated, either by agreement of the parties or by a final trial thereof, and he desires to be released from any further liability for costs therein.

Affiant further says that he [in] engaged in the mortgage loan business in said county of Douglas, which said
56 business involves a special, financial responsibility and trust in affiant, in connection with the management of the same, and that his position as security for costs in said actions has been deterimental to him in his said business as affiant verily believes, and affiant fears that his said business may suffer serious injury, should he continue further as such security in said suits.

Affiant further says that he has been informed by the attorneys for said several defendants in each of the foregoing actions, that a bond for costs in said actions, executed by the said L. B. Wheat, Esq., would be approved and accepted by said defendants, in lieu of said bond executed by this affiant.

WM. T. SINCLAIR.

Subscribed and sworn to before me this 12th day of January, A. D. 1888.

[Seal] W. E. BENSON,
Notary Public.

Term expires Jany. 20/91.

Indorsed: No. 3147. In U. S. Circuit Court. No. 3147. Sallie E. Hillmon, Plff., vs. Mutual Life Ins. Co. of N. Y., Deft. No. 3149. Sallie E. Hillmon, Plff., vs. Conn. Mutual Life Ins. Co. No. 3148. Sallie E. Hillmon, Plff., vs. N. Y. Life Ins. Co., Deft. Afft. in support of Motion for release of surety. Filed Jan. 13, 1888. A. S. Thomas, Clerk.

57 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Motion.

Said defendant respectfully moves, asks and requests the Court to require the plaintiff to give additional security for costs in the above entitled cause for the following reasons, to wit:

1. Because William T. Sinclair, the present security for costs, has given said defendant notice of his withdrawal as such security, and that he will not longer be liable for costs in said case.

2. Because said plaintiff has assigned her cause of action to her attorneys of record in said case, and they are abunddantly able to give security for costs.

3. Because said plaintiff has since the commencement of this action, removed from the state.

4. Because said defendant has no valid cause of action against said defendant.

JAMES W. GREEN,
GEO. J. BARKER,
Attys. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Ins. Co. Motion. Filed June 16, 1888. A. S. Thomas, Clerk.

58 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, et al., Defendants.

"Consolidated Case."

Motion.

Said defendant respectfully moves asks and requests the Court to require the plaintiff to give additional security for costs in the above entitled cause for the following reasons, to wit:

I. Because William T. Sinclair, the present security for costs, has given said defendant notice of his withdrawal as

such security, and that he will not longer be liable for costs in said case.

2. Because said plaintiff has assigned her cause of action to her attorneys of record in said case, and they are abundantly able to give security for costs.

3. Because said plaintiff has since the commencement of this action, removed from the state.

4. Because said [defendant] has no valid cause of action against said defendant.

JAMES W. GREEN,
GEO. J. BARKER,
Attys for Deft.

Indorsed: No. 3147. Sallie E. Hillmon vs. The Mutual Life Ins. Co. of N. Y., et al. Motion. Filed Jan. 16, 1888. A. S. Thomas, Clerk.

59 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District, on Monday, the 28th day of November A. D. 1887, proceedings were had, and appear of record in words and figures as follows, to wit:

Monday, January 16, 1888.

Sallie E. Hillmon,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Motion of W. T. Sinclair to be discharged from further security for costs in the foregoing cause is by leave of court withdrawn.

60 In the Circuit Court of the United States for District of Kansas.

Sallie E. Hillmon, Plaintiff,
No. 3147. vs.
Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
Connecticut Mutual Life Insurance Company, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3148. vs.
New York Life Insurance Company, Defendant.

To W. C. Jones, Marshal of the United States Circuit Court, Topeka, Kansas.

You are hereby notified, that from and after this date, I shall not be responsible for any costs hereafter made in the

above action, under and by virtue of my undertaking as surety, dated October 8th, 1883.

WM. T. SINCLAIR.

Dated at Lawrence, Kansas, this 16th day of January, 1888.

Indorsed: No. 3147, 3148, 3149. Notice. Filed Jan. 16. 1888. A. S. Thomas Clerk. By Frank H. Holt, Deputy.

61 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant.

The defendant, the Connecticut Mutual Life Insurance Company, moves asks and requests the court to vacate and set aside the order heretofore made, consolidating this case for trial with two other cases, and asks and requests a separate trial hereof.

CHARLES S. GLEED,
Atty. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Conn. Mutual Life Ins. Company. Motion. Filed Feb. 29, 1888. A. S. Thomas, Clerk. By Frank H. Holt, Deputy. Chas. S. Gleed, Atty. for Deft.

62 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday the 28th day of November A. D. 1887 proceedings were had, and appear of record in words and figures as follows, to wit:

Wednesday, February 29, 1888.

Sallie E. Hillmon
3147. vs.
The Mutual Life Insurance Company of New York.

Sallie E. Hillmon
3148. vs.
The New York Life Insurance Company.

Sallie E. Hillmon
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

This day the three causes above named coming up for trial in pursuance of the order heretofore made by this court re-

quiring the same to be tried at one and the same time and as one cause, and the parties thereto appearing by counsel, thereupon each of the said named defendants filed its motion asking the court to set aside the order heretofore made requiring the causes to be tried as one, and asking that each case be tried separately and the said motions being submitted to the court, were by the court overruled, it being ordered that in pursuance to the order heretofore made the causes should be tried as one cause, to which rulings and order, each of the said defendants at the time duly excepted. And thereupon by direction of the court a jury was empanelled for the trial of said causes, the several defendants claiming the right to challenge three persons peremptorily for each defendant, which claim was denied, the court ruling that but three per-

63 emptory challenges could be exercised by the defendants as a whole, to which ruling each of the said defendants at the time duly excepted, and after three parties called into the jury box had been peremptorily challenged by counsel for defendants, each of said defendants asked to be permitted to challenge one or more jurors peremptorily which request was refused by the court, to which ruling each of the said defendants at the time duly excepted, and after the defendants had challenged three parties peremptorily there being in the box twelve good men, to wit: Samuel Kozier, G. W. Coffin, James Rood, Jacob Moon, J. S. Bouton, A. S. Davidson, H. S. Miller, Riley Elkins, J. S. Ernest, J. W. Farnsworth, Enoch Chase and Furman Baker, against whom no challenges for cause existed or were made by either plaintiff or defendants, the same were duly sworn as the jury in said causes, and thereupon the opening statements for the respective parties were made to the jury, upon the conclusion of which the court adjourned until 9:30 a. m. of Thursday.

64 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday the 28th day of November A. D. 1887 proceedings were had, and appear of record in words and figures as follows, to wit:

Wednesday, March 7, 1888.

Sallie E. Hillmon
3147. vs.
The Mutual Life Insurance Company of New York.

Sallie E. Hillmon
3148. vs.
The New York Life Insurance Company.

Sallie E. Hillmon
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Now come the parties herein same as yesterday, and thereupon with leave of court, plaintiff amends her petitions herein, to which defendants except, and all the jury being present the trial hereof is proceeded with, and the trial not being concluded at the hour of adjournment the further hearing hereof is postponed until tomorrow.

65 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Leavenworth, in said District on Monday the 5th day of June A. D. 1893 proceedings were had, and appear of record in words and figures as follows, to wit:

Saturday, June 17, 1893.

Sallie E. Hillmon
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

And now comes J. W. Green, attorney for The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, the defendant, and applies to and moves the court for leave to file an amended answer herein. And thereupon appearing specially for the purposes of the following objection only, came the plaintiff herein by L. B. Wheat one of her attorneys and objects to the court here at Topeka, hearing said application or motion because this said Circuit Court was not lawfully or for any legal cause adjourned from Leavenworth to Topeka or so as to give jurisdiction here in Topeka to hear or determine any such application or motion in this action which is a suit at law. Which objection is now by the court here sustained for want of jurisdiction to hear said application or motion at Topeka, to which order and ruling of the court the defendant by its attorney excepts.

66 In the Circuit Court of the United States.

Hillmon, Plaintiff,

vs.

The Insurance Companies—3 cases, Defendants.

It is stipulated by and between the parties that these cases shall not be tried before April next.

SAM'L. A. RIGGS,
Atty. for Plaintiff.
GEO. J. BARKER,
Atty. for Defts.

Dated this 25th day of January, 1894.

Indorsed: No. 3147, 3148, 3149. Stipulation. Filed Jan'y. 26, 1894. Geo. F. Sharitt, Clerk.

67 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the City of Topeka, in said District, on Monday, the 26th day of November, A. D. 1894, proceedings were had and appear of record in words and figures as follows, to wit:

Present: Hon. Alfred D. Thomas, Judge.

Wednesday, January 9, 1895.

Sallie E. Hillmon
3147 vs.
The Mutual Life Insurance Company of New York.

Sallie E. Hillmon
3148 vs.
The New York Life Insurance Company.

Sallie E. Hillmon
3149 vs
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Now comes the plaintiff in the above entitled actions respectively by L. B. Wheat, C. F. Hutchings and S. A. Riggs, her attorneys, and the defendant, The Mutual Life Insurance Company of New York, by Gleed, Ware and Gleed, and Edward Lyman Short, its attorneys, and the defendant, The New York Life Insurance Company by George J. Barker, Geo. W. Hubbell and W. R. Smith, its attorneys, and the defendant, The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, by J. W. Green and Edward S. Isham, its attorneys, and it appearing to the court that heretofore, to wit,

on the 14th day of June, 1882, an order was entered in these cases by this court consolidating them for trial, it is now here ordered that said order consolidating the said cases be and the same is continued in force. To which order of the court the defendants and each of them duly except. And to try the issues joined in these three several actions respectively, come a jury, to wit: W. W. Wells, Joseph Young, J. W. McGhe, Charles S. Uhl, M. W. Whitney, S. W. Carney, Fred
68 Gifford, George Dryer, L. J. Sprinkle, H. Bartholomew, W. E. Dennison and W. S. Chapman, twelve good and lawful men of the body of the District of Kansas, who being duly impaneled and sworn to well and truly try the matters submitted to them in each of these three several actions respectively and a true verdict render in each of said actions, respectively according to the law and the evidence, and thereupon the trial of these three actions respectively is proceeded with and the trial of the same not being concluded at the time of adjournment the jurors are admonished by the court as to their duties and the further hearing hereof is postponed until tomorrow.

69 In the Circuit Court of the United States Within and for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,

vs.

Connecticut Mutual Life Insurance Company, Defendant.

Now comes the defendant, the Connecticut Mutual Life Insurance Company, and moves, asks and requests the court to set aside the order of consolidation heretofore made in this action, as to this defendant, and to withdraw this defendant's case from the jury and enter judgment in said case for the defendant, for the following reasons:

First. That from the evidence adduced in this trial the issues in this case are not the same and identical with those of the other two defendants.

Second. For the additional reason that before any contract of insurance between this defendant and the assured, John W. Hillmon, was consummated he, the said Hillmon, refused to complete the same.

Third: Because no contract for insurance was ever entered into between this defendant and the plaintiff in this case.

Fourth: Because from the evidence in this case the plaintiff is not entitled to recover.

J. W. GREEN,
Atty. for Defendant.

Indorsed: No. 3149. Motion of Defendant for Judgt., &c. Filed Mch. 13, 1895. Geo. F. Sharitt, clerk.

70 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday, the 26th day of November, A. D., 1894, proceedings were had and appear of record in words and figures as follows, to-wit:

Present, Hon. Alfred D. Thomas, Judge.

Wednesday, March 13, 1895.

Sallie E. Hillmon
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Now come the parties in this case by their respective counsel, and comes on for hearing the motion of the defendant to set aside the order of consolidation hereteofore made in this action as to this defendant and to withdraw this defendant's cause from the jury and to enter judgment in this case for this defendant, which motion was argued by counsel, and the Court being fully advised in the premises, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled to which order and ruling of the Court the defendant, by its counsel, excepts.

71 In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant,

Motion.

Now comes the said defendant, The Connecticut Mutual Life Insurance Company, and respectively moves the Court for an order requiring the plaintiff to give security for costs in this action for the following reasons, among others, to-wit:

First. That this action is being prosecuted largely in the interest of, and on the behalf of said plaintiff's attorneys of record, who are financially interested in the result of this action and are promoting the same, and are abundantly able to give security for costs.

Second. Because said plaintiff is able to give security for costs.

Third. Because there is no merit in said plaintiff's action.

In support of this motion, the defendant offers in evidence the testimony of Samuel A. Riggs, one of the attorneys of record for the plaintiff, given upon a former trial of this action, which evidence is hereto attached, and made a part of this motion.

E. S. ISHAM,
GLEED, WARE & GLEED,
GREEN & BARKER and
W. R. SMITH,
Attys. for Defendant.

72 In the Circuit Court of the United States in and for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company, Defendant,

Affidavit of C. H. Nettels.

United States of America,
District of Kansas—ss.

C. H. Nettels, of lawful age, being first duly sworn on his oath, says that he is a stenographer; that as such, he took down in shorthand the evidence of various witnesses upon the last trial of the above entitled cause, among them, the testimony of Samuel A. Riggs, Esq., one of the attorneys for the plaintiff herein, and that the following is a true and correct transcript of the evidence given by Saumel A. Riggs at said trial, touching the subject of his financial relations to said case.

And further affiant says not.

C. H. NETTELS.

Subscribed and sworn to before me this 10th day of March, 1896.

[Seal] E. D. McKEEVER,
Notary Public, Shawnee County, Kansas.
My commission expires May 7, 1898.

73 A portion of the testimony of Samuel A. Riggs, Esq., given on behalf of the plaintiff in the trial of the case of Sallie E. Hillmon vs. the Insurance companies in 1895.

Cross-Examination by Mr. Barker, Counsel for the Defendants.

Q. Mr. Riggs, you stated that you are one of the attorneys for the plaintiff in this case? A. I am.

Q. I will ask you if you have a contingent fee in this case?

A. I have sir.

Q. I will ask you, Mr. Riggs, if this claim of the plaintiff in this suit is not owned by a syndicate consisting of yourself and the other attorneys in this case, and other parties?

A. It is not.

Q. I will ask you if the syndicate don't furnish the money for carrying on this suit, including the payment of Mrs. Hillmon's expenses, and the expenses of one Mr. Smith?

A. No, sir, there is no such arrangement or any such syndicate.

Q. I will ask you if you are not treasurer of that syndicate, and if you do not pay out money?

A. I am not treasurer of any syndicate, and I do not pay out any money except——

Q. You haven't paid out any money in this case since you have been here? A. Not for any syndicate, sir.

Q. Let me see if I understand you, then; you pay out money, but you do not pay it out on behalf of a syndicate?

A. On behalf of nobody except the plaintiff, sir.

Q. The plaintiffs? A. Nobody except the plaintiff.

Q. What I want to get at now, does the plaintiff furnish the money? A. The plaintiff will furnish money.

Q. I ask you if the plaintiff had furnished money.

A. The plaintiff has not furnished money.

Q. As a matter of fact, you, Mr. Wheat and Mr. Hutchings have furnished money, haven't you?

A. That is not a fact, sir.

Q. Haven't you furnished a portion of the money?

A. I think so.

74 Q. And Mr. Hutchings? A. Probably.

Q. You then have, and you say—have you a written contract with reference to your interest in this claim?

A. Yes, sir.

Q. That is to say, if the plaintiff recovers in this case, why, you get a certain amount, and this money back which you have expended? A. The contract speaks for itself.

Q. I am asking you with reference to that; if you recover, if the plaintiff recovers in this case, you get the money back again, do you not?

A. There is no arrangement in relation to money advanced at all; it is a matter of our own volition; it is not a matter of contract.

Q. Then I understand you are advancing money without any arrangement with reference to it?

A. There is no arrangement by which we were to advance one penny in this case, not one penny.

Q. Then, I will ask you, Mr. Riggs, what, in a certain notice is meant by the twenty-five hundred dollars in excess of fifty per cent of the amount you should recover?

A. It was the probable amount of money that we had advanced for Mrs. Hillmon without any arrangement so to do, without any obligation so to do.

Q. For that twenty-five hundred dollars you claim a lien?

A. Simply because she is to refund it; she is to pay it.

Q. Since that time you have advanced a large amount of money have you not?

A. Well, not a very large amount; some considerable.

Q. A considerable amount of money?

A. Oh, yes, quite a little amount.

Q. You pay your own expenses?

A. We do, sir; I generally do that in my practice.

Q. I will ask you how much of the expense money or the money for carrying on this suit the plaintiff furnished during this trial? A. I cannot say.

Q. Has the plaintiff furnished any money for the purpose of carrying on this suit during the present trial?

A. Well, if you know—if you will make your question a little more specific; what kind of money do you mean? She has paid her own expenses, unquestionably, at least,
75 I presume so, nobody else has paid them to my knowledge.

Q. I am not asking you in regard to that; I am asking you whether she has furnished the money for the purpose of carrying on the trial? A. She has not, to me, sir.

Q. Don't you look after the financial part of this case?

A. I do not.

Q. Who does?

A. I do not know that any one does particularly; I suppose the other counsel—

Q. (Interrupting.) I am not asking you—

A. Very well; no one does.

Q. No one looks after the financial part of this case?

A. No arrangement at all.

Q. Who pays the expenses, who has paid the expenses of the witnesses here?

A. Well, sir, I think I have advanced some money to pay the expenses of witnesses.

Q. I know, but I asked you who paid them, Mr. Riggs?

A. I have paid some, I think, perhaps Mr. Wheat some, and possibly Mr. Hutchings has paid some.

Q. You have paid some and Mr. Wheat some, and Mr. Hutchings some? A. I believe so.

Q. And what you have paid, you have paid out of your own money? A. I have, certainly.

Q. What the other parties have paid—you don't know with reference to that, I suppose? A. I do not.

Q. Do you remember of a proceeding, a certain proceeding, before Mr. Snider, the commissioner of Insurance, Superintendent of Insurance? A. Yes, sir.

Q. I will ask you who paid Mrs. Hillmon's expenses at Topeka on that occasion? A. I don't know sir.

Q. Is it not a fact that you paid or caused them to be paid?

A. It is not.

Q. Then, I want to see if I understand your connection; your compensation, you have stated, is dependent upon the amount of your recovery in this case?

A. I told you that we received a contingent fee.

Q. Yes, sir, that is what I want to get at; in addition to that the amount of money which you attorneys advance

76 is dependent, is it not, upon your recovery in this case?

A. No arrangement of that kind, sir.

Q. I know, but I ask you if it is not dependent upon your recovery in this case? A. It is not.

Q. What is it dependent on not anything.

Q. Who is to refund that money?

A. Mrs. Smith is under obligations to refund it.

Q. How will she refund it?

A. I don't know, sir, that is not in the contract.

Q. I will ask you how much is your contingent fee; what is the contingent fee claimed by the counsel for the plaintiff in this case?

A. Counsel for the plaintiff, in this case among them, are to receive an amount equal to fifty per cent of the amount recovered.

[A.] And they are to be reimbursed for all money that they expend in this case? A. Yes, sir, except personal expenses.

Q. That is the arrangement, is it? A. Yes, sir.

Q. Fifty per cent and expenses; that is the arrangement between you and the plaintiff in this case? A. Yes, sir.

Q. Is it not a fact that there are persons outside of the attorneys in this case who are financially interested in the result of this case? A. It is not, sir.

Q. Have other parties furnished, I mean now, I am speaking of parties outside of the attorneys for the plaintiff in this case, and of the plaintiff herself, if other parties haven't furnished money for the purpose of carrying on this litigation?

A. Not a dollar.

Q. Have they furnished services contingent, the payment of which was contingent upon your recovery in this case?

A. No, sir.

Q. I will ask you if Mr. Clark's fees ain't dependent upon your recovery?

A. I don't know what the arrangement between Mr. Clark and Mr. Hutchings was, because I was not present when made; I don't know, there was a private arrangement between Mr. John Hutchings who is now dead, and Mr. Clark.

Q. In regard to what the arrangement was, you don't know?

77 A. No, sir, I don't know; Mr. Hutchings was one of the attorneys with me in the case, called into the case by me.

By Mr. C. F. Hutchings:

Q. You may state to the jury, Mr. Riggs, whether you as counsel for the plaintiff in this case, ever used any money for any purpose except to enable the plaintiff to have a fair trial.

By Mr. Barker: I object to that; nobody said they did.

Indorsed: No. 3149. U. S. Circuit Court, Dist. of Kansas. Sallie E. Hillmon vs. Connecticut Mutual Life Ins. Co. Motion to require plff. to give security for costs with affidavit of C. H. Nettels in re testimony of S. A. Riggs. Filed Mar. 10, 1896. Geo. F. Sharitt, Clerk.

78 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday, the 25th day of November A. D., 1895, proceedings were had and appear of record in words and figures as follows, to wit:

Present: John A. Williams, Judge.

Tuesday, March 10, 1896.

Sallie E. Hillmon,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Now on this day comes the plaintiff by her attorneys, L. B. Wheat, S. A. Riggs and C. F. Hutchings, and the defendant, The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, by E. S. Isham, Gleed, Ware and Gleed, Green & Barker and W. R. Smith, its attorneys, thereupon comes on for hearing the motion of the defendant, The Connecticut Mutual Life Insurance Company, to require the plaintiff to give security for costs. After hearing evidence and arguments of counsel, and being fully advised in the premises it is by the court ordered that said motion be and the same is hereby overruled. To which order and ruling of the court the defendant duly excepts.

79 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday the 25th day of November A. D. 1895, proceedings were had, and appear of record in words and figures as follows, to wit:

Present: John A. Williams, Judge.

Wednesday, March 11, 1896.

Sallie E. Hillmon,
3147. vs.
The Mutual Life Insurance Company of New York.

Sallie E. Hillmon,
3148. vs.
The New York Life Insurance Company.

Sallie E. Hillmon,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

Now comes the plaintiff in the above entitled actions respectively by L. B. Wheat, S. A. Riggs and C. F. Hutchings, her attorneys, and the defendant The Mutual Life Insurance Company of New York by Gleed, Ware & Gleed, and Edward Lyman Short, its attorneys and the defendant The New York Life Insurance Company by George J. Barker and W. R. Smith, its attorneys and the defendant The Connecticut Mutual Life Insurance Company of Hartford Connecticut by J. W. Green and Edward S. Isham, its attorneys, and it appearing to the court that heretofore to wit: on the 14th day of June, 1882, an order was entered in these cases by this court consolidating them for trial, and to try the issues joined in these three several actions respectively come the following jurors of the regular panel P. E. Simmons, J. H. Hatch, Samuel Fulton, Robert Clark, O. H. Shepard, R. B. Snell, H. A. Hester, J. W. Gibson, Chas. J. Peck, John E. McCullough and John
80 Norton. And it appearing to the court that by reason of challenges there is not of the jurors regularly drawn a petit jury to try these cases, the court thereupon ordered the U. S. Marshal to complete the panel from the bystanders, whereupon the U. S. Marshal called into the jury box from the bystanders, A. Burkhart, the jury thereupon being completed as follows: P. E. Simmons, J. H. Hatch, Samuel Fulton, Robert Clark, O. H. Shepard, R. B. Snell, H. A. Hester, J. W. Gibson, Chas. J. Peck, John E. McCullough, John Norton and A. Burkhart, twelve good and lawful men of the body of the first division of the district of Kansas, who being duly impaneled

and sworn to well and truly try the matters submitted to them in each of these three several actions respectively, and a true verdict render in each of said actions respectively according to the law and the evidence, and thereupon the trial of these three actions respectively is proceeded with, and the trial of the same not being concluded at the time of adjournment, the jurors are admonished by the court as to their duties, and the further hearing hereof is postponed until to-morrow.

81 In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs. Motion.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

The said defendant asks an order of this court requiring the said plaintiff to give security for costs in said action, for the reasons,

First. That she is abundantly able to do so.

Second. That there is no merit in her alleged cause of action in said case.

Third. Because said alleged cause of action is owned by the attorneys of record for said plaintiff in said action, and one R. J. Borgalthaus, of Minneapolis, Minnesota, and that said case is being prosecuted in the interest of said attorneys, and is not a meritorious action against said defendant.

J. W. GREEN,
Attorney for Defendant.

Indorsed: No. 3149. Sallie E. Hillmon, Plaintiff, vs. The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant. Motion. Filed May 28, 1896. Geo. F. Sharitt, clerk. J. W. Green, attorney for defendant.

82 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford,

State and District of Kansas,
Leavenworth County—ss.

The undersigned Sallie E. Smith, formerly Sallie E. Hillmon, being first duly sworn does on oath depose, state and say that she is the Sallie E. Hillmon named in the title of

this the above entitled action and is the plaintiff in this said action, and that because of her, affiant's, poverty she is unable to pay the costs of said action, or to give security for the same, and that she, affiant, believes she is entitled to the redress she seeks by such action, that is, by this said action.

And Affiant further on oath deposes states and says that the nature of her cause of action sued on in said action is as follows, to wit, and said action was brought and is being prosecuted by said plaintiff to recover judgment for the sum of $5,000.00 with interest thereon and costs of suit against the defendant in said action and on and because of a certain policy of insurance and because of the death in March, A. D. 1879 of the John H. Hillmon hereinafter mentioned, which said policy was made, executed, issued and delivered by said defendant to and in favor of said plaintiff in A. D. 1879 on the life of her then husband John W. Hillmon for the sum of $5,000.00 all as shown by the Petition of said plaintiff heretofore filed in said action, which petition is here referred to for a more full and complete description of her aforesaid cause of action.

SALLIE E. SMITH.

83 Subscribed in my presence and sworn to before me the undersigned, a Notary Public, in and for the county of Leavenworth in the State of Kansas, by the above named Sallie E. Smith, formerly Sallie E. Hillmon, this 1st day of June, A. D. 1896.

In witness whereof I hereto set my hand and affix my Notarial seal the day and year last above written.

[Seal] F. P. FITZWILLIAM,
Notary Public.

My commission expires on the 24th day of January, A. D. 1899.

Indorsed: 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Insurance Company of Hartford, Connecticut. Affidavit cannot give security etc. Filed Jun. 1st, 1896. Geo. F. Sharitt, Clerk.

84 In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
General No. 3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
General No. 3148. vs.
New York Life Insurance Company, Defendant.

Sallie E. Hillmon, Plaintiff,
General No. 3149. vs.
Connecticut Mutual Life Insurance Company, Defendant.

It is stipulated between the respective parties hereto that said actions (and the action into which said actions have been consolidated for the purposes of trial) and all motions therein and in each of said actions, be continued until the next regular term of said court, but the defendants reserve the right to renew or call up for hearing upon proper notice, but not at this term, all motions filed in said action.

SAML. A. RIGGS,
Atty. for Plaintiff,
GEO. J. BARKER,
Atty. for said Defts.

Nov. 21st, 1896.

Indorsed: In the Circuit Court of the U. S. for the District of Kansas. First Division. No. 3147. Sallie E. Hillmon, Plaintiff, vs. Mutual Life Ins. Co., Defendant, No. 3148, Sallie E. Hillmon, Plaintiff, vs. The New York Life Ins. Co., Defendant. No. 3149. Sallie E. Hillmon, Plaintiff, vs. The Con. Life Ins. Co., Defendant. Stipulation. Filed Nov. 30, 1896. Geo. F. Sharitt, clerk. Geo. J. Barker, Atty. for Defts.

85 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

State and District of Kansas,
Leavenworth County—ss.

The undersigned Sallie E. Smith, formerly Sallie E. Hillmon, being first duly sworn does on oath depose, state and say that she is the Sallie E. Hillmon named in the title of

this the above entitled action and is the plaintiff in this said action, and that because of her, affiant's, poverty she is unable to pay the costs of said action, or to give security for the same, and that she, affiant, believes she is entitled to the redress she seeks by such action, that is, by this said action.

And Affiant further on oath deposes and says that the nature of her cause of action sued on in said action is as follows, to wit, and said action was brought and is being prosecuted by said plaintiff to recover judgment for the sum of $5,000.00 with interest thereon and costs of suit against the defendant in said action and on and because of a certain policy of insurance and because of the death in March, A. D. 1879 of the John W. Hillmon hereinafter mentioned, which said policy was made, executed, issued and delivered by said defendant to and in favor of said plaintiff in A. D. 1879 on the life of her then husband John W. Hillmon for the sum of $5,000.00 all as shown by the Petition of said plaintiff heretofore filed in said action, which petition is here referred to for a more full and complete description of her aforesaid cause of action.

SALLIE E. SMITH.

86 Subscribed in my presence and sworn to before me the undersigned.

James Gray, Clerk of the District Court of the County of Leavenworth, in the State of Kansas, by the above named Sallie E. Smith, formerly Sallie E. Hillmon, this 30th day of April, A. D. 1897.

In Witness Whereof, I hereto set my hand and affix the seal of said court at my office in Leavenworth, in said county and state the day and year last above written.

[Seal] JAMES GRAY, Clerk.

Indorsed: No. 3149. Affidavit of Sallie E. Smith. Filed May 1st, 1897. Geo. F. Sharitt, clerk.

87 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas. First Division.

Sallie E. Hillmon, Plaintiff,
No. 3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The New York Life Insurance Company, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

State and District of Kansas,
Leavenworth County—ss.

The undersigned Sallie E. Smith, formerly Sallie E. Hillmon, being first duly sworn, does on oath depose, state and say that she is the Sallie E. Hillmon, named in the title of each of the three above entitled actions and is the plaintiff in each of said actions and that because of her, affiant's, poverty, she is unable to pay the costs of said action or of either of them, or to give security for the same, and that she, affiant, believes she is entitled to the redress she seeks by such actions, that is, by said actions.

And affiant further on oath deposes and says that the nature of her causes of action sued on in said actions is as follows, to wit, and said actions were brought and are being prosecuted by said plaintiff to recover judgments one for the sum of $10,000.00 another for $10,000.00 and the other for $5000.00 with interest on each of such sums and costs of suit
88 against the defendants in said actions and on and because of four certain policies of insurance and because of the death in March A. D. 1879 of the John W. Hillmon hereinafter mentioned, which said policies were made, executed, issued and delivered one thereof by one of said defendants to and in favor of the said plaintiff in A. D. 1879 on the life of her then husband John W. Hillmon the other three thereof one by one of said defendants the other by another of said defendants all as shown by the petitions of said plaintiff heretofore filed in said action, which petitions are here referred to for a more full and complete description of her aforesaid several causes of action.

SALLIE E. SMITH.

Subscribed in my presence and sworn to before me the undersigned.

JAMES GRAY,

Clerk of the District Court of Leavenworth in the State of Kansas by the above named Sallie E. Smith, formerly Sallie E. Hillmon this 30th day of April A. D. 1897.

In Witness Whereof, I hereto set my hand and affix the seal of said Court at my office in Leavenworth, in said county and state the day and year last above written.

JAMES GRAY, Clerk.

Indorsed: Nos. 3147, 3148, 3149. Affidavit of Sallie E. Smith. Filed May 1st, 1897. Geo. F. Sharitt, clerk.

89 United States of America,
District of Kansas—ss.

At a term of the Circuit of the United States of America, for the District of Kansas, began and held at the City of Leavenworth in said District on Monday the 7th day of June A. D. 1897, proceedings were had and appear of record in words and figures as follows, to wit:

Tuesday, June 8, 1897.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Order Overruling Motion for Security for Costs.

And now on this 8th day of June A. D. 1897 comes the plaintiff herein by L. B. Wheat and R. J. Borgalthous Esq. two of her attorneys and also comes the defendant herein by Messrs. George J. Barker and Eugene F. Ware two of its attorneys, and the court having heretofore and on the 1st day of May A. D. 1897 heard and taken under advisement the motion of said defendant before then filed in this action for an order requiring the plaintiff to give security for costs in this action for the reasons in that motion stated, and the court having duly considered that motion and being well advised in the premises now overrules and denies said motion, to which ruling and decision of the court, said defendant excepts. And thereupon it is now by the court here further ordered that this action be and the same is continued to the next term of this court.

90 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday the 22nd day of

November A. D. 1897, proceedings were had, and appear of record in words and figures as follows, to wit:

Tuesday, February 15, 1898.

Sallie E. Hillmon
3149 vs.
The Connecticut Mutual Life Insurance Company.

And now at this day this cause came on to be heard upon the motion of the defendant for leave to file a supplemental answer herein upon hearing whereof said defendant is given twenty days to file its supplemental answer herein and said plaintiff twenty days thereafter in which to plead thereto.

91 In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, and the Connecticut Mutual Life Insurance Company,
Defendants.

Motion.

Now come the defendants above named and move the court to vacate and set aside all orders heretofore made in said action, allowing said plaintiff to sue without giving security for costs.

And also for an order requiring said plaintiff to give security for costs in this action, for the following reasons:

Because since the making of the last order in said case in regard to security for costs, the financial condition of said plaintiff has materially changed in this to wit:

That since said date she has received a large amount of money and is now abundantly able to give security for costs.

The said defendants also move the court to require said plaintiff to give security for costs for the reason that she has never complied with the law allowing plaintiffs to sue as a poor person.

E. F. WARE,
J. W. GREEN,
GEO. J. BARKER,
Attys. for said defendants.

Indorsed: No. 3147, 3149. In the Circuit Court of the United States. Sallie E. Hillmon vs. The Mutual Life Insurance Company of New York and The Connecticut Mutual Insurance

Company. Motion. Filed Apr. 28. 1898. Geo. F. Sharitt, clerk.

92 In the Circuit Court of the United States for the District of Kansas, in the First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

United States of America,
State & District of Kansas,
Leavenworth County—ss.

The undersigned Sallie E. Smith formerly Sallie E. Hillmon being first duly sworn does on oath depose and say that she is the plaintiff in this the above entitled action, and that she is now and was before and at the time of the commencement of this action and has ever since been a citizen of the United States of America.

SALLIE E. SMITH.

The above affidavit was subscribed in my presence and sworn to by the above named plaintiff before me the undersigned clerk of the District Court in and for the county of Leavenworth, in the state of Kansas this 4th day of May A. D. 1898.

In witness whereof, I hereto set my hand and affix the seal of said court at my office in said county the day and year last aforesaid. JAMES GRAY, clerk.

[Seal]

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Ins. Co. Affidavit of Citizenship. Filed May 5, 1898. Geo. F. Sharitt, clerk.

93 In the Circuit Court of the United States for the District of Kansas. First Division.

Sallie E. Hillmon
vs.
Mutual Life Insurance Company of New York.

Sallie E. Hillmon
vs.
Connecticut Mutual Life Insurance Company.

And now comes the said defendants, the Mutual Life Insurance Company of New York, and the Connecticut Mutual Life Insurance Company on this 9th day of May A. D. 1898, and this cause having been heretofore by order of this court,

and by and with the consent of the parties set down for trial on the 14th day of February, A. D. 1898; and said trial having been then on that date, on the application of the plaintiff, on the ground of her illness postponed until the 3rd day of May A. D. 1898; and the said trial having been again on that 3rd day of May, upon the suggestion of the plaintiff's attorneys, of sickness in the family of one of said attorneys postponed until this 9th day of May; and application for the continuance of said cause and the postponement of the trial thereof necessarily beyond the present term, being now again renewed upon like suggestion merely of plaintiff's attorneys, and the ground of said suggestion having existed with equal force since before the said 14th day of February, 1898, and there being no representation to the court, that the said ground may not continue for a long time and almost indefinitely; and the said cause having been now pending for about nineteen years, to wit: since the 13 day of July, 1880, and having already tried five times before five different judges of this court; the average duration of each of said trials having been more than four weeks; and for other reasons hereinafter referred to, this defendant moves the court for
94 an order, that this cause proceed immediately to trial, or that the same be dismissed forthwith for want of prosecution.

This motion is founded upon the matters above suggested, and, also upon the proceedings and findings of this court, shown in the files and records of this court, and of the District Court of this district in certain proceedings had therein, to which this defendant refers for all purposes of this motion, to-wit:

First. An application of the New York Life Insurance Company, The Mutual Life Insurance of New York, and the Connecticut Mutual Life Insurance Company, filed in this court —— day of March, 1897, for a rule on Webb McNall, Superintendent of Insurance of the State of Kansas, to show cause why he should not for reasons stated in said application be proceeded against for contempt of court.

Second. The case of the United States against Webb McNall, being number 3401 of the Criminal Calendar of the District Court aforesaid, being an indictment of said McNall in the court founded upon the same matters which were the ground of the aforesaid application concerning contempt of this court.

Third. A bill in chancery against the said McNall and others for injunction founded on the grounds aforesaid, and

filed in this court on the 27th day of July, 1897, and being case Number 7503 on the Equity Docket of this court.

GEO. J. BARKER,
E. F. WARE,
J. W. GREEN,
Attys. for Defts.

Indorsed: No. 3147-3149. Motion to dismiss. Filed May 9, 1898. Geo. F. Sharitt, clerk.

95 In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

United States of America,
State and District of Kansas,
Leavenworth County---ss.

I, the undersigned, Sallie E. Smith, formerly Sallie E. Hillmon, being first duly sworn, do, on oath, depose and say that I am the plaintiff in this the above entitled action, and that before and at the time of and ever since the commencement of this action, I was [——] ever since have been and now am a citizen of the United States of America, and that my financial situation is not such as to enable me to give or furnish security for costs in said action, and that out of the monies paid in settlement and compromise of my late suit against The New York Life Insurance Company, Case No. 3148, in said court, large sums were used to pay certain expenses that had been incurred and further sums to apply on fees, and further large amounts towards and on payment of some of my debts, and further large sums, part thereof have before 26th ult. been disposed of in various ways, until now I do not and did not when I heard of the motion for security for costs filed herein on 26th ult., have hold or own as much as six hundred dollars thereof. And I still owe and am indebted in sums of money more than that last named sum, and more than I am now able to pay, and I feel sure and believe that I would not be able to procure any person or persons to become security for costs in this said above entitled action, even if I should be ordered or required to give security for costs in this said action.

SALLIE E. SMITH.

96 The above affidavit was subscribed in my presence and sworn to by the above named plaintiff before me, the undersigned, a Notary Public, in and for the County of

Leavenworth, in the State of Kansas, this 4th day of May, A. D., 1898.

In witness whereof I hereto set my hand and affix my Notarial Seal at my office in said county the day and year last aforesaid.

[Seal] F. P. FITZWILLIAM,
Notary Public.

My commission expires on the 24th day of January, A.
97 D., 1899.

In the Circuit Court of the United States for the District of Kansas, in the First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149 vs.
The Connecticut Mutual Life Insurance Company, of Hartford, Defendant.

United States of America,
State and District of Kansas,
Leavenworth County—ss.

I, the undersigned, Sallie E. Smith, formerly Sallie E. Hillmon, being first duly sworn, do, on oath, depose and say that I am the plaintiff in this, the above entitled action, and I refer to the above and foregoing affidavit as part hereof and depose and say that the same and the facts therein stated are true as and to the extent as therein stated.

SALLIE E. SMITH.

The above affidavit was subscribed in my presence and sworn to by the above named plaintiff before me, the undersigned, a Notary Public, in and for the County of Leavenworth, in the State of Kansas, this 4th day of May, A. D., 1898.

In witness whereof I hereto set my hand and affix my Notarial Seal at my office in said county the day and year aforesaid.

My commission expires on the 24th day of January, A. D., 1899.

[Seal] F. P. FITZWILLIAM,
Notary Public.

Indorsed: Nos. 3147 and 3149. Hillmon vs. The Mutual Life Insurance Company and Hillmon vs. The Connecticut Mutual Life Insurance Co. Affidavit in each case. Filed May 9, 1898. Geo. F. Sharitt, clerk.

98 In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,

No. .... vs.

The Mutual Life Insurance Company, of New York, Defendant.

Sallie E. Hillmon, Plaintiff,

No. .... vs.

Connecticut Mutual Life Insurance Company, Defendant.

United States of America,
District of Kansas—ss.

C. F. Hutchings being duly sworn, deposes and says that he is and has been for several years one of the attorneys for the said plaintiff and during said time has assisted in the trials and other proceedings had in the above causes; that if said causes are tried, or the trial thereof commenced during the present month of May, 1898, affiant cannot be present to assist in such trial for the following reasons, to wit: Affiant's daughter in the month of March last was very sick of the disease called acute spinal meningitis, and by the advice and instruction of her physician, affiant took her to Hot Springs, Arkansas for medical treatment, the baths there administered from the natural hot waters being considered beneficial in such cases. That as the result of said disease affiant's daughter entirely lost the use of her limbs and became so nervous, weak and paralyzed that she could not walk or stand upon her feet and was confined to her bed most of the time and could only be removed from her room by carrying her or by means of a rolling chair, and her life was for a long time despaired of; that in addition to said bodily weakness her mind became greatly affected so that she was almost constantly in a state of great mental despondency and depression of spirits, and required the most constant and assiduous attention; that during

99 all of the time since her removal to Hot Springs her mother had been her attendant, but from the incessant strain incident thereto has become wearied and ill, and is very desirous of returning to her home where her other children, one of whom is a young lad are left without other attention than such as affiant or a servant is able to bestow; that his wife has urgently requested affiant to come to her assistance and it is necessary that affiant should either go to Hot Springs and take the place of his wife or bring his sick daughter home, and he has resolved upon the latter course as soon as it can be done with the approval of the attending physician; that affiant is informed that his daughter is improving very slowly, but is subject to sudden and dangerous relapses; that affiant started to go to Hot Springs last week for the purpose of

accompanying his daughter home, but before reaching there was informed by his wife that the attending physician strongly advised against such course at that time, but was of opinion that in a week or ten days she may in the absence of a relapse, be safely brought home; that affiant has accordingly arranged to go to Hot Springs on the 11th day of May for that purpose; that in affiants opinion it would be wholly impracticable for his daughter in her sick and enfeebled condition to undertake the journey home without the personal presence and assistance of affiant; that it is necessary on the journey home to change cars at St. Louis and wait sometime for a connecting train, and both affiant's wife and daughter are unaccustomed to traveling; that for the reasons stated affiant cannot until after she shall have been brought home engage in the trial of said causes, at least without neglecting his duty to his, affiant's daughter; that it is impossible to state or fix a time when she can be brought home, but affiant is strongly encouraged by reports from his wife and the attending physician to believe that she will in all probability be able to undertake and accomplish the journey before the 1st day of June; that if affiant's daughter should become worse, or if she should remain in her present condition without further improvement it is necessary that affiant should go to Hot Springs and remain there and devote his entire time and personal attention to her care.

C. F. HUTCHINGS.

100 Subscribed and sworn to before me this 7th day of May, 1898.

[Seal] C. E. HARSHBURGER,
Notary Public.

My commission expires Sept. 27, 1901.

Indorsed: Nos. 3147 and 3149. Hillmon vs. Two Insurance Companies. Affidavit. Filed May 9, 1898. Geo. F. Sharitt, Clerk.

101 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Topeka, in said District on Monday the 22nd day of November A. D. 1897, proceedings were had and appear of record in words and figures as follows, to wit:

Monday, May 9th, 1898.

Sallie E. Hillmon, Plaintiff,
3147. vs.
Mutual Life Insurance Company of New York.

Sallie E. Hillmon
3149. vs.
Connecticut Mutual Life Insurance Company.

And now upon this 9th day of May, 1898, came the said plaintiff by L. B. Wheat and S. A. Riggs, her attorneys and came also the said defendants by Edward S. Isham, J. W. Green, Gleed, Ware & Gleed, and George J. Barker, their attorneys, and thereupon came regularly on for hearing the application of said plaintiff for a continuance and at the same time came on for hearing the application and motion of defendants to have said cause tried now or dismissed for want of prosecution; that upon the hearing of said motion for a continuance, the only evidence which was presented to the court was the affidavit of Mr. C. F. Hutchings. And the court having heard said evidence and the arguments of counsel, doth sustain said motion to continue said cause. It is therefore ordered and adjudged that this action be and the same is hereby continued until Monday, September 19th, 1898, at 10 o'clock a. m. And the application of said defendants to have said cause tried now or dismissed for want of prosecution was by the court overruled. To the order of said court in sustaining said motion for a continuance said defendants, and each of them then and there duly excepted; and to the refusal of the court to require said plaintiff to try her said cause now or dismiss the same, the defendants and each of them then and there duly excepted.

102 It was thereupon ordered, adjudged and decreed by the court that said cause shall be, so far as the plaintiff is concerned, tried at the time to which the same is continued, to wit: September 19th, 1898, at ten o'clock a. m. or that the same shall stand dismissed; but said order shall not apply to the defendants, who shall have the right to continue said cause at said time, if they so desire. To which last ruling of the court the plaintiff then and there duly excepted.

JNO. A. WILLIAMS, Judge.

Sallie E. Hillmon,
3147 vs.
The Mutual Life Insurance Company of New York.

Sallie E. Hillmon
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut.

And now comes the plaintiff in the above entitled actions by L. B. Wheat and S. A. Riggs, her attorneys, as well also come the defendants by G. J. Barker, E. F. Ware and J. W. Green, their attorneys and this cause came on to be heard upon the defendants motion filed herein requiring the plaintiff to give security for costs filed herein on the 28 day of April, 1898. Upon hearing whereof the court orders that the said plaintiff be and she is hereby required to give security for future costs to the extent and amount of one thousand dollars in these two cases jointly, which are consolidated for trial, within 20 days from this date, security to be approved by the Clerk of this court. To which order and ruling the plaintiff excepts.

103 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas in the First Division.

Sallie E. Hillmon, Plaintiff,
No. 3147. vs.
The Mutual Life Insurance Company of New York, Defendant.
and
Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Know all men by these presents that whereas on the Ninth day of May, A. D. 1898, it was at Topeka, Kansas, in and by the above named Circuit Court of the United States in and for the District of Kansas in the First Division thereof, in the two above entitled actions ordered and required that the plaintiff in said actions give security for future costs to the extent and amount of one thousand dollars in these said two cases jointly, which were consolidated for trial, within twenty days from that date, security to be approved by the Clerk of that said court.

Now therefore, to comply with said order and requirement we the undersigned hereby to the extent and amount of one thousand dollars enter ourselves security for costs in said two

cases jointly, and jointly and severally acknowledge ourselves held and bound as such security for costs as required by said order and requirement; and as such security for costs for and on behalf of Sallie E. Hillmon the plaintiff in said actions we hereby acknowledge ourselves held and firmly bound to the defendants in said actions for the benefit of all who may be or become entitled to the benefit hereof in the sum of one thousand dollars that said plaintiff shall and will duly
104 pay such future costs in said causes to the extent and amount of one thousand dollars.

A. CALDWELL,
A. E. WILSON.

Dated this 27" of May, 1898.

Approved May 28, 1898. Geo. F. Sharitt, Clerk.

Indorsed: No. 3147, 3149. Security for Costs. Filed May 28, 1898. Geo. F. Sharitt, Clerk.

105 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States began and held at the City of Leavenworth, in said District, on Monday the 5th day of June, A. D. 1899, proceedings were had, and appear of record in words and figures as follows, to wit:

Tuesday, June 13th, 1899.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties herein, the plaintiff appearing by L. B. Wheat, her attorney, and the defendant by J. W. Green and George J. Barker, its attorneys, and by agreement of parties in open court, it is ordered by the court that said entitled action be passed until and that the same be called for trial upon October 16th, 1899.

106 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

The defendant The Connecticut Mutual Life Insurance Company of Hartford, moves the court to quash the venire and discharge the entire panel of jurors, drawn for the trial of the above entitled action to be had on the 16th day of October, 1899; for the following reasons:

First. That said jurors were not publicly drawn from a box containing at the time of such drawing, the names of not less than three hundred (300) persons, possessing the qualifications provided in section 800 of the Revised Statutes of the United States.

Second. Because said jurors were not publicly drawn.

Third. Because said jurors were privately drawn.

Fourth. Because said jurors were privately drawn without any notice, knowledge of information to said defendant of the time or place when the drawing of said jurors would take place.

Fifth. Because said jurors were not drawn in the manner prescribed by law.

Sixth. Because the names and residences of the jurors so privately drawn, were kept concealed from this defendant.

Seventh. Because at the time of the filing of this motion the names of said jurors were unknown to this defendant nor could it ascertain the names or residences thereof, by any means within its power.

J. W. GREEN,
E. F. WARE,
GEO. J. BARKER,
Attys. for Deft.

Indorsed: No. 3149. Sallie E. Hillmon, Plaintiff, vs. The Conn. Mut. Life Ins. Co. Motion. Filed Oct. 9, 1899. Geo. F. Sharitt, clerk. Geo. J. Barker, J. W. Green, E. F. Ware, Attorneys for Deft. Lawrence, Kansas.

107 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
No. 3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Motion.

The defendant The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, respectfully moves, asks and requests the court to vacate and set aside so much of the order of said court of May 9, 1898, which consolidates or attempts to consolidate this action for trial with the case of Sallie E. Hillmon, Plaintiff, vs. The Mutual Life Insurance Company of New York, defendant, for the following reasons:

First. That said order was inadvertently made.

Second. Because said actions are not such actions as can be, under the law, consolidated for the purposes of trial.

Third. Because the issues in said cases are not the same.

Fourth. Because said court theretofore and on the 15" day of February, 1897, made an order severing said actions and setting aside the order of consolidation theretofore made.

Fifth. Because it was agreed, in writing, between said parties that each should be entitled to a separate trial.

Sixth. Because such an order of consolidation would be greatly prejudicial to the rights of this defendant.

J. W. GREEN,
Atty. for said deft.

Indorsed: No. 3149. Motion to set aside order consolidating cases. Filed Oct. 16, 1899. Geo. F. Sharitt, clerk.

108 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon
vs.
New York Life Insurance Company.

Sallie E. Hillmon
vs.
Mutual Life Insurance Company of New York.

Sallie E. Hillmon
vs.
Connecticut Mutual Life Insurance Company.

Whereas, since the making and entering by the court of the order consolidating the above entitled action for trial, the said plaintiff, Sallie E. Hillmon, now Sallie E. Smith, has sold and conveyed her interest and claim against the defendant, the New York Life Insurance Company to one James F. Lord, who has become plaintiff in said action. And whereas, the reason for the consolidation of said action for trial, no longer exists, it is therefore stipulated and agreed by and between the parties hereto, that is, the said Sallie E. Hillmon, now Sallie E. Smith, the said James F. Lord, the defendant, the New York Life Insurance Company and the other two defendants above named, that the order of consolidation heretofore made shall be by the court annulled and wholly set aside, and that each

plaintiff and each defendant shall be entitled to have and shall have a separate trial in each of said actions.

C. F. HUTCHINGS,
SAMUEL A. RIGGS,
L. B. WHEAT,
Attys. for plaintiff.
GEO. J. BARKER &
J. W. GREEN,
Attys. for Defendants.

Indorsed: No. 3147-3149. Stipulation. Filed Oct. 16, 1899. Geo. F. Sharitt, clerk.

109 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Leavenworth in said District on Monday the 5th day of June A. D. 1899, proceedings were had and appear of record in words and figures as follows, to wit:

Present: Hon. William C. Hook, Judge.

Monday, October 16th, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
No. 3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now comes the plaintiff in the above entitled actions respectively by L. B. Wheat, C. F. Hutchings and John H. Atwood, her attorneys, and the defendant the Mutual Life Insurance Company of New York by George J. Barker and E. F. Ware its attorneys, and the defendant The Connecticut Mutual Life Insurance Company of Hartford Connecticut by J. W. Green and Edward S. Isham, its attorneys. And thereupon comes on for hearing the defendants' motions to set aside the order consolidating the above entitled actions for trial. The court having heard the arguments of counsel and being fully advised in the premises, it is now by the court considered, ordered and adjudged that the said motions and each of them be and they are hereby overruled, and the order heretofore entered consolidating these two cases for trial be and is continued in force, to which order of the court the defendants and each of them except.

110 Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now comes the plaintiff in the above entitled actions, respectively by L. B. Wheat, C. F. Hutchings and John H. Atwood, her attorneys and the defendant the Mutual Life Insurance Company of New York by George J. Barker and E. F. Ware, its attorneys and the defendant The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, by J W. Green and Edward S. Isham, its attorneys. Thereupon comes on for hearing the defendants' motions to quash the venire and discharge the jury and the court having heard the evidence and arguments of counsel and being fully advised in the premises, it is by the court considered, ordered and adjudged that said motions be and they are hereby respectively overruled, to which order of the court the defendants and each of them except Thereupon the plaintiff and the defendants announced themselves ready for trial. The court directed that a jury be impanelled to try the issues in these two cases as consolidated for trial. The impanelling of a jury in these two cases as consolidated for trial was proceeded with. The hour of adjournment having arrived and the panel of the jury not being completed the jurors called into the jury box are by the court duly admonished as to their duties and further hearing of these two cases is postponed until to-morrow.

111 In the Circuit Court of the United States for the District of Kansas, Eastern Division.

Sallie E. Hillmon, Plaintiff,
vs.
Connecticut Mutual Insurance Co., Defendant.

Motion.

Now comes the above named defendant and objects to the trial of its case before the jury now impaneled herein, for the reason that said jury is not constituted according to law, in this:

That the plaintiff has been given by the Court, and has exercised under the order of the Court, six peremptory challenges to the jury now impaneled for the trial of the case between the said plaintiff and this defendant, which is a greater number of peremptory challenges than the said plaintiff is entitled to by law, so that said jury is illegally constituted

as against this defendant; and said defendant moves the court accordingly that said jury may be discharged and that a new venire be ordered.

EDWARD S. ISHAM,
J. W. GREEN,
Counsel for Defendant.

Endorsed: No. 3149. Motion to Discharge Jury. Filed Oct. 17, 1899. Geo. F. Sharitt, clerk.

112 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, began and held at the city of Leavenworth in said District on Monday the 5th day of June A. D. 1899, proceedings were had and appear of record in words and figures as follows, to wit:

Present: Hon. William C. Hook, Judge.

Tuesday, October 17, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties same as on yesterday and the jurors who were in the jury box when the court adjourned on yesterday being called answering to their names and all being present the empanelling of the jury to try these two cases respectively as consolidated for trial, is proceeded with and to try the matters in issue in these two actions respectively the following jury came, and was duly selected and empanelled to wit: W. T. Sargent, G. A. Swallow, J. W. Skinner, J. C. Seaton, Jesse White, J. W. Fox, Thomas Prior, W. S. Caldwell, H. O. Whitaker, T. M. Durland, Prior Dickey, P. G. Lowe, twelve good and lawful men of the body of the first division of the district of Kansas. And when the said jurors had arisen to be sworn the defendants severally and respectively, by their counsel objected to the jurors being sworn, and moved the court to discharge the whole panel and issue a new venire, because of the plaintiff having been allowed six peremptory challenges, that is to say three peremptory challenges in each of said two actions, which objections and motions were by the court overruled, to which ruling and decision of the
113 court said defendants respectively except. And thereupon the said twelve men were as such jury, in these

two cases respectively duly sworn to well and truly try the matters submitted to them in these two cases respectively and a true verdict render according to the law and the evidence in each of these said two cases respectively, the trial of these two cases as consolidated for trial is proceeded with. And the hour of adjournment having arrived and the trial of these two cases as consolidated for trial not being concluded further hearing of said two cases is postponed until to-morrow.

114 Wednesday, Oct. 18, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present, and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment, the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until tomorrow.

115 Thursday, Oct. 19, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present, and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment, the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until tomorrow.

116 Friday, Oct. 20, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until tomorrow.

117 Saturday, Oct. 21, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until Monday, Oct. 23, 1899.

118 Monday, Oct. 23, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on Saturday last, and the jury all being called, present and answering to their names, the trial of these two cases as con-

solidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until to-morrow.

119 Tuesday, Oct. 24, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until tomorrow.

120 Wednesday, Oct. 25, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until to-morrow.

121 Thursday, Oct. 26th, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until tomorrow.

122 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
v.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
v.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Motion.

The defendants respectfully move, ask and request the court to discharge the jury empaneled in this case and to issue a new venire on account of the remarks of the Judge of said court, made in the presence of the jury and while said court was in session, which are as follows, and which greatly prejudice and impair the rights of said defendants before said jury and on account of which the defendants cannot have a fair and impartial trial before said jury;

By the Court: I desire to say this: There is a juror whose conduct is very commendable, and whom I honor for it, has stated to me that a communication was made to him which he interpreted as a preliminary to an offer to bribe. He stated to me the language that was used to him and it looks to me very much as it did to him, but inasmuch as there might be some mistake, I think it best not to mention the name of the party who made the communication, or the name of the juror to whom it was made, but I desire to say this, that if there is any further effort made in that direction, I will have

hat man's name presented to the next grand jury for in-
ictment: It is no lawyer connected with this case. I do
ot mean to say that the effort came from either side of this
ase, and no counsel is called upon, it is not necessary in the
ind of the court for any counsel to say anything one way or
the other about it. There is no reflection cast upon any
23 one directly connected with this case, so far as I know,
but I desire to say to the person that that must be
topped, and it must proceed no further. If I can prevent it,
his case will not be tried with anything of that sort in it.

Remembering, gentlemen, the admonition that has been
iven you return into court at 2 o'clock.

J. W. GREEN,
GEO. J. BARKER,
E. F. WARE,
Attys. for Defts.

Indorsed: 3147-3149. Defts. motion to discharge the jury.
Filed Oct. 26, 1899. Geo. F. Sharitt, Clerk.

24 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of
merica, for the District of Kansas, began and held at the
ty of Leavenworth, in said District on Monday the 5th day
f June, A. D. 1899, proceedings were had and appear of re-
ord in words and figures as follows, to wit:

Present: Hon. William C. Hook, Judge.

Friday, Oct. 27th, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
he Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
he Connecticut Mutual Life Insurance Company of Hartford,
Connecticut, Defendant.

Now come the parties in these two cases respectively as on
esterday, and the jury all being called, present and answer-
g to their names, the trial of these two cases as consolidated
r trial is proceeded with and the trial of the same not being
ncluded at the hour of adjournment the jurors are duly
dmonished by the Court as to their duties and the further
aring of these two actions is postponed until to-morrow.

125 Saturday, Oct. 28, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the Court as to their duties and the further hearing of these two actions is postponed until Monday, Oct. 30, 1899.

126 Monday, Oct. 30, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on Saturday, last, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the Court as to their duties and the further hearing of these two actions is postponed until tomorrow.

127 Tuesday, Oct. 31, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively, as on yesterday, and the jury all being called, present, and answering to their names, the trial of these two cases as consolidated

for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the Court as to their duties and the further hearing of these two actions is postponed until to-morrow.

128 Wednesday, November 1st, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively, as on yesterday, and the jury all being called, present, and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the Court as to their duties and the further hearing of these two actions is postponed until to-morrow.

129 Thursday, Nov. 2, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively, as on yesterday, and the jury all being called, present, and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the Court as to their duties and the further hearing of these two actions is postponed until to-morrow.

130 Friday, Nov. 3rd, 1899.

Sallie E. Hillmon, Plaintiff,
3147 vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively, as on yesterday, and the jury all being called, present, and answer-

ing to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the Court as to their duties and the further hearing of these two actions is postponed until to-morrow.

131 Saturday, Nov. 4th, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until Monday, Nov. 6th, 1899.

132 Monday, Nov. 6, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on Saturday last, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until Wednesday, Nov. 8, 1899.

133 Wednesday, November 8th, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on Monday, Nov. 6th, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until tomorrow.

134 Thursday, November 9, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until tomorrow.

135 Friday, November 10, 1899.

Sallie E. Hillmon Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and an-

swering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until to-morrow.

136 Saturday, November 11, 1899.

Sallie E. Hillmon Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until to-morrow.

137 Monday, Nov. 13, 1899.

Sallie E. Hillmon Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on Saturday last, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until to-morrow.

138 Tuesday, November 14, 1899.

Sallie E. Hillmon, Plaintiff,
3147, vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until to-morrow.

139 Wednesday, November 15, 1899.

Sallie E. Hillmon, Plaintiff.
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff.
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until to-morrow.

140 Thursday, Nov. 16, 1899.

Sallie E. Hillmon, Plaintiff.
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff.
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answer-

ing to their names, the trial of these two cases as consolidated for trial is proceeded with and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties and the further hearing of these two actions is postponed until to morrow.

141 Friday, Nov. 17, 1899.

Sallie E. Hillmon, Plaintiff.
3147. vs.
The Mutual Life Insurance Company of New York, Defendant

Sallie E. Hillmon, Plaintiff.
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday, and the jury all being called, present and answering to their names, the trial of these two cases as consolidated for trial is proceeded with, and the trial of the same not being concluded at the hour of adjournment the jurors are duly admonished by the court as to their duties, and the further hearing of these two actions is postponed until tomorrow.

142 In this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon. Proof has been offered, which has not been disputed, that the corpse had a perfect set of teeth, without decay or imperfection. If it appear by a preponderance of the evidence that John W. Hillmon in his life time had lost a tooth or that any of his teeth were imperfect then it follows that the body at Lawrence was not the body of John W. Hillmon but the body of some other person and if you find from a preponderance of the evidence that John W. Hillmon in his life time had lost a tooth or had imperfect teeth, then you will return a verdict for the defendants. In determining the preponderance of the evidence on this question, if the number of the witnesses testifying on this question are persons of equal credibility and standing and with equal means of knowledge, then the party producing the greater number of witnesses on that question must prevail in this case.

No. 1.

No. 2.

In determining the issues in this case you will be careful to exclude from your minds, and from all consideration, the financial condition of the defendant insurance companies. This case is to be decided solely upon the evidence, unaffected by such considerations, as they are not legitimate matters to be

brought into this case either in evidence, argument or otherwise.

No. 2.

It is not only necessary for the plaintiff to prove by a preponderance of the evidence that John W. Hillmon is dead, but it is also necessary for her to prove by a preponderance of evidence that he was dead before the commencement of this action, and that he died at the time and in the manner in her petition and reply in this action averred.

No. 3.

143 In order to enable the plaintiff to recover upon the policies of insurance, it is necessary that she prove that the death of John W. Hillmon occurred at the time and in the manner alleged in the pleadings of the plaintiff in this case.

No. 4.

No. 5.

The plaintiff must prove that the body brought to Lawrence was the body of John W. Hillmon to the satisfaction of the jury by a preponderance of testimony.

No. 5.

No. 6.

It is not necessary that the defendants should prove that the body was the body of Walters, but the plaintiff must prove by a preponderance of testimony that it was the body of Hillmon.

No. 6.

No. 7.

The preponderance of testimony in this case is that the body was not the body of Hillmon.

No. 7.

The evidence introduced to the effect that John H. Brown testified to certain things before the coroner's jury at Lawrence is no proof of the truth of the statements, but is only to be considered by the jury as evidence of the fact that such a statement was made by Brown then and there.

No. 8.

144 That it is undisputed in this case that two men, Hillmon and Walters, disappeared during the month of March, 1879. That one of them, namely Hillmon, if alive, had every reason for concealment, while with regard to Walters, no reason for his disappearance is shown to exist. That Hillmon, if alive, after that month, was guilty of murder, and an attempt to swindle the insurance companies, while Wal-

ters was guilty of no offense which would induce him to conceal himself.
No. 9.

That the evidence tending to identify the body as that of F. A. Walters of Fort Madison, Iowa, is not contradicted by any direct evidence in this case.
No. 10.

That every witness who identifies the body as that of F. A. Walters in effect denies the identity of the body as that of Hillmon.
No. 11.

The releases signed by the plaintiff, Mrs. Hillmon, discharging and releasing the defendant companies, from all claim under and liability upon the policies sued on are such written instruments as, under the law, import a consideration, and the execution of said releases being admitted, they are admissible on the part of the defendants as evidence as admissions on the part of the plaintiff that no lawful claim could be made under said policies, or that no right of action thereon existed when said releases were made, and in considering her act in executing these releases, and in ordering the policies to be surrendered and delivered up to the defendants, the jury should ascribe to her only the ordinary and usual motives which ordinarily influence persons, and not ascribe to her unusual or fanciful motives, inducements or controlling influences.
No. 12.

145 The execution of an order for the policies and releases of the policies by Mrs. Hillmon would justify the jury in finding that Mrs. Hillmon knew at the time of the execution of the aforesaid papers, that her husband was alive.
No. 13.

That the jury are at liberty to find that the reason why the plaintiff executed the order for the policies and also executed the releases of the policies was the fact that she was aware that John H. Brown had made a statement and that her executing this paper was an acquiescence on her part in the fact that her husband was not killed in Barber county, but was still alive.
No. 14.

No. 15

It is not necessary that the conspiracy alleged in the answer of the defendants should be proved in order to defeat the plaintiff's right to recover in this action, the question being whether or not the body brought to Lawrence was the body of John W. Hillmon.
No. 15.

It is not necessary in this case that the defendant companies prove the alleged conspiracy or prove fraud or any fraudulent intent. But nevertheless, if the jury find that the body brought to Lawrence was not the body of John W. Hillmon, then Mrs. Hillmon cannot recover.

No. 16

The essential point of this case is the identity of the body, and if you believe the body brought to Lawrence was not the body of Hillmon then the plaintiff, Mrs. Hillmon, cannot recover even though the defendant companies fail to show any fraud or conspiracy.

No. 17

146

No. 18

If it is a fact that the relatives and parents of Frederick A. Walters at once recognized the picture of the dead body immediately on seeing it as the body of their son, such fact is entitled to great weight on the question of the identity of the body at Lawrence. This identification in connection with the letter of Frederick A. Walters to his sister, from Wichita, stating that he would start from Wichita west on March 5th with a man named Hillmon; and in connection with the confession of John H. Brown as to the killing by Hillmon of a man near Medicine Lodge on March 17th, 1879, constitute evidence of great weight in determining the identity of the body brought to Lawrence.

No. 18

The causes and reasons why human beings recognize one another with whom they are acquainted do not depend upon analysis of separate features, but rather upon general appearance, in which many elements combine, and it is therefore immaterial if a witness, when called upon to describe in detail the features of a party whom he is identifying, differs in some of these details from others, if he is able to say that as a whole he recognizes the person by his general appearance. As a matter of fact, the act of recognition between friends and even members of the same family, may not depend upon the color of the hair, the condition of the teeth, the size or shape of the nose, or any independent feature, but upon the individual appearance of the individual as it makes an impression upon the mind or brain of the observer.

No. 19.

There is no evidence in this case showing or tending to show that the coroner's inquest held at Lawrence in 1879 was not a properly and legally constituted tribunal, engaged in a proper and legal inquiry. The law of Kansas provides that "when the coroner has notice of a dead body of a person supposed to have died by unlawful means, the cause of whose

death is unknown, found or being in the county, it shall b
his duty to summon forthwith six citizens of the count
147 to appear before him at the time and place named b
him," and under this provision of the law of Kansa
the coroner had jurisdiction to hold an inquest over the bod
that was brought to Lawrence.
No. 20.

Under the facts and circumstances developed in this case
I instruct you as a matter of law that it was not only legal bu
it was the duty of the coroner of Douglas county to hold a
inquest over the body brought there on or about the secon
day of April, 1879.
No. 21.

Flight by a party is legitimate evidence tending to sho
his consciousness of guilt, and in this case, you can take int
consideration that fact for the purpose of determining whethe
or not there was not a crime committed in Barber county wit
which he, Brown, was connected, the fact that he, Brown fle
from the State of Kansas.
No. 22.

No. 23

There is no evidence in this case proving or tending to prov
that Wm. J. Buchan has been guilty of any illegal or unpro
fessional acts or conduct in connection with this case, or tha
he was not duly and properly authorized by John H. Brown t
deal with the insurance companies and receive his compensa
tion from them. Members of the bar are officers of the court
and are engaged with the court in the administration of jus
tice, and it is the duty of the court to state its opinion to th
jury, if the court sees that an unjust or unfounded charge b
made against any member of the bar in connection with an
suit then pending before the court.
No. 23.

The jury are not at liberty to arbitrarily and capriciously
reject or disregard the testimony of an uncontradicted wit
ness, but it is the duty of the jury to so reconcile the testi
mony in the case as to give effect to the testimony o
148 such witnesses.
No. 24.

Exhibit number "26" which has been called in this case th
"Munn paper" is not, under the laws of Kansas the compound
ing of a felony, nor is it possible as a matter of law for an
agent of a corporation to bind his principles or agree for them
to compound a felony.
No. 25.

If you find that W. J. Buchan as the attorney of John H. Brown was given by him authority to get the compensation for his Buchan's services from the insurance companies and did with his client's consent so obtain his compensation the court instructs you that obtaining of his compensation in such manner was in nowise illegal, improper or unprofessional.

No. 26.

The coroner in the exercise of his functions would have a right during the progress of an inquest, if in his judgment the conditions demanded it, to order an exhumation of a buried body over which the inquest was being held, in order to make further examinations.

No. 27.

The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case for the reason that the real question in this case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is from a gun-shot wound at the hands of one John H. Brown at Barber county on the 17th day of March, 1897.

No. 28.

In weighing and considering the testimony of witnesses the jury should take into consideration among other things their interest in the controversy; that while the laws of the
149 State of Kansas provide that no person is disqualified as a witness in any civil action by reason of his or her interest in the event of the suit as a party or otherwise, yet such interest should be taken into consideration by the jury for the purpose of affecting the credibility of such party or witnesses.

No. 29.

The jury are the sole judges of the weight of testimony and of the credibility of witnesses and in determining the credibility of witnesses you should take into consideration the interest, motive, conduct and appearance of the witness upon the stand, and if you are satisfied from the evidence that any witness has testified falsely in regard to a material fact you are at liberty to reject the testimony of such witness entirely.

No. 30.

The statement by J. W. Hillmon to the agents of the Life Insurance Company when he made out applications for policies that he was 5′ 11″ in height is not to be taken by you as evidence that such was his height.

No. 31.

In considering the testimony of witnesses, you are to allow greater weight to those witnesses whose testimony is affirma-

tive than to those whose testimony is negative. In oth
words, that the evidence of a witness who affirmatively tes
fies that a conversation took place or an occurrence happen
in the presence of other parties, is entitled to more weig
than the evidence of a witness claiming to be present, but w
simply testifies that he did not hear the words spoken or s
the occurrence.

No. 32.

150 There is no proof in this case that the plaintiff h
married since the commencement of the action, and
would not be competent for the plaintiff to make such pro
because she could not by her own acts make evidence for h
self or attempt to strengthen the presumption of the death
the said John W. Hillmon on March 17th, 1879, by her subs
quent remarriage.

No. 33.

The Supreme court of the United States in the case of Greg
vs. Houston, 104 U. S. 553, speaking through Chief Justi
Waite:

"If upon the evidence the jury had brought in a verdi
against the defendants, it would have been the duty of t
court to set it aside and grant a new trial. It is right, ther
fore, to direct a verdict for the defendants."

In accordance with the rule of law which is again enun
ated by the same court in the case of Randall vs. The B. & O
Rd. Co., 109 U. S. 478, being of opinion that it would be n
duty in the event of a verdict for the plaintiff, to set the sam
aside, I charge you that you must find a verdict for the d
fendants.

No. 34.

The jury are instructed that all efforts or attempts by an
one interested in any matter to suppress or destroy or to a
complish the suppression or destruction of pertinent evidenc
are always deemed prejudicial circumstances of great weigh
against such party; and that all attempts by any such perso
to disturb the current of truth and justice, or to prevent a fa
or impartial trial by endeavors to intimidate witnesses or pe
suade them to the concealment, suppression, destruction o
alteration of any matter of evidence, are to be regarded a
denoting on the part of such person a consciousness of gui
and a desire to evade the pressure of facts tending to establis
it.

No. 35.

151 The jury are instructed that if they believe from th
evidence that before the institution of this suit, th
plaintiff had been told and was informed and was thereby no

tified that Levi Baldwin, John H. Brown and John W. Hillmon had confederated and conspired together to procure from the defendant insurance companies the policies sued upon in these cases, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured and of thereby falsely representing the said insured to be dead; and that they had accordingly in fact produced, received and accepted said policies in execution to that extent of the design and purpose aforesaid; and that the dead body presented to the defendants was one procured and presented by said persons conspiring together as aforesaid and was falsely represented by them to be the body of the insured; then by the institution of this suit and by claiming therein the body so presented to be the body of the insured she thereby availed herself of and adopted and made in legal effect, her own, all the acts done by said persons and each of them so confederating and conspiring in aid and furtherance of the matter of said unlawful combination and conspiracy with like legal effect as to her as if she had been one of the parties originally conspiring.

No. 36.

The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case for the purpose and with the intent to defraud the said defendants by procuring and presenting to the said defendants a dead body of another person than the insured, representing the same to be that of said John W. Hillmon, thereby pretending to the defendants that said insured was dead, though still living; and that they procured and accepted the said policies in pursuance and in furtherance of said unlawful scheme and that thereafter while engaged in the prosecution of said unlawful scheme, the said John W. Hillmon
152 actually came to his death; then the jury are instructed that right of action against the defendants accrued and no action can lie on the said policies even though the dead body actually presented to the defendants was really that of the said John W. Hillmon.

No. 37.

The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured, and of thereby

falsely representing the said insured [—] be dead; and that they did accordingly, in fact procure, receive and accept said policies in execution to that extent of the design and purpose aforesaid; then and in such case, the said contracts of insurance, so fraudulently and with such fraudulent intent procured and received, were never valid, but were void, and never attached to the life of said John W. Hillmon, and no right of action can be founded thereon in this case, and the jury must find for the defendants.

No. 38.

The jury are instructed that where there are a number of witnesses upon any general subject, combination among them is rendered more difficult and opportunities and facilities of contradictory alleged facts, if they be not true, are increased in proportion to the number of such witnesses or circumstances. The general accordance of all material circumstances and the general credit of the whole are confirmed by subordinate and slight diversities which show that the general agreement and concord have not been produced by meditation or fraudulent contrivances but must necessarily be true. Differences between witnesses or between statements of the same witness upon such matters as dates, localities or other subordinate matters may often confirm the substan-
153 tial truth of the testimony. In all such cases the jury may consider and determine whether such diversities arise from a purpose of the witness to deceive or whether they illustrate, merely, the general uncertainty of human memory in matters of minute and subordinate detail.

No. 39.

There has been some allusion in the course of the trial to the compounding of a felony. The court, during the progress of the trial, instructed you that you were to pay no attention to the insinuations of counsel, and the court now further instructs you that there has been no proof introduced of the compounding of any felony nor is there any issue of that kind in this case, and you are to wholly disregard any illusions of counsel on that subject.

No. 40.

If you believe that John W. Hillmon sold or disposed of mortgaged chattel property in such a manner, in 1878, as to be guilty of a crime in Texas, punishable with imprisonment, in the penitentiary you are then at liberty to consider the probability that such crime would tend to induce him to disappear or to go to unknown parts or conceal himself, and this tendency you may further consider in your deliberations as to whether the body found at Crooked Creek was the body of Hillmon.

No. 41.

You are instructed that by the laws of the State of Texas in the year 1878, it was provided that if any person had given a mortgage in writing upon any personal or movable property and should, during the existence of such chattel mortgage, remove the said property out of the state or dispose of the same with intent to defraud the person having such lien; such act or acts would be criminal and the person found guilty thereof would be subject to imprisonment in the penitentiary of Texas for a term not less than two nor more than five years.

No. 42.

154 You are instructed that Exhibit [—] called the Munn paper, had nothing to do with the obtaining of the insurance, or with the alleged death, or with the proof of death, or with the making of the alleged releases, and had no influence upon the plaintiff or any of her acts and in no wise affected her interests or her rights, and the said paper may be wholly disregarded by you, and you are not to consider it in arriving at a verdict.

No. 43.

The jury are instructed that the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness.

No. 44.

It is not incumbent for the defendants to account for the absence or whereabouts of John W. Hillmon.

No. 45.

The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, The Mutual Life Insurance Company of New York upon the life of John W. Hillmon was procured through fraud or through any attempt at fraud by said Hillmon alone or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown then said policy is absolutely null and void and they are to find for the defendant.

No. 46.

The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, The Connecticut Mutual Life Insurance Com-

155 pany of Hartford, Conn., upon the life of John W. Hillmon was fraudulently procured by said Hillmon alone

or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then such policy is absolutely null and void, and they are to find for the defendant.

No. 47.

There has been testimony offered that the defendant companies paid a part of the expenses of the coroner's inquest and for the transcribing of the notes of evidence and for the post mortem examination, and the exhuming of the body, and the taking of photographs and plaster cast of the teeth of the corpse. You are instructed that the defendants had a perfect right to make such payments if they so desired; that by so doing, they wronged nobody, and that such acts in no wise injured the plaintiff, and she has no right to complain that such payments were made; and I instruct you that in arriving at a verdict, you are to wholly disregard the fact of such payments.

No. 48.

J. W. GREEN,
E. F. WARE,
EDWARD S. ISHAM,
GEO. J. BARKER,
for Defts.

Indorsed: No. 3147-3149. Hillmon vs. Insurance Companies. Instructions requested by defts, forty-eight in number. Filed Nov. 18, 1899. Geo. F. Sharitt, clerk, All refused except as given in general charge. William C. Hook, Judge.

United States of America,
156 District of Kansas.

In the Circuit Court of the United States for said District.

Sallie E. Hillmon, Plaintiff,
No. 3147 vs.
The Mutual Life Insurance Company of New York, Defendant.
and
Sallie E. Hillmon, Plaintiff,
No. 3149 vs.
The Connecticut Mutual Life Insurance Company, Defendant.

And now the plaintiff in each of the above entitled actions askes the Court to give the following instructions to the jury, which request is made separately and severally as to each of said instructions respectively as written and numbered as follows, to-wit:

1st. That if the jury believe from the evidence that John W. Hillmon was killed in March, 1879, about the 17th or 18th of that month they should in each of these cases find for the

plaintiff and assess her damages at the amount of the policies sued on made by each defendant respectively, with interest thereon at the rate of six per cent. per annum from the first day of October, 1879.

2nd. The undisputed evidence in these cases shows that there was no consideration for the releases signed by the plaintiff, and therefore the same are wholly inoperative to release the plaintiff's causes of action upon the policies.

3d. That if the jury believe from the evidence that there was not any consideration for any of the releases plead by either of the defendants—or that they were obtained under circumstances and in the manner stated by plaintiff; and if the jury also believes from the evidence that John W.
157 Hillmon was killed in March, 1879, then they should find for the plaintiff and assess her damages at the amounts of the policies in each case with interest thereon at the rate of six per cent. per annum from the first day of October, 1879.

4th. That if the corpse brought to Lawrence in April, 1879, was that of John W. Hillmon, then the jury should, upon the evidence given in relation to the manner said releases were obtained, and of want of consideration therefor, disregard these releases and find for the plaintiff.

5th. That it is not incumbent on the plaintiff to account for the whereabouts or absence of Frederick A. Walters.

6th. The jury are instructed that they must use their common knowledge such as any man may bring to the subject when considering the evidence in this case and every part thereof for the purpose of determining the reasonableness thereof and the weight and effect to be given the same.

7th. That neither fraud or any intention to commit fraud should be presumed against plaintiff or John W. Hillmon, and none should be found unless established by a preponderance of evidence, the law presumes in favor of innocence, and that there was neither fraud nor crime either in the matter of procuring the policies or of the death of the person whose corpse was taken from Barber county to Lawrence unless shown by a preponderance of the evidence.

8th. That the statement signed by John H. Brown and by him sworn to on the 4th day of September, 1879, before a Notary Public, is not evidence in these cases of any fact therein stated as against the plaintiff and should not be considered further than on the question of credibility of John H. Brown as a witness, and on that question of credibility the jury

should consider all of the testimony showing, under what circumstances he made the same, and as to whether he was or was not induced to make the same by W. J. Buchan and whether Buchan was acting as his attorney at the time and all other evidence that will help to show why Brown made that statement.

9th. That the evidence is not sufficient to show that
158 plaintiff was a party to any conspiracy to defraud the defendants, and no statement made by John H. Brown, either in his conversations with W. J. Buchan, or in the paper signed by said Brown, dated the 4th day of September, 1879, is evidence that the plaintiff was a party to any conspiracy or other wrong, or that she had any knowledge of or that there was any such conspiracy as claimed by the defendants.

10th. The jury are instructed that the vaccination sores on the arm of the body examined at Lawrence were important as proofs bearing upon the question of identity. And if the jury shall find from the evidence that any of the witnesses testifying on the behalf of the defendants at this trial removed and carried away such vaccinations sores or a part thereof or the skin showing the same, without the knowledge or consent of the plaintiff with a view to prevent, hinder or impede the plaintiff in the examination or investigation of such sores, the jury are at liberty to disregard all the testimony given by such witnesses touching such vaccination sores, their condition, appearance, and may consider the facts of such removal in determining the weight to be given to the testimony of such witnesses upon all other matters.

11th. The jury are instructed that the jury have a right to determine from all the circumstances surrounding and attending that so-called inquest held at Lawrence whether or not it was planned and conducted with a view to controlling, in the interest of the defendants, the custody and inspection of the body and shaping proofs bearing on the question of the identity of that body.

12th. That when a party is shown to have suppressed evidence, the presumption is that the evidence was injurious to the party suppressing the same; and the jury may consider whether the defendants by their agents for the managements of these suits have purposely suppressed or lost the piece of flesh containing the whole or any part of both or of either of the vaccination marks or scabs that were on the arm of the dead body at Lawrence or the tintype mentioned in the testimony as having upon it likenesses of John H. Brown and John W. Hillmon, or the hair that was taken from the dead body at Lawrence by Dr. J. H. Stuart.

159 13th. That it would not have been improper for Levi Baldwin if he was second cousin of the plaintiff to have assisted her in preparing proofs required by the policies sued on to be furnished before suit;

Men have a lawful right and frequently ought to assist their female relatives in the protection and enforcements of their rights.

14th. And all men have a right to assist the weak and the needy, whether that necessity or weakness consists in matters personal or want of knowledge or education, or habit of life. Especially is it proper for men to assist women in matters of business with which the women may at the time be unacquainted.

15th. That it would have been perjury in the witness, John H. Brown to have intentionally testified untruthfully in regard to any material matter at either of the inquests held in Barbour county, or at the inquest held at Lawrence if such inquest was a legal one, or in his deposition in this case; but it was not perjury in him to make false statements in his affidavit made on the 4th day of September, 1879, at Parkville, Missouri, because that affidavit was given ex-parte and not in a proceeding in court nor authorized by law; and any untruthful statement in that affidavit is in contemplation of law like any other false statement not made under oath and is no more an offense against the law of the land than the statements contained in the letters of Charles R. Walters, should the jury find them to be false.

16th. If you believe from the evidence that the statements made by Charles R. Walters in his letters to H. S. Clarke, are true and were believed by said Walters to be true when he wrote the same, then the court instructs you that in denying the truth of said statements and testifying that they are false upon the trial of this case, the said Charles R. Walters, committed the crime of perjury; and if you further believe that he did wilfully testify falsely in relation to said letters upon this trial of this case, then you are at liberty to disregard the whole of his testimony.

17. In determining the weight to be given the testi-
160 mony of Charles R. Walters, you, have a right to take into consideration and it is your duty to do so his statements in relation to the letters written to H. S. Clarke, and that some of the statements therein contained are false and were written for the purpose of misleading and deceiving said H. S. Clarke, and to conceal the facts in relation to the identity of his brother, Frederick Adolph Walters. You have

a right to take into consideration all of the facts in relation to the writing of said letters, to determine whether the statements made by said Walters was true or false. You may also consider whether said Walters has at previous trials of this case, testified that said letters were intentionally false.

18. And the Jury are further instructed that the plaintiff's case does not at all depend on the question as to whether the jury believed John H. Brown to be a truthful witness or not. If the dead body brought to Lawrence was that of John W. Hillmon, the plaintiff is entitled to recover even if the jury should disregard the evidence of John H. Brown.

19. That the jury may consider whether the affidavit of John H. Brown, made on the 4th day of September, 1879, at Parkville, Missouri, was obtained for the purpose of preventing him from testifying to the truth in actions on the policies sued on in these cases.

20. The Jury are instructed that the evidence is not sufficient to show that John W. Hillmon was a party to any conspiracy.

21. That if the Jury believe from the evidence that the dead body mentioned by witnesses as having been brought from Barbour county to Lawrence about the first of April, A. D. 1879, was the dead body of John W. Hillmon, then it is not necessary for the jury to find whether there was or was not a conspiracy.

22. If the dead body mentioned by the witnesses as having been brought to Lawrence in the first part of April, A. D. 1879, was the dead body of John W. Hillmon, then it is immaterial whether there was or was not a conspiracy as claimed by the defendants.

161 24. All contracts and agreements by which any persons or corporations having knowledge that any crime has been committed promises or agrees to withhold or suppress any such knowledge, or grant immunity from prosecution to the person or persons guilty of such crimes are against public policy and absolutely void; and all persons entering into such contracts or agreements in consideration of any benefits received or promised them for so doing are guilty of a criminal offense.

And if you believe from the evidence that the defendants, through their representatives, acquired information which they believed to be true that Hillmon and Brown had entered into a conspiracy to kill a human being for the purpose of wrongfully obtaining the payment of the policies sued on and that to procure the surrender of said policies the defendants prom-

ised through their representatives not to prosecute or furnish evidence to prosecute John H. Brown for such supposed crime and by the means of such promise procured the releases set up in the answer, then such releases are void.

25. That the evidence is not sufficient to sustain any verdict or finding that Levi Baldwin, John H. Brown and John W. Hillmon or any of them made or entered into any such conspiracy as claimed by defendants.

26. That if the Jury believe from the evidence that Alvah Baldwin and Levi Baldwin were second cousins of plaintiff then they ought to consider whether it was not proper that these cousins should do whatever they did to aid the plaintiff in respect to any of her matters of business and the jury would not be justified in finding that Levi Baldwin was a party to any conspiracy because of any act shown to have been done by him for the plaintiff.

162 27. That the Jury may consider the evidence relating to the matter of the height of John W. Hillmon as it is in the certificate of Dr. J. H. Stuart, dated on the 25th of February, A. D. 1879—and if the Jury believe from the evidence that the erasure on the paper in connection with the matter of that height was made at the instance of defendants to cast suspicion on the plaintiff or any one acting for her or for the purpose of creating doubt as to whether that height was first therein written as being five feet eleven inches, then the Jury may consider that matter in connection with all the evidence introduced by defendants even on other subjects and matters; because if defendants so did in relation to that matter for such purpose then the jury may rightfully consider whether any other evidence in the case had or has not been manufactured by defendants; and in considering such matter the Jury may also take into consideration the testimony in relation to the transaction between William J. Buchan, John H. Brown and the defendants to assist in determining what defendants would do either to procure evidence or destroy either the evidence or character of a witness for the purpose of injuring plaintiff's case.

28. That the Jury is the sole Judge of the credibility of the witnesses, and if the jury believe from the evidence that any witness has wilfully testified, falsely in regard to any material matter then the Jury may disregard all of the testimony of any such witness.

29. That the Jurors are the sole judges of the credibility of the witnesses, and if the Jury believe from the evidence that any witness has wilfully testified falsely in regard to any material matter then the Jury may disregard all of the testimony

of any such witness and if the jury further believe, from the evidence, that any witness testified falsely with regard to the matter of whether the height of John W. Hillmon was first written 5 feet 11 inches in the certificate of Dr. J. H. Stuart dated on the 25th day of February, A. D. 1879, at the instance of defendants, or of those representing the defendants in the matter of the defense in these actions, for the purpose of casting imputation on the plaintiff or those representing her, then the jury may consider that matter in connection with
163 any other testimony introduced by defendants which could have been either manufactured or obtained or produced by improper means—this because if a party would do such acts for such purpose that may be by the Jury considered in considering whether those representatives would intentionally introduce false or perjured testimony.

30. That, because of receiving and retaining the premium paid for a period of time later than March, 1879, the defendants are not in position to ask that the policies be considered void and inoperative because of any fraud or conspiracy by any of them alleged; therefore, if the jury believe from the evidence that John W. Hillmon died in March 1879, and that there was not any consideration for any of the releases, they should find for the plaintiff.

31. That the testimony given by William J. Buchan in relation to statements he testifies were by John H. Brown made to him concerning or as to who was killed, or as to who did the killing, is not competent or proper to be by the jury considered as evidence either showing or tending to show as against plaintiff, who was killed or that John W. Hillmon killed any other person, but only go to the question of the credit to be given to the testimony of John H. Brown.

32. The statement made in writing by John H. Brown dated of the 4th day of September, 1879, is not competent or proper testimony to prove against plaintiff, that John W. Hillmon killed any person or that John W. Hillmon was party to any conspiracy or that there was any conspiracy or wrongful act done.

33. That if the Jury believe from the evidence that about the 15th day of March, 1879, plaintiff offered to surrender or to give up the policy made by the Connecticut Mutual Life Insurance Company if Selig would give her the premium paid thereon, they may consider that as bearing upon the question of the good faith of John W. Hillmon in his transactions with defendant companies.

34. That the uncontradicted testimony clearly shows that there was not any lawful consideration for the papers referred

to in the evidence and answers as releases, and because
164 thereof the Jury should find their verdict on the basis that those so-called releases are void, and that the plaintiff did not by any of them release or discharge any cause of action or other right.

35. That there is no allegation in defendants answers that plaintiff was a party to, or knew of the formation of any conspiracy before the dead body was brought to Lawrence, or that she became a party to any conspiracy after, and before it can be properly claimed that she became a party to any conspiracy it must be shown by a preponderance of the evidence that when she saw the dead body or subsequently she knew or believed that it was not the body of John W. Hillmon.

36. That the evidence and policies of insurance sued on in these actions, show that for consideration the policies sued on were respectively made; and there is not any evidence or claim made indicating or tending to show that either of the defendants ever offered to return any part of either of the premiums paid—therefore the policies continued to be valid and binding until after April, 1879, and if the Jury believe from the evidence that the John W. Hillmon mentioned in the policies died in March, 1879, A. D., and that the releases were made without consideration, then the Jury should find for the plaintiff and assess her damages against each defendant respectively at the amount of the policy or policies, made by each defendant respectively, with interest thereon at the rate of six (6%) per cent. per annum from the first day of October, 1879.

37. That unless the Jury believe from the evidence other than and independent of any letter, postal card or other writing of Frederick Adolph Walters, that he went or was with John W. Hillmon on a trip into Barbour county in March, 1879, they should not find said Walters was with said Hillmon on such a trip.

38. That the letters and other writings claimed by defendants to have been written in March, 1879, by Frederick Adolph Walters are not either sufficient or competent to prove that he went with John W. Hillmon on any trip.

39. That such letters and writings are not sufficient
165 to prove that Frederick Adolph Walters was personally in Wichita.

40. Where a party to suit has introduced the testimony of witnesses known by him to be false or which he does not believe to be true, the Jury may take such fact into consideration

as tending to discredit such party's case and tending to show that such party is not acting in good faith.

41. The preponderance of evidence required in the preceding instructions does not mean the greater number of witnesses. The Jury should look rather to the quality of the evidence than to the quantity thereof; the Jury are under no obligation to believe the testimony of any witness which appears to them to be improbable. The Jury may disbelieve the testimony of any witness which seems to them from their common knowledge to be unnatural and contrary to the laws of probability.

43. That the letters mentioned by witnesses as having been written by Frederick Adolph Walters are not of themselves sufficient to show that he ever went from Wichita with any man named Hillmon—or that he went from Wichita at all.

44. That if from all the evidence it is as reasonable to find that the dead man was accidentally killed as to find he was murdered, then there is a presumption in favor of innocence rather than of guilt.

45. If considering the evidence if the jury shall find the same in any respect as to any question in the case to be conflicting, then the jury should if compelled to determine
166 as between conflicting evidences as to which is true, presume in favor of innocence rather than guilt if consistently with the preponderance of the evidence in the case the Jury can do so.

And in considering as to whether the Hillmon referred to in any letter was John W. Hillmon or not, the Jury should consider all the other evidence in the case, bearing on that point, including the testimony of the witnesses Moesh and Helda in relation to the time of Brown and Hillmon being with them and any effort of Brown and Hillmon to get either of those witnesses to go with them, and also as to any other evidence as to the whereabouts of Frederick Adolph Walters in the Spring of 1879 and his intentions as expressed by him.

46. That the plaintiff does not have to prove beyond a reasonable doubt that the dead body was that of her husband—it is sufficient [is] she has so proven by a mere preponderance of the testimony—and by preponderance is not meant the greater number of witnesses, but all the circumstances, evidence and facts should be considered in determining which side to the issue has a preponderance of the testimony.

47. The plaintiff is not required to prove her case by evidence that removes all possible doubt.

Absolute certainty is seldom attainable in determining disputed questions of fact. The plaintiff is only required to prove the death of John W. Hillmon by a preponderance of the evidence. This preponderance need not be great, it is sufficient if in the estimation of the jury it barely outweighs the contrary proof and renders it more probable that what the plaintiff claims in relation thereto is true, than the opposite.

By preponderance of the evidence is not meant the greater number of witnesses, but that evidence which is the most convincing and satisfactory to the jury. In considering the testimony upon any given question you should not alone count the witnesses, it is not always the most satisfactory neither is it the most certain criterion of truth. 19 Kans. 28—34.

48. That in considering the testimony in relation to whose body the corpse brought from Medicine Lodge to Law-
167 rence was, the jury may refer to the testimony of Fannie Walters as to the entire condition of the teeth of Frederick Adolph Walters in connection with the testimony of the witness Patterson in relation to a part of one of the teeth of the corpse having been broken off or worn away, and give due weight thereto as well as to all of the testimony in the case relating to the teeth or other matters of identification.

49. That the Jury should consider and give due weight to the testimony in relation to Frederick Adolph Walters having been bitten by a dog, and the testimony of those who examined the body of the corpse and their statements as to what, if any, scars or marks they found or did not find.

50. That as against the Mutual Life Insurance Company the jury should consider the answer "none" as to marks of identification in its medical examiner's certificate or statement read in evidence. The jury may consider that answer "none" when considering, the evidence given by witnesses in relation to any claimed mark or marks of identification. And as to such defendant the jury should consider the opportunities shown by the evidence had by different representatives, of each defendant respectively, to observe as to the teeth and hands of John W. Hillmon, as well as to the matter of his height when taking his application for insurance or measuring or seeing him for any purpose in connection with any such application or examining him in reference to any matters stated in medical examiner's certificate of such companies respectively.

51. That the statement as to the height of John W. Hillmon or other statement relating to description of John W. Hillmon in any medical examiners certificate of the defendants respectively are to be considered as statements of the

defendant whose medical examiner made the same as again
such defendant, and as having been so made with opportuni
to know the truth as to the facts so stated at the time wh
it was proper to state the truth and when the truth ought
have been stated in the certificate being made and as stron
evidence against such companies that Hillmon was
168 the height therein stated; and such statement of heig
should be considered by the jury as true unless t
same has been shown to be actually wrong by evidence su
ficient not only to overcome such written statement of heig
but also to overcome all evidence supporting the writte
statement so made in medical examiners certificates respe
tively.

52. That the Jury ought to consider the statements of d
scription of John W. Hillmon in the medical examiner's ce
tificates respectively of each defendant as against such d
fendant as true unless the same has by evidence sufficient n
only as against such statement of description in such ce
tificates respectively, but also as against any oral evidenc
in conformity to such description in certificates, to overcom
all the same by a preponderance of evidence contrary to suc
certificates. This as to each defendant, the certificates
each company being evidence of description only as again
the company whose examiner made the same.

53. The opinions of medical experts are to be considered b
you in connection with all the other evidence in the case, bu
you are not bound to act upon them to the entire exclusion
other testimony; taking into consideration the opinions of th
medical experts and giving them just weight, you are to d
termine for yourself what the facts are in relation to the va
cination marks and the other matters concerning which the
have testified.

54. The court instructs you that the testimony in relatio
to the notes claimed to have been executed by John W. Hil
mon in his life time to one McCamey, and which it is als
claimed he did not pay, should not be considered by you an
the same is now withdrawn from your consideration by th
court. The facts that John W. Hillmon obtained a larg
amount of personal property that he converted to his own us
and did not pay for, if such be the facts, does not tend
show his financial condition or that he was unable to carr
the amount of insurance taken out by him.

169 55. If the court refuses to give the next precedin
instruction prayed for, then the plaintiff asks the cou
to give the following:

Some evidence has been introduced in relation to promissory notes and a chattel mortgage executed by John W. Hillmon and which it is claimed by the defendants have not been paid. This testimony was admitted and is to be considered by the Jury as solely upon the question of the financial condition of said John W. Hillmon, and as to whether the amount of insurance taken out by him was in excess of his ability or was unreasonably large, and is not to be considered by the jury for any other purpose whatever. The fact that said John W. Hillmon did not pay said promissory notes, if you find that he did not do so, is not to be considered by the Jury as affecting his character or in any manner as affecting the right of the plaintiff to recover upon the policies sued on, if you believe that the person killed at Crooked Creek in March, 1879, was John W. Hillmon.

If the person killed on Crooked Creek in March, 1879, was John W. Hillmon, then it become wholly immaterial what his financial condition was at the time said policies were issued, and whether the amount of insurance taken out by him was unreasonably large or not.

56. It is wholly immaterial in this case whether the amount of insurance taken out by John W. Hillmon upon his life was unreasonably large or not, if John W. Hillmon was killed in March, 1879.

57. In considering the testimony in relation to the notes given by John W. Hillmon and which it is claimed were not paid by him, you may take into consideration the fact that a mortgage was given to secure the same upon a large number of buffalo hides, and all other testimony that has been introduced in relation to the dealings between said Hillmon and the holder of said notes.

58. That the absence for a period of 7 years from the home and friends of a person is ordinarily prima facie sufficient to show that such person is dead; that if the jury believe from the evidence that John W. Hillmon left Lawrence in February, 1879, with the intention of locating a ranch or place of doing business in the southerly portion of Kansas or
170 adjacent country with the intention of residing thereon with himself and family or of returning to Lawrence and that he has not been heard from or seen alive since the first part of March, 1879, by those with whom he had corresponded or associated you are justified in believing that he is dead and such absence and matter of not hearing from him since then may and should be considered by the Jury in the matter of determining whether it was his body that was brought as shown by the evidence to Lawrence, Kans., in the spring of 1879.

59. The jury should take into consideration the want of any evidence showing that John W. Hillmon has been either seen alive or heard from as living since the first part of March, 1879, in determining the matter as to whose dead body it was taken from the banks of Crooked Creek to Medicine Lodge and from there to Lawrence Kansas as shown by the evidence.

The want of any such evidence of Hillmon having been seen alive or heard from since the first part of March A. D. 1879 raises a strong presumption of his death and should be taken into consideration by the Jury in considering the evidence of this case.

60. That in determining whose dead body it was that was brought to Lawrence in 1879 as shown by the evidence the Jury should take into consideration the length of time that has expired since John W. Hillmon is shown to have been seen alive or heard from seven years of absence unaccounted for is sufficient to raise a presumption of death if such absence is contrary to the habits and expressed intention of a person absent. And this independent of any evidence of actual death.

61. That in considering the question of the whereabouts of F. A. Walters the Jury may take into consideration the evidence of the witness Charles W. Schott in relation to having seen him in the fore part of February, 1879, and in the spring of 1879 together with any intention expressed by Frederick Adolph Walters of going to his brother and of taking the wagon road to Independence. And also any other evidence in relation to the whereabouts of said Frederick Adolph Walters at the last times he has been shown to have been
171 seen by any person from whose testimony the Jury believe that said Frederick Adolph Walters was seen.

62. That the jury should take into consideration the conflict of evidence in relation to the whereabouts of Frederick Adolph Walters in February, 1879, shown by witnesses called to the stand, or by depositions taken by defendants and also in the conflict of evidence shown by such witnesses as to the matter of intention of said Frederick Adolph Walters and also by shortage of finances of his shown by evidence of defendants witnesses and they may also take into consideration the evidence of any other witness as to the whereabouts of Frederick Adolph Walters before or after the corpse was found.

63. The jury should also take into consideration as to whether Frederick Adolph Walters is shown to have been of changeable mind on the matter of intentions as to where he

would go and in this connection they may consider any evidence on that subject shown by letters or postal cards the jury believes written by Frederick Adolph Walters in the year of 1878.

64. That in relation to the amount of insurance on the life of John W. Hillmon the jury are instructed that an appropriate time to have considered the mater of such amount of insurance was when the application were being made and the premiums for the insurance being paid—that the jury may find [they] verdict on the presumption that the defendants respectively were satisfied with such amount of insurance being on the life of John W. Hillmon as the defendants respectively or their agents in relation to the matter of taking same had notice of from application or otherwise.

65. That the jury may take into consideration in this case the reasons why John W. Hillmon did not take one of the policies offered him because as shown by the evidence, of talked of prohibition therein against fast riding after stock and the carrying of firearms as expressed by Mr. Hillmon as shown by the testimony of the witness Selig.

C. F. HUTCHINGS,
L. B. WHEAT,
JNO. H. ATWOOD,
Attys. for Plaintiff.

172 Indorsed: 3147-3149. Hillmon v. Insurance Companies. Instructions requested by Plff. Nos. 1 to 65 inc. excepting Nos. 23 and 42. Filed Nov. 18, 1899. Geo. F. Sharitt, Clerk. All refused except as given in general charge. William C. Hook, Judge.

173 In the United States Circuit Court for the District of Kansas.

Sallie E. Hillmon
v.
Mutual Life Insurance Company

Sallie E. Hillmon
v.
Connecticut Mutual Life Insurance Company.

Gentlemen of the Jury:

The cases which have been tried and which are submitted to you with the conclusion of this charge are two in number.

Sallie E. Hillmon is the plaintiff in both cases. One of them is against the Mutual Life Insurance Company of New York and the other against the Connecticut Mutual Life Insurance

Company. They were commenced in this court on the 13th day of July, 1880. The issues in the cases being substantially identical they were by the order of the court consolidated for purposes of trial in order to effect a saving of time and expense. Each of the actions is brought upon a policy of life insurance issued upon the life of John W. Hillmon for the benefit of Sallie E. Hillmon, his wife. The policy issued by the Mutual Life is for the sum of ten thousand dollars and that issued by the Connecticut Mutual is for the sum of five thousand dollars. It is conceded that the policies sued upon were duly issued and delivered and would constitute valid and binding obligations of the insurance companies respectively except for the defenses set up and maintained by them and to which your attention will be called. It is also admitted that if the plaintiff is entitled to recover the verdicts should be for the amounts of the policies respectively with interest thereon at the rate of 6 per cent per annum from October 1, 1879, until the date of your verdict, that is to say, in the case against the Mutual Life for the sum of ten thousand dollars and in the case against the Connecticut Mutual for five thousand
174 dollars, both with interest as stated. The policies are what is known as ordinary life policies and in order that plaintiff may recover thereon it must appear that John W. Hillmon died whilst the policies were still in force. It is not denied that the premiums on the policies were paid to a period later than March, 1879.

It is claimed in the plaintiff's pleadings that John W. Hillmon was accidentally killed near Medicine Lodge, Kansas, on or about the 17th day of March, 1879. It is admitted that proper proofs of death were furnished the companies by or on behalf of Mrs. Hillmon.

Each of the defendant companies as matter of defense denies that John W. Hillmon died as alleged by the plaintiff but claims on the contrary that he is still living; that on and before November 30, 1878, John W. Hillmon, John H. Brown, Levi Baldwin and divers other persons unknown to the defendants conspired together for the purpose of defrauding the insurance companies and with such purpose in view procured the two policies of insurance mentioned, amounting to the sum of fifteen thousand dollars and an additional policy in the New York Life Insurance Company for the sum of ten thousand dollars and that thereafter in pursuance of the conspiracy and with the said purpose in mind Hillmon, Brown and Baldwin falsely and fraudulently pretended and represented unto the companies and others that Hillmon was dead and that in the months of March, and April, 1879, and thereafter, for the purpose of securing the payment of the policies and obtaining

the money thereon, falsely and fraudulently claimed and represented to the companies that Hillmon was dead and that a certain dead body which they had procured and had was the body of Hillmon, whereas Hillmon was not dead; and that since said time Hillmon has kept himself concealed and is keeping himself concealed under assumed names for the purpose of consummating the alleged conspiracy. The companies for another defense allege that Mrs. Hillmon, the plaintiff, for a valuable consideration, executed and delivered to the companies her release and satisfaction of the policies.

In reply to these claims on the part of the companies the plaintiff denies that her husband is living, avers that on or about March 17, 1879, he was accidentally killed by the discharge of a gun, denies the charges of fraud and fraudu-
175 lent conspiracy and claims that the written releases set forth in the answers of the companies were procured from her by them, their authorized agents and other persons acting by their procurement, through false and fraudulent statements and by unfair means and at a time when she was in ill health and unable to resist the improper and unfair influences brought to bear on her, and that no consideration was paid for such releases and that the same are therefore void and of no effect.

These are substantially the issues presented by the pleadings in the cases.

We are now near the end of the fifth week of this trial and such an enormous amount of evidence has been introduced of such a varied, complex and contradictory character that even were I desirous of doing so it would be impossible for me to give you an intelligible and comprehensive resume thereof without the attendant danger of omitting the mention of evidence and matters of importance. While it is within my province to indicate to you my own opinions, gathered from the evidence without encroaching upon your exclusive right as the final judges of the evidence, I shall not avail myself of it but shall confine myself as closely as possible to the declaration of legal principles that are to control and govern you in your consideration of your verdicts.

The principal question for your determination and it may be said to be the crucial question in the cases, is whether John W. Hillmon died as claimed by the plaintiff in March, 1879, and whether it was his body that was brought to Lawrence, Kansas, in April of that year. I will explain to you at this time the meaning of certain expressions which will be used in the delivery of this charge to you, so that you may fully un-

derstand their purport and signification at the time they were used.

Preponderance of the evidence means the greater weight or value of the entire evidence adduced at the trial, considering each part thereof in connection with everything appear-
176 ing in the cases that goes to make for or against its credibility and value. It does not mean that a greater number of witnesses have testified on the one side or on the other, although that fact, if it be one, is to be taken into consideration. A party who is required to prove a fact or an issue by a preponderance of the evidence is not required to prove it beyond a reasonable doubt. The requirement that an issue or fact be proven beyond a reasonable doubt exists in criminal cases but does not generally apply in civil cases, and it does not apply to the cases on trial.

In determining the weight and value of the evidence the credibility of the witnesses must necessarily be passed upon by you. You are the exclusive judges of the evidence and of the credibility of the witnesses. If any witness has wilfully testified falsely regarding any material matter you are at liberty to disregard his entire testimony but you are not bound to do so. You may accept that portion of his testimony which you deem consistent with truth or probability and reject the remainder or as I have told you, you may entirely disregard the evidence of the witness so falsely testifying.

You should not arbitrarily and capriciously reject or disregard the credible testimony of any uncontradicted witness, but it is your duty to so reconcile all of the evidence in the case as to give effect to the testimony of such witness if the same is possible. A person is not disqualified as a witness in a civil action by reason of his interest in the event of the suit as a party or otherwise, yet such interest should be taken into consideration in estimating the weight or value to be given to his testimony. You should also take into consideration the conduct, demeanor, and appearance of the witnesses upon the witness stand, the probability or improbability of their testimony, the bias or prejudice that they may have shown, if any, in favor of or against the one side or the other; the means and sources of knowledge they may show themselves to be possessed of; the length of time that elapsed between the happening of a fact or circumstance and the date they first testified thereto, giving due consideration to anything that might serve to cause a remembrance thereof.

A witness who testifies to an affirmative is ordinarily
177 entitled to credit in preference to one who testifies to a negative, but you are not required to believe a witness

whose testimony appears to you to be improbable and unreasonable.

In considering of your verdicts and the weight and value of the evidence and of the credibility of the witnesses you are entitled to use and exercise your common knowledge such as is possessed by men generally, regarding the ordinary affairs of life, not however any particular facts resting in your private knowledge, nor any special knowledge not possessed by men generally, for you should be governed by the evidence. You may apply such common general knowledge as you may possess of the subject of inquiry to the testimony of any witness and you are entitled to disregard such as is believed by you to be unnatural and contrary to the laws of probability. In other words, you should apply the same rules of good sense and sound judgment to the facts in evidence that you would apply to any other subject that comes under your consideration.

In order that the plaintiff may recover in these cases it is her duty to prove by a preponderance of the evidence that her husband died as claimed by her in March, 1879, that is to say, whether it was his corpse that was brought to Lawrence in April of that year. If she should fail in so proving your verdicts should be for the defendants, but if she should succeed in so proving your verdicts should be in her favor. The plaintiff is not required to prove that the corpse was that of John W. Hillmon by evidence that removes all possible doubt, nor beyond a reasonable doubt, but simply by a preponderance of the evidence. Such preponderance need not be great, for it is sufficient if in the estimation of the jury it fairly and reasonably outweighs the contrary proof and renders it more probable that what she claims with reference thereto is true, than the opposite.

Plaintiff's right to recover does not turn upon your determination whether John H. Brown is a truthful witness or not, that is to say, if you should disbelieve the testimony of John H. Brown and still find from the evidence that the corpse in question was that of John W. Hillmon the plaintiff in
178 such case would be entitled to recover. It is not incumbent upon the plaintiff to account for the whereabouts or absence of F. A. Walters, nor is it incumbent on the defendants to prove that the corpse was that of Walters or to account for the absence or whereabouts of Hillmon.

As bearing upon the question whether John W. Hillmon died as claimed by the plaintiff and whether it was his corpse that was brought to Lawrence, you are entitled to consider the fact, if it be one, that he has not been seen nor heard from

alive since the 17th or 18th day of March, 1879, at which time it is claimed he was killed. The unexplained absence of a person from his home and friends without being heard from, if continued for a sufficient length of time, may become evidence tending to show that he is dead and it may be taken in connection with other evidence tending to show that he died at a certain time and place. For some purposes, such as the settlement of estates and the like, the law adopts the presumption that an unexplained absence of seven years without tidings being received from the absent one is evidence of his death. The weight to be given to such continued absence depends upon circumstances. If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death.

As to the alleged conspiracy: a conspiracy is a combination or confederation between two or more persons to do an unlawful act or to do a lawful act by unlawful means. In these cases the defendants allege that John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons to the defendants unknown, unlawfully conspired together to cheat and defraud the defendants by procuring the insurance policies by substituting the body of another person, claiming it to be the body of Hillmon, and by thereby obtaining the money upon the policies. The objects of the conspiracy alleged to have been formed contemplated the commission of a crime, that of obtaining money by false and fraudulent pretenses, and it is
claimed by the defendants that during the progress of
179 the conspiracy it resulted in the commission of murder.

Whoever alleges a conspiracy or a fraud, whether as a cause of action or as a defense against the cause of action of another, is required to be definite and precise not only in the description of the conspiracy or fraud charged but also in respect of the persons sought to be held as conspirators or participators in the fraud, especially if they are parties to the suit in which the charge is made. In these cases, although it was known, that the policies of insurance were made payable to Sallie E. Hillmon and that no one else could obtain the money thereon without her act and assent, there is no allegation in the answers of the defendants that she was either a party to the alleged conspiracy or participated therein at any time or had any knowledge thereof. Consquently it cannot be claimed in this case that she was a party to any alleged conspiracy or had any guilty participation therein or knowledge thereof.

If the acts done by the three parties who are claimed to have engaged in the conspiracy are consistent equally with an hon-

est and lawful intent as with a fraudulent or criminal purpose, your finding should be in their favor in that respect, because there is always a presumption of honesty and innocence until the contrary is shown, and in order to overthrow such presumption of honesty and innocence there must be at least a preponderance of the evidence showing the existence of the contrary and of the alleged conspiracy. If you believe from the evidence that John W. Hillmon, Brown and Baldwin did conspire as charged by the defendants and pursuant to such combination the policies of insurance were obtained and that Hillmon did not die in March, 1879, that is to say, that it was not the body of Hillmon that was brought to Lawrence in the early days of April, 1879, then your verdicts should be for the defendants. Even if you should find that there was no unlawful conspiracy or fraud or fraudulent intent as charged by the defendants, but should further find that the body brought to Lawrence as aforesaid was not the body of Hillmon, your verdicts in such event should be for the defendants. In other words, it is not necessary for defendants to prove a con-
180 spiracy or fraud or fraudulent intent in order to defeat a recovery. On the other hand, even if you should find that there was a conspiracy between the three men as charged by the defendants, but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdicts in such event should be for the plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in the case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, then it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse.

As to the releases executed by the plaintiff and set up in the answers of the defendants. While under the law the execution of the written instruments of release by the plaintiff imports a consideration therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration and therefore they are inoperative as releases and do not constitute a valid defense, and the plaintiff did not by any of them release or discharge any cause of action or any other right that she may have had. Although they may be inoperative and void as releases and insufficient to constitute a defense you may nevertheless consider them

and the fact that she executed them as acts and declarations of the plaintiff and give such weight thereto against the plaintiff in determining the other questions in the cases as you may deem just and proper. In doing so, however, you should consider all of the facts and circumstances surrounding the giving of such releases, when, to whom and under what circumstances they were given, all as shown by the evidence.

Do not take into consideration the financial condition of the defendants, but confine yourselves to the evidence adduced at this trial as weighed in the scale of your judgment and interpreted in the light of your common knowledge as I have defined it. Evidence has been introduced in relation to some promissory notes and a chattel mortgage executed by
181 John W. Hillmon and which it is claimed have not been paid. This testimony was admitted and is to be considered by you solely as bearing upon the question of Hillmon's financial condition and as to whether the amount of insurance taken out by him was in excess of his ability or was unreasonably large, and it is to be considered by you for no other purpose. The fact that Hillmon did not pay said notes or some them, if it be a fact, is not to be considered by you as affecting his character or as affecting the right of the plaintiff to recover in these cases if you believe that it was Hillmon who was killed near Medicine Lodge in March, 1879. In other words, if it was Hillmon who was killed and whose corpse was brought to Lawrence it is immaterial what his financial condition was at the time the policies were issued and whether the amount of insurance taken by him was unreasonably large or not.

Various statements and declarations of various parties have been offered in evidence not as affirmative proof of the truth of such declaration and statements, but for the purpose of contradicting and impeaching the testimony of the parties making them. It is proper when a witness has given his testimony at a trial to contradict him and affect the weight and value of his testimony by showing that at some other time he has made statements or declarations contrary to what he has testified to. The unsworn statements of any person which have been admitted in evidence are not evidence as to the truth of such statements; but if the statements are made by a party to the suits and are contrary to the interest of such party they may be considered against him.

The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan and showing that he also signed and swore to a statement contrary to his testimony given before you. The

oral declarations of said Brown not under oath and the statement signed and sworn to by him are not affirmative evidence of the truth of any matter therein contained or mentioned and they should not be considered by you excepting as af-
182 fecting the credibility of the evidence of the said Brown given in his deposition, and in determining this matter of credibility you should consider the testimony of both sides showing the circumstances under which Brown made said declarations and statement as well as all other evidence bearing on that question.

I will also call your attention to the evidence of C. R. Walters who testified on behalf of the defendants. Letters written by him to H. S. Clarke of Lawrence were introduced in evidence by plaintiff, tending to show that he made statements in such letters contrary to his evidence given upon the witness stand. That such letters were written and such contradictory statements made, if such is the case, is to be considered by you solely as affecting the credibility of the testimony of said Walters and not as affirmative evidence of any statement made by him in the letters, and in that connection you should take into consideration the testimony of the said Walters as to his motive and purpose in writing the letters as he did. Certain letters written by Frederick Adolph Walters were given in evidence by defendants. The contents of such letters should be considered by you not as narratives of facts communicated to said Frederick Adolph by others, nor yet as proof that he actually went away from Wichita, but as evidence that shortly before the time when other evidence tended to show that he went away, he had the intention of going and of going with Hillmon, which makes it more probable that he went and that he went with Hillmon than if there had been no proof of such intention.

It was lawful for the coroner of Douglas county, Kansas, to hold an inquest over the body that was brought to Lawrence, and he had the authority to order the exhumation of the body for further examination after it was once interred.

Evidence introduced at this trial that John H. Brown testified to certain things before the coroner's jury at Lawrence is not proof of the truth of the statement there made by him, but is only to be considered by you as evidence of the fact that such a statement was then and there made by Brown. If a witness at the coroner's inquest should have wilfully testified falsely regarding any material matter in such proceeding he would have been guiity of perjury. The sworn state-
183 ment of John H. Brown given to W. J. Buchan, even if wilfully and intentionally false would not constitute

perjury because it was given ex parte and not in any proceeding in court nor in any proceeding authorized by law.

The causes and reasons why human being recognize one another with whom they are acquainted do not generally depend upon analysis of separate features but rather upon general appearance in which many elements combine and it is therefore immaterial if a witness when called upon to describe in detail the features of a party whom he is identifying differs in some of these details from others if he is able to say that as a whole he recognizes the person by his general appearance. The act of recognition between friends and even members of the same family may not depend upon the color of the hair, the condition of the teeth, the size or shape of the nose or any independent feature, but upon the individual appearance of the person as it makes an impression upon the mind or brain of the observer.

All efforts or attempts by anyone interested in any manner under investigation to suppress or destroy or to accomplish the suppression or destruction of pertinent evidence are always deemed prejudicial circumstances of great weight against such person; and all attempts by any such person to disturb the current of truth and justice or to prevent a fair or impartial trial by endeavors to intimidate witnesses or persuade them to the concealment, suppression, destruction or alteration of any matter of evidence are to be regarded as denoting on the part of such person a consciousness of wrong and a desire to evade the pressure of facts tending to establish it.

This is an important case, gentlemen of the jury, and is the conclusion of six long, expensive trials. It is very desirable that you should agree upon a verdict. I do not desire however that any juror should surrender his conscientious convictions. On the other hand each juror should perform his duty conscientiously and honestly according to the law and the evidence and the verdicts rendered should in the end be the result of his convictions. In conferring together you should pay respect to each others opinions with a disposition to be convinced by each others arguments and you should endeavor to harmonize the conflicting testimony of credible witnesses if the same may be reasonably done and come ultimately to some unanimous conclusion that will be in accord with your honest judgment respecting the merits of this controversy.

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I will hand you four forms of verdict, two in each case; one in each case being prepared upon the theory that your verdict may be for the plaintiff and the other upon the theory that your verdict may be for the defendant in such case.

Whichever forms may be in accord with the result of your determination you should sign by one of your number as foreman and return the same into court. You may retire.

WILLIAM C. HOOK, Judge.

Indorsed: No. 3147-3149. Hillmon vs. Insurance Companies Instructions. Filed Nov. 18, 1899. Geo. F. Sharitt, Clerk.

185 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Leavenworth in said District on Monday the 5th day of June, A. D. 1899, proceedings were had, and appear of record in words and figures as follows, to wit:

Present: Hon. William C. Hook, Judge.

Saturday, Nov. 18, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now come the parties in these two cases respectively as on yesterday and the jury all being called, present and answering to their names the trial of these two cases as consolidated for trial is proceeded with, and the jury having heard the evidence, arguments of counsel and instructions of the court, retire under the charge of their sworn bailiff to consider of the matters submitted to them in these two actions respectively as consolidated for trial, and afterwards come into open court and through their foreman present the following verdicts.

"In the Circuit Court of the United States for the District of Kansas, Sallie E. Hillmon, Plaintiff, vs. The Mutual Life Insurance Company of New York, Defendant, Case No. 3147. We, the jury in the above entitled case, duly empaneled and sworn upon our oaths find for the plaintiff, and assess her damages at the sum of twenty-two thousand and sixty-eight dollars ($22,068.00) J. W. Skinner, Foreman."

"In the Circuit Court of the United States for the
186 District of Kansas, Sallie E. Hillmon, Plaintiff, vs. The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant, Case No. 3149. We, the jury

in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff and assess her damages at the sum of eleven thousand and thirty-four dollars ($11,034.00). J. W. Skinner, Foreman."

It is thereupon now by the Court here considered, ordered and adjudged that the said plaintiff Sallie E. Hillmon have and recover of and from the said defendant The Mutual Life Insurance Company of New York the sum of $22,068 with interest thereon at the rate of 6% per annum from this date and her costs in this action expended taxed at $.... and that execution issue therefor, to which order and judgment of the court the defendant The Mutual Life Insurance Company of New York excepts.

It is further considered, ordered and adjudged by the court that the said plaintiff Sallie E. Hillmon have and recover of and from the said defendant The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, the sum of $11,034 with interest thereon at the rate of 6% per annum from this date and her costs in this action expended taxed at $....., and that execution issue therefor, to which order and judgment of the court the said defendant The Connecticut Mutual Life Insurance Company of Hartford, Connecticut excepts.

187 Verdict.

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
Case No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

We, the jury in the above entitled case, duly impaneled and sworn, upon our oaths find for the plaintiff, and assess her damages at the sum of eleven thousand and thirty-four dollars ($11,034.00).

J W. SKINNER, Foreman.

Indorsed: No. 3149. Sallie E. Hillmon vs. Conn. Mut. Life Ins. Co. Verdict. Filed Nov. 18, 1899. Geo. F. Sharitt, clerk.

188 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Leavenworth, in said District on Monday the 5th day of June A. D. 1899, proceedings were had and appear of record in words and figures as follows, to wit:

Saturday, Nov. 18, 1899.

Sallie E. Hillmon, Plaintiff,
3147. vs.
The Mutual Life Insurance Company of New York.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company.

It is ordered by the court that the jury in the above entitled cases be kept together in charge of their sworn bailiff until they agree upon their verdicts or are discharged by the court. By consent of parties the expense of meals and lodging of the said jury and the bailiff in charge are to be paid equally by the respective parties, that to say, one half of said expense by the plaintiff and one half by the two defendants.

Nov. 18, 1899 WM. C. HOOK, Judge.

189 In the Circuit Court of the United States in and for the District of Kansas. First Division.

Sallie E. Hillmon, Plaintiff,
No. v.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Motion to set Aside Verdict and Judgment and for a New Trial.

Now comes the defendant in the above entitled action and moves the court to vacate and set aside the verdict and judgment heretofore rendered in the above entitled action and to grant defendant a new trial thereof, for the following reasons materially affecting the substantial rights of said defendant, to wit:

1. Misconduct of the plaintiff during the trial of said action.
2. Misconduct on the part of the jury trying the same.
3. Because said verdict and judgment are contrary to law.
4. Because said veridct and judgment are contrary to the evidence.
5. Because of errors of law occurring at the trial of said action duly excepted to by said defendant at the time.
6. Because of newly discovered evidence material to the defendant which it could not by reasonable diligence have discovered and produced upon the trial of said action.
7. Misconduct of plaintiff's attorneys during the progress of the trial of said action and in the argument of said case to the jury.
8. Because of irregularities occurring at the trial prejudicial to the defendant, duly excepted to by it at the time.

EDWARD S. ISHAM,
J. W. GREEN,
Attorneys for defendant.

Indorsed: 3149. Sallie E. Hillmon vs. The Conn. Mutual Life Ins. Co. Motion for new trial. Filed Nov. 20, 1899. Geo. F. Sharitt, clerk.

190 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America for the District of Kansas, began and held at the city of Leavenworth, in said District on Monday the 5th day of June A. D. 1899, proceedings were had and appear of record in words and figures as follows, to wit:

Present: Hon. William C. Hook, Judge.

Monday, Nov. 20, 1899.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now on this day, this case come on for further hearing on the motion of the defendant for a new trial and to set aside the verdict and judgment heretofore filed and entered in this cause on the 18th day of November, 1899, the said plaintiff appearing by her attorney L. B. Wheat and the said defendant appearing by J. W. Green, its attorney. The said motion being submitted to the court and the court being fully advised in the premises doth now here order, adjudge and decree that the said motion be and the same is hereby overruled, to which order and judgment of the court, the defendant excepts.

191 Sallie E. Hillmon, Plaintiff,
3149 vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Now on this 20th day of November, 1899, came said plaintiff by L. B. Wheat, C. F. Hutchings and John H. Atwood, her attorneys, and came also the defendant by James W. Green and Edward S. Isham its attorneys; and thereupon the motion and application of the defendant for an order extending the time for making, signing, settling and allowing a bill of exceptions in said action beyond the present term of this court came regularly on for hearing by the court. And it appearing to the court that said bill of exceptions can not be prepared and completed at the present term of this court, it is by the court considered, ordered and adjudged that the time for settling, allowing and signing a bill of exceptions in this case be, and the same is, hereby extended to and including the second day of April, 1900 and that the allowing, settling

and signing the same at said time shall have the same effect in all respects as if the same had been signed, settled and allowed at the present term of this court, to wit: the term at which said cause was tried. It is further ordered by the court that said bill of exceptions shall be served upon the plaintiff's attorneys of record on or before the 1st day of March, 1900 that the plaintiff shall have twenty days from the time of such service upon her within which to suggest amendments thereto; that said bill of exceptions shall then
192 on April 2, 1900 be settled, allowed and signed but the same shall not be settled, allowed and signed later than said 2nd day of April, 1900 without the further order of this court, or the judge thereof.

It is further ordered that execution in said action be stayed until said 2nd day of April, 1900.

WILLIAM C. HOOK, Judge.

193 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,

vs.

The Connecticut Mutual Life Insurance Company of Hartford, Conn., Defendant.

Order.

Upon application of the plaintiff in the above entitled action and for good cause shown, it is ordered that the time in which she is required to suggest amendments to the defendant's bill of exceptions herein, be and is hereby extended till the 2nd day of April, 1900, inclusive.

Given under my hand at Chambers, in Leavenworth, Kansas, this 19th day of March, 1900.

WILLIAM C. HOOK, Judge.

Indorsed: No. 3149. Order. Filed Mar. 19, 1900. Geo. F. Sharitt, clerk.

194 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas, in the First Division.

Sallie E. Hillmon, Plaintiff,

No. 3149 vs.

The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, Defendant.

And now comes Sallie E. Hillmon the plaintiff in this the above entitled action and applies to and moves the above

named Circuit Court of the United States for the District of Kansas, in the first division thereof, to amend the entry of the judgment heretofore and on the 18th day of November A. D. 1899 rendered in said action so as to make the same correct, and to consider, order and adjudge that the judgment heretofore and on the 18th day of November A. D. 1899 rendered in and by said Circuit Court in said action be fully entered of record and written in and on the Journal and record of said court in said above entitled action, nunc pro tunc, and as of that date; and to then and there render, make and enter of record on and in the record and journal of said court in said action, such judgment and to consider, order and adjudge that said plaintiff, Sallie E. Hillmon, have and recover of and from The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, the sum of Eleven thousand and thirty-four dollars, with interest thereon at the rate of six per cent per annum from said 18th day of November A. D. 1899, and the cost by said plaintiff in said action incurred, taxed at $.... and that execution issue therefor. And to insert the proper amount of costs therein, and that such judgment be so rendered and entered of record nunc pro tunc and as of said 18th day of November A. D. 1899.

For the following reasons, namely: because such judgment was actually rendered in said action on that day, and
195 it was only because of clerical mistakes that the same does not more definitely appear of record than as shown by the journal entry made in said action on that last named day.

C. F. HUTCHINGS,
J. H. ATWOOD,
L. B. WHEAT,
Attorneys for Plaintiff.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Insurance Company of Hartford, Connecticut. Motion to amend and make correct entry of judgment as of 18th Nov., 1899. Filed April 2, 1900. Geo. F. Sharitt, clerk.

196 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas, in the First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, Defendant.

And now the plaintiff in this the above entitled action asks, applies to and moves the defendant in said action, and the

above named court, and William C. Hook, the Judge before whom said action was last tried, to further amend the proposed bill of exceptions in said action by striking out of and from the same all thereof except merely and only such exceptions as said defendant does and will actually rely on in good faith and so much more thereof as may be necessary to explain such exceptions, for the following reasons namely; because more than that is useless, expensive, unnecessary and improper, and will oppressively and unnecessarily greatly increase costs.

Dated this 31 day of March, A. D. 1900.

JOHN H. ATWOOD,
C. F. HUTCHINGS,
L. B. WHEAT,
Attorneys for Plaintiff.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Ins. Co. of Hartford, Conn. Suggestion of amendment and motion to strike out all of proposed bill of exceptions except certain exceptions, etc. Filed Apl. 2, 1900. Geo. F. Sharitt, Clerk.

197 State of Kansas,
Insurance Department.

I, W. V. Church, Superintendent of Insurance for the State of Kansas, do hereby certify that I received the annexed notice of motion to amend entry of judgment, etc.

Sallie E. Hillmon versus The Connecticut Mutual Life Insurance Company, of Hartford, Conn.	Issued by Attorneys for plaintiff, Jno. H. Atwood and L. B. Wheat. Dated the 30th day of March A. D. 1900.

on the 31st day of March, A. D. 1900, at 8:30 o'clock a. m., and that on the 31st day of March, A. D. 1900, I forwarded one duly certified copy of the same, by depositing same in the United States mail, postage paid, addressed as follows:

Mr. Jacob L. Green, Secretary,
Connecticut Mutual Life Insurance Company,
Hartford, Conn.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the city of Topeka, this 31st day of March, A. D. 1900.

[Seal] W. V. CHURCH,
Superintendent.

Fees.

Making copy for Secretary of Co.....	$0.25
Making certificate on same.....	.25
Certifying to same.....	1.00
Making certificate on Return.....	.25
Certifying to same.....	1.00
Total	$2.75

198 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District o
Kansas, in the First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartfor
Connecticut, Defendant.

The defendant in this the above entitled action, and its a
torneys are hereby notified that the plaintiff in this the sai
action will, on Monday the 9th day of April, A. D. 1900, at th
court room where the Circuit Court of the United States fo
the District of Kansas, in the First Division thereof, is usu
ally held, in Topeka, in said District, at two o'clock p. m. o
that day, apply to and move said court to amend the entry o
the judgment heretofore and on the 18th day of Novembe
A. D. 1899 rendered in said action so as to make the sam
correct, and to consider, order and adjudge that the judgmen
heretofore and on the 18th day of November, A. D. 1899, re
dered in and by said Circuit Court in said action be fully e
tered of record and written in and on the Journal and recor
of said court in said above entitled action, nunc pro tunc, an
as of that date; and to then and there render, make and ente
of record on and in the record and journal of said court in sai
action, such judgment, and to consider, order and adjudge tha
said plaintiff Sallie E. Hillmon have and recover of and fro
The Connecticut Mutual Life Insurance Company of Hartfor
Connecticut, the sum of eleven thousand and thirty-four do
lars with interest thereon at the rate of six per cent per annu
from said 18th day of November A. D. 1899, and the cost b
said plaintiff in said action incurred, taxed at $....., an
that execution issue therefor. And to insert the prope
amount of costs therein, and that such judgment be so re
dered and entered of record nunc pro tunc and as of said 18t
day of November, A. D. 1899.

For the following reasons, namely; because such judgmen
was actually rendered in said action on that day, and it wa

only because of clerical mistakes that same does not more definitely appear of record than as shown by the Journal
199 entry made in said action on that last named day.

And you are further notified that affidavits and other evidence will be used, read and given on the hearing of said application and motion.

Dated this 30th day of March, A. D. 1900

JNO. H. ATWOOD,
L. B. WHEAT,
Attorneys for Plaintiff.

Indorsed: No. 3149. Notice of motion and return of service. Fee, $2.75. Filed Apr. 2, 1900. Geo. F. Sharitt, Clerk.

200 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas. In the First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

Be it remembered that heretofore and on to wit: the second day of April A. D. 1900 before the bill of exceptions in the above entitled action signed by the undersigned W. C. Hook Judge of date of the second day of April A. D. 1900 and prepared by the defendant in said action with reference to exceptions taken at the trial thereof had in October and November A. D. 1899 in the above named Court as Consolidated with another action, was allowed, settled or signed or examined for settlement allowance or signing by said Judge, the plaintiff in said action applied to and moved said defendant and the above named Court and William C. Hook the Judge before whom said action was last tried to further amend the proposed bill of exceptions in said action by striking out of and from the same all thereof except merely and only such exceptions as said defendant does and will actually rely in good faith and so much more more thereof as may be necessary to explain such exceptions, for the following reasons namely:

Because more than that is useless expense, unnecessary and improper and will oppressively and unnecessarily greatly increase costs, but said defendant and said Judge refused to consider, said motion or to sustain the same in any part or to strike out of and from the same any part thereof now in said bill of exceptions as signed by said judge, to which rulings and decisions of said judge said plaintiff then excepted.

And be it further remembered that then and when said Judge was examining said proposed bill of exceptions
201 with reference to settling and allowance of the same so far as he should deem proper said plaintiff further orally applied to and moved said defendant and the judge aforesaid to strike out of and from the same said proposed bill of exceptions each copy of any deposition therein or any part of any deposition therein other than the copy of the depositions of James S. Crew and so much of the copy of the deposition of John H. Brown as would be necessary to explain the questions and answers in the deposition of said Brown excluded on the objection of said plaintiff, and all thereof except such questions and answers—and also all of the testimony of any and every witness given at any former trial of said action, and also so much of the testimony of any witness at said first mentioned trial in A. D. 1899 as is not necessary to explain any exception of said defendant in relation to any part thereof and also each copy of any and every policy, application, Medical examiners certificate, receipt, letter or other writing, paper, picture or diary and written instrument read or given in evidence in said action, or in said action and the other action with which it was consolidated for trial, for the following reasons namely:

Because the same were and are respectively useless, expensive, unnecessary and improper, and that to have the same in said bill of exceptions respectively will operate oppressively on said plaintiff and greatly and unnecessarily increase costs—and for the same reasons said plaintiff then objected to any thereof, that is, to any of the matter so moved to be stricken out being left in said bill of exceptions, which objections and the last aforesaid application and motion was then by said plaintiff made separately and severally as to each copy of every deposition and of any part of any deposition, policy, application, Medical Examiners' certificates, receipt, letter and other writing, paper, pictures, diary and written instruments aforesaid.

And as to the parts objected to of testimony of each witness aforesaid, so referred to for the following reasons namely: Because the same were respectively useless, expensive, unnecessary and improper and that it will operate oppressively on and against said plaintiff and unnecessarily greatly increase costs to leave the same or any thereof in said bill of exceptions, but said defendant and said Judge refused to
202 strike out of and from said bill of exceptions anything left therein when signed, or any of the matters so objected to or moved to be stricken out.

And then said defendant and said Judge as to each matter so objected to or moved to be stricken out respectively, refused to strike out of and from said bill of exceptions any matter or thing left therein when so signed by the said Judge and said Judge overruled such objections severally and separately respectively as to each thereof, to which action of said defendant and to such rulings and decisions of the court and Judge respectively said plaintiff then at the time thereof excepted as to each thereof separately and severally and respectively.

And be it further remembered that after said bill of exceptions was on the second day of April A. D. 1900 presented to said Judge as aforesaid and before he had signed the same plaintiff objected to the same being settled, allowed, or signed because after the morning of the 19th day of March A. D. 1900 and after the same had been returned to said defendant the three following parts of said bill of exceptions namely: the parts thereof in substance as follows to wit:

"And thereupon the plaintiff peremptorily challenged Andrew Johnson who was excused by the Court"—

"And thereupon, the plaintiff peremptorily challenged A. O. Leslie, who was excused by the Court"—

"And thereupon, the plaintiff peremptorily challenged Martin Yoste, who was excused by the Court"—

Were respectivly written and placed in said bill of exceptions without the knowledge or consent of said plaintiff, and that, at the instance of said defendant by its attorneys—and thus said bill of exceptions was altered and changed materially without the knowledge or consent of said plaintiff to such extent that the same was not and is not, in substance or effect what was served on plaintiff within the time allowed for service of the bill of exceptions on plaintiff.

And said plaintiff then also asked the said judge to strike those copied parts of said bill of exceptions out of and from the same if he signed or allowed the same or any part thereof, because of the reasons for the making of said objection—
203 and thereupon said judge overruled said objection and request and signed the same bill of exceptions with those copied parts thereof therein as thereby shown to each of which acts, rulings and decisions of the Judge said plaintiff then duly excepted.

And inasmuch as the matters aforesaid do not appear of record thus the above and foregoing statement showing the aforesaid applications, motions, objections and exceptions of said plaintiff is now allowed and signed by said Judge after

service thereof on said defendant and made part of the record in said action at the same time when said bill of exceptions is signed by said Judge as the same appears.

WILLIAM C. HOOK, Judge.

April 2, 1900.

Indorsed: No. 3149. Sallie E. Hillmon vs. the Connecticut Mutual Life Ins. Co. of Hartford, Connecticut. Plaintiff's exceptions relating to defts. bill of exceptions. Filed Apr. 2, 1900. Geo. F. Sharitt, clerk.

204 In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Conn., Defendant.

Now, on the 2nd day of April, 1900, the above entitled cause came on for hearing upon the application of the defendant for an order directing the Clerk to transmit to the Circuit Court of Appeals with the record in said cause, the following particularly described exhibits which were offered and admitted in evidence during the trial of said cause, to wit:

1. Plaster cast or model of upper and lower teeth of cadaver or corpse, whose identity is in question in said cause. (Unmarked.)

2. Copy of tin type of John W. Hillmon, marked Ex. No. 22, W. C. H. and also marked Ex. D., W. C. H.

3. Small photograph of Frederick Adolph Walters (with mustache) marked Ex. B: Also marked Ex. V. Also marked Exhibit No. 35, Nov. 99, W. C. H.

4. Small photograph of Frederick Adolph Walters, (without mustache) marked Exhibit No. 36, Nov., 99, W. C. H.

5. A cabinet sized copy of the photograph of Frederick Adolph Walters, (without mustache), last above mentioned, marked Exhibit No. 33, Nov., 99, W. C. H. Judge.

6. A cabinet sized photograph of John W. Hillmon, marked Exhibit No. 10, Oct., 99, W. C. H. Judge.

7. A small photograph of John W. Hillmon, marked No. 14, of which a copy enlarged to cabinet size is marked Exhibit No. 34, Nov., 99, W. C. H. Judge. Both to be sent.

8. A front view of cadaver or corpse in a coffin, marked "G" Ex. No. 29, Oct., 99, W. C. H. Judge.

This is the same as Ex. No. 13, W. C. H. Judge.

9. A side view of the same cadaver or corpse in a
205 coffin, marked "G", Exhibit No. 30, Oct., 99, W. C. H. Judge.

This is the same as Ex. No. 12, W. C. H. Judge.

And the court having examined said exhibits and being satisfied that the application of the defendants ought to be allowed, does order that said original exhibits or duplicates thereof, be transmitted by the Clerk with the record in said cause, to the Circuit Court of Appeals.

WILLIAM C. HOOK, Judge.

Indorsed: No. 3149. Order, Clerk to send original exhibits to Court of Appeals. Filed April 2, 1900. Geo. F. Sharitt, Clerk.

221 In the Circuit Court of the United States in and for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
No. 3147. vs.
The Mutual Life Insurance Company of New York, Defendant.

Be it remembered: That on the 16th day of October, A. D. 1899, the same being one of the judicial days of the regular June, 1899, term of the Circuit Court of the United States for the District of Kansas, First Division, begun and held in the city of Leavenworth, in said district and division on the first Monday in June, 1899, the above entitled cause came on for trial before the court and a jury upon the issues therein joined pursuant to the order of the Court theretofore made, fixing said date for the trial thereof.

The plaintiff appeared in person and by L. B. Wheat, C. F. Hutchings and John H. Atwood, her attorneys.

The defendant appeared by Edward S. Isham, George J. Barker and E. F. Ware, its attorneys.

And thereupon the following proceedings were had, to wit:

The following writen motion, filed by the defendant on the 9th day of October, 1899, to wit:

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, Defendant.

The defendant, The Mutual Life Insurance Company of New York moves the court to quash the venire and discharge the

entire panel of jurors drawn for the trial of the above entitled action, to be had on the 16th day of October, 1899, for the following reasons:

222 First: That said jurors were not publicly drawn, from a box containing at the time of such drawing the names of not less than three hundred (300) persons, possessing the qualifications provided in section 800 of the Revised Statutes of the United States.

Second: Because said jurors were not publicly drawn.

Third: Because said jurors were privately drawn.

Fourth: Because said jurors were privately drawn without any notice, knowledge or information to said defendants of the time or place when the drawing of said jurors would take place.

Fifth: Because said jurors were not drawn in the manner prescribed by law.

Sixth: Because the names and residences of the jurors so privately drawn were kept concealed from this defendant.

Seventh: Because at the time of the filing of this motion the names of said jurors were unknown to this defendant, nor could it ascertain the names or residences thereof by any means within its power.

J. W. GREEN,
E. F. WARE,
GEO. J. BARKER,
Attys. for Deft."

Filed Oct. 9, 1899. Geo. F. Sharitt, Clerk.

came on for hearing by the court; whereupon the defendant in order to maintain the issue in that behalf, produced as a witness George F. Sharitt, who being duly sworn, testified as follows, to wit:

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George F. Sharitt, being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposes and says as follows:

Direct Examination

By Mr. Barker:

Q. You are the clerk of this court and have been for some time? A. Yes, sir.

Q. You were present at the drawing of this jury?

A. Yes, sir.

Q. No notice was given to either party, was there, of the drawing of the jury? A. No, sir.

Q. And neither party was present at the drawing?

A. No, sir.

Q. After the jury had been drawn some time, and you may state the date, the defendant applied for a list of the jurymen drawn, did they not?

A. The jury was drawn about the 2nd of October. On the 5th a young man from your office called for a list of the names?

Q. That was on the 5th? A. Yes, sir.

Q. And at that time you declined to furnish us with a list?

A. Yes, sir.

Q. Afterwards, and on what day did you send the list?

A. On the 7th.

Q. That was on Saturday or Sunday?

A. Saturday, the 7th, I mailed you a copy of the venire.

Q. Then it would reach Lawrence on Sunday?

A. It would reach Lawrence Saturday evening on the fast mail.

Q. How many jurymen were drawn. A. 40.

Q. From what counties were they drawn?

A. I don't know that I can tell you the counties; I can make a pretty good guess at most of them.

Q. State as definitely as you can—you have the venire before you, haven't you? A. Yes, sir.

Q. The venire shows, does it not?

A. It shows the postoffice. The first man is from Onaga, I think that is in Pottawatomie county. The next one is from White City, I think Morris county; Wa Keeney, Trego county; Ackerland, Leavenworth county; Centralia, Nemaha county; Washington, Washington county; Oak Mills, Atchison county; Farmington, Atchison county; Courtland, Republic county; Council Grove[m], Morris county; Clifton, Washington county; Winona, Logan county; Clay Center, Clay county; Junction City, Geary county; Topeka, Shawnee county; Osage City, Osage county; Delaware—I don't know the county; Harrisonville—it seems there is no such postoffice; Lincoln, Lincoln county; Belleville; Russell, Goodland, St. Mary's, Beloit, Sabetha, Olathe, America—Victor, Colver, Hill City, Ellsworth.

Q. Have you made an estimate now of how many counties the jurymen were drawn from? A. No, sir; I haven't.

Q. You can state very readily, can you not, by figuring out that? A. I think so.

Q. Take, for instance, the remote counties and state about how far those counties are situated from Leavenworth.

A. The farthest is about 420 miles. Winona, I should judge, would be the farthest point.

Q. And the nearest is Leavenworth county?

A. No, sir; possibly Atchison is a little nearer; Oak Mills, possibly, is a little nearer.

I think the Court will take judicial cognizance of the location of the counties.

Q. From these various counties there is only one county from which there are more than two jurymen drawn, is there not, and that is from Morris county?

A. That I don't remember.

Cross-Examination

By Mr. Hutchings:

Q. That was a special venire for this case?

A. Drawn under the order of the Court to try this case, yes, sir.

Q. When was the order made? A. Last June.

Q. The jury was drawn on what day?

A. The 2nd day of October.

Q. And a list was furnished to the defendants on the 7th?

A. Mailed on the 7th to you and to Mr. Barker.

Q. They made application for it on the 5th? A. Yes, sir.

Q. What date was the venire dated? A. The 2nd.

Q. When was it delivered to the marshal?

A. The Thursday following, I think.

Q. At the time they applied for this list the venire had not yet been issued had it?

A. It had been issued, but not delivered to the marshal.

Q. Do you remember what time on the 7th you mailed it?

A. About 4 o'clock.

Q. In the afternoon. A. Yes, sir .

Q. It would get to Lawrence the same day?

A. It would get to Lawrence about 9:30 that night.

Redirect Examination

By Mr. Barker:

Q. The list you furnished was mailed to me, was it not?

A. G. J. Barker, Lawrence, Kansas, yes, sir.

By the Court:

Q. Did you mail a list to both sides of this case at the same time?

A. In the same mail, one addressed to C. F. Hutchings, Kansas City, Kansas, one addressed to G. J. Barker, Lawrence, Kansas; they were copies of the venire that was issued.

Q. At the time of the application for the copies, was or was not the original delivered to the marshal? No, sir, it was not.

By Mr. Barker:

I will state that I received a copy of the list by mail on Sunday, October 8th, 1899.

By Mr. Hutchings:

And I will state that I received a copy of the list by mail on Monday, October 9th, 1899.

224 And thereupon after hearing the evidence, the Court overruled said motion of the defendant to quash the venire, to which action and ruling of the Court, the defendant then and there duly excepted.

And thereupon, the following further proceedings were had: The Court upon its own motion made, and caused to be entered upon the journal of the court, an order consolidating for trial the above entitled cause with a certain other cause then pending and undetermined upon the law side of said court, wherein Sallie E. Hillmon is plaintiff, and the Connecticut Mutual Life Insurance Company of Hartford, Ct., is defendant, numbered 3149.

To which action and ruling of the Court, the defendants and each of them then and there duly excepted.

And thereupon, the defendants The Mutual Life Insurance Company of New York, filed the following written motion, to-wit:

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,

No. 3147. vs.

The Mutual Life Insurance Company of New York, Defendant.

Motion.

The defendant, The Mutual Life Insurance Company of New York respectively moves, asks and requests the Court to vacate and set aside so much of the order of said court of May 9, 1898, which consolidates or attempts to consolidate this action for trial with the case of Sallie E. Hillmon, plaintiff, vs. The Connecticut Mutual Life Insurance Company, defendant, for the reasons:

First. That said order was inadvertently made.

Second. Because said actions are not such actions as can be under the law, consolidated for the purposes of trial.

Third. Because the issues in said cases are not the same.

Fourth. Because said court theretofore, and on the 15th day of February, 1897, made an order severing said actions and setting aside the order of consolidation theretofore made.

225 Fifth: Because it was agreed in writing between said parties that each should be entitled to a separate trial.

Sixth: Because such an order of consolidation would be greatly prejudicial to the rights of this defendant.

GEO. J. BARKER,
E. F. WARE,
for said Deft."

Filed Oct. 16, 1899. Geo. F. Sharitt, clerk."

And thereupon, the defendant, to maintain the issue upon its behalf, read in evidence to the court, the following stipulation, to wit:

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon
vs.
New York Life Insurance Company.

Sallie E. Hillmon
vs.
Mutual Life Insurance Company of New York.

Sallie E. Hillmon
vs.
Connecticut Mutual Life Insurance Company.

Whereas, since the making and entering by the court of the order consolidating the above entitled action for trial, the said plaintiff, Sallie E. Hillmon, now Sallie E. Smith, has sold and conveyed her interest and claim against the defendant, the New York Life Insurance Company, to one James F. Lord, who has become plaintiff in said action. And whereas, the reason for the consolidation of said action for trial no longer exists. It is therefore stipulated and agreed by and between the parties hereto, that is, the said Sallie E. Hillmon now Sallie E. Smith the said James F. Lord, the defendant, the New York Life Insurance Company and the other two defendants above named, that the order of consolidation heretofore made shall be by the court annulled and wholly set aside, and that each plaintiff and each defendant shall be entitled to have, and shall have a separate trial in each of said actions.

C. F. HUTCHINGS,
SAMUEL A. RIGGS,
L. B. WHEAT,
Attys. for Plaintiff.

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GEO. J. BARKER &
J. W. GREEN,
Attys. for defendants."

No. 3147-3149. Stipulation. Filed Oct. 16, 1899. Geo. F. Sharitt, Clerk."

It is admitted by the parties that said stipulation was made some time in December, 1897.

This stipulation was presented to Judge Williams, holding this Court in February, and in May 1898, when these causes were up for trial, and a request was made for separate trials thereof, pursuant to said stipulation; the Court, nevertheless, renewed the order of consolidation thereof, so far as these two causes are concerned, as shown by the records.

After argument by counsel, the Court said that if there was no consolidation, he would certainly make the order; that if there was reason for consolidating the three, there was equal reason for consolidating the two.

And thereupon, the Court, after hearing said stipulation read, and the arguments of counsel, overruled said motion to vacate and set aside the order of consolidation, to which action and ruling of the Court, the defendants and each of them then and there duly excepted.

227 And thereupon, all parties announcing themselves as ready for trial, twelve good and lawful men from the body of said district and division were called into the jury box, and having taken their seats therein were each duly sworn to well and truly answer all questions put to them by court or counsel touching their qualifications to sit as jurors in the trial of said causes. And thereupon, the empaneling of a jury to try said causes was proceeded with.

P. Botkin, one of said tweleve men, was asked the following question upon his voir dire by counsel for the defendants:

Q. Suppose the testimony in this case was just equally balanced, no preponderance either way; which way would your vedict go under those circumstances?

To which said Botkin made answer:

A. The verdict would be for the woman, of course.

And thereupon, the defendants and each of them, challenged the juror for cause.

By the Court: Suppose the instructions of the Court should be that if the evidence were equal, the verdict should be in favor of the defendants. Would you so find?

By the Juror: That is, if the Court so instructed?

By the Court: Yes; you would obey the instructions of the Court?

By the Juror: Yes sir.

And thereupon, the Court overruled the challenge of the defendants to which action and ruling of the Court, the de-

fendants and each of them then and there duly excepted.

228 And thereupon, in the progress of the empanelling of the jury, when twelve men had taken their seats in the jury, who were qualified to serve as jurors in the trial of said causes, the Court said: "It is my opinion that the plaintiff has six peremptory challenges and each of the defendants three."

To which statement and ruling of the Court, the defendants and each of them then and there duly excepted.

And thereupon, the parties proceeded to exercise their peremptory challenges.

The plaintiff peremptorily challenged one juror.

The defendant, the Mutual Life Insurance Company of New York, peremptorily challenged one juror.

The plaintiff peremptorily challenged a second juror.

The defendant, the Connecticut Mutual Life Insurance Company, peremptorily challenged one juror.

The plaintiff peremptorily challenged a third juror.

The defendant, the Mutual Life Insurance Company of New York, peremptorily challenged a second juror.

And thereupon, the plaintiff, having already exercised three peremptory challenges, claimed the right to exercise a fourth peremptory challenge. The defendants and each of them objected to the exercise by the plaintiff of a fourth peremptory challenge. The Court overruled the objection, to which action and ruling of the Court, the defendants and each of them then and there duly excepted, and thereupon the plaintiff peremptorily challenged Andrew Johnson, who was excused by the Court.

The defendants, the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, exercised a second peremptory challenge.

And thereupon, the plaintiff claimed the right to exercise a fifth peremptory challenge. The defendants and each of them objected to the exercise by her of a fifth peremptory challenge. The Court overruled the objection, to which action and ruling of the Court, the defendants and each of them then and there duly excepted, and thereupon the plaintiff peremptorily challenged A. O. Leslie who was excused by the Court.

The defendant, the Mutual Life Insurance Company,
229 waived its third peremptory challenge.

And thereupon, the plaintiff claimed the right to exercise to sixth peremptory challenge.

The defendants and each of them objected to the exercise by her of a sixth peremptory challenge. The Court overruled the objection to which action and ruling of the Court, the defendants and each of them then and there duly excepted, and

thereupon the plaintiff peremptorily challenged Martin Yoste who was excused by the Court.

The defendant, The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, waived its third and last challenge.

And thereupon, all challenges having been exercised or waived by the parties, respectively, and the empaneling of the jury completed, the defendants, and each of them separately, filed a written motion, which is in words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Kansas, Eastern Division.
Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, Defendant.
Motion.

230 Now comes the above named defendant and objects to the trial of this case before the jury now impaneled herein for the reason that said jury is not constituted according to law, in this:

That the plaintiff has been given by the Court and has exercised under the order of the Court, six peremptory challenges to the jury, now impaneled for the trial of the case, between the said plaintiff and this defendant, which is a greater number of peremptory challenges than the said plaintiff is entitled to by law, so that said jury is illegally constituted as against this defendant; and said defendant moves the Court accordingly that said jury may be discharged and that a new venire be ordered.

E. F. WARE &
GEO. J. BARKER,
Counsel for defendant.

Filed Oct. 17, 1899. Geo. F. Sharitt, "Clerk."

After hearing arguments of counsel, the Court overruled and denied said motion, to which action and ruling of the Court, the defendants, and each of them then and there duly excepted.

And thereupon, the twelve men then in the jury box, so selected to try the causes, arose and were duly sworn to well and truly try the causes, and true verdicts render according to the law and evidence.

231 And thereupon, Mr. Atwood stated the cause of the plaintiff to the jury.

And thereupon, Mr. Green, stated the defenses of the defendants, and each of them to the jury. Among other things, he said:

"The second defense is that John W. Hillmon, Levi Baldwin and John H. Brown, entered into a conspiracy to defraud these insurance companies out of the money which was called for by these policies. It is said by the gentleman who addressed you that we have never claimed that Mrs. Hillmon is a party to this conspiracy; what the evidence will be deduced on that point is for you gentlemen to determine; what we say on paper is that John W. Hillmon, Levi Baldwin and John H. Brown did conspire to defraud these insurance companies." * * * And by the way, these applications as is stated to you, show that he was five feet, eleven inches in height."

And the hour for adjournment having now arrived, the Court, after admonishing the jury as to their duties during the separation, arose and adjourned until 9:30 A. M. Wednesday, October 18th, 1899.

Wednesday, October 18th, 1899, 9:30 A. M.

Court convened pursuant to the adjournment. All parties present as before. The trial of the cause was proceeded with.

And thereupon, the plaintiff to maintain the issues upon her part produced and offered evidence, oral and documentary as follows, to wit:

232 Plaintiff offered and read in evidence the policy of insurance issued by the Mutual Life Insurance Company of New York to John W. Hillmon and the indorsements thereon, being the policy sued on in these actions. Said policy is marked "Exhibit I. M. L. J." and a copy thereof is attached to plaintiff's petition herein and a copy is also attached hereto.

Plaintiff then offered and read in evidence a receipt given to the owner of policy 195132, dated December 10th, 1878, for the first semi-annual premium on said policy last above referred to. Said receipt was marked "Ex. 2. M. L. J." and is in the words and figures following:

The Mutual Life Insurance Company of New York.
140 to 146 Broadway, New York, December 10, 1878.

Received from the owner of Policy No. 195,132 the annual premium due December 10, 1878 $121.40
(for terms of Mutual agreement see Application and Policy)
C. SCHROEDER, Asst. Secretary.

Notice to Policy Holders: The agreement is mutual (see application and policy) that unless the premium is paid on or before the day it becomes due, the policy is forfeited and void. No person except the President or Secretary is authorized to

make, alter or discharge contracts or waive forfeitures and no contract, alteration, discharge or waiver is valid except it be in writing and signed by the president or secretary. Payments of Premiums are evidenced by receipts signed by the President or Secretary.

All premiums are due and payable at the Home office in New York. When receipts are sent to any person for delivery with authority to receive the money, such person shall countersign the same as evidence of payment to him.

F. S. WINSTON, Prest.

233 Ex. No. 1 M. L. J. Ex. 1. C. H. N.

No. 195132. Wife's Life.

The Mutual Life Insurance Company of New York.

Age 31 years. Amount $10,000.

Semi-Annual Premium $121.40

In consideration of the Application for this Policy of Insurance, which is hereby referred to and made a part of this Contract, and of each of the statements made therein, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material, and warrants to be full and true, and to be the only statements upon which this contract is made; and in further consideration of the premium of One hundred and twenty-one dollars and forty cents, to be paid in advance to the Company at its Home Office in the City of New York, and of the payment of the like sum to be made at the said office on or before the tenth day of December and June in every year during the continuance of this contract.

Does promise to pay to Sallie E. Hillmon, wife of John W. Hillmon of Lawrence, Douglass Co., Kan. (The person whose life is hereby insured), for her sole use, if living, in conformity with the statute, and if not living, to their children, or their guardian for their use the sum of Ten Thousand Dollars (any indebtedness to the Company on account of this contract to be first deducted therefrom) at the said office of the Company in the city of New York, within sixty days after notice and the proofs hereinafter required of the death of the said person whose life is insured shall have been furnished to the Company at its said office.

Upon the following conditions:

1. If any statement made in the Application for this Policy be in any respect untrue, the consideration of this contract shall be deemed to have failed, and the Company shall be without liability under it.

2. If any premium, or installment of a premium, on this policy, shall not be paid when due, the consideration of this contract shall be deemeed to have failed, and the Company shall be released from liability; and the only evidence of payment shall be the receipt of the Company, signed by the President or Secretary.

3. If the said person upon whose death this Policy matures shall die in consequence of a duel; or of the violation of law or of resistance to any legally constituted authorities, or by diseases, violence, or accident brought about by intoxication or shall impair his health by narcotics or alcoholic stimulants or shall have delirium tremens; or if he shall be convicted of felony, or shall engage in any insurrection or rebellion against the Government of any State or of the United States; or if, without the written consent of the Company, signed by the President or Secretary thereof, he shall pass or remain beyond the limits of residence and travel, or shall personally engage or participate in any of the occupations or employments, which are specified on the back of this policy, the Company shall be released from all liability on account of this contract.

4. It is hereby declared and agreeed that the self-destruction of the person, during the continuance of this insurance, whether voluntary or involuntary, and whether he be sane or insane at the time is not a risk assumed by the company in this contract; but in every such case, the company will, upon demand made and the surrender of this policy, accompanied with satisfactory proofs of such death, within sixty days after its occurrence, pay the net reserve upon it held by the company at the beginning of the year in which death occurs, calculated by the present legal standard of the state of New York, first deducting therefrom any indebtedness which shall have accrued to the Company on account of this contract.

234 5. The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the President or Secretary of the Company, whose authority for this purpose will not be delegated; and it is further declared and agreed, that in case the obligation of the Company under this contract be defeated by the failure of any of the considerations, or by the violation of any of the covenants or conditions recited or referred to herein, all payments which shall have been made to the Company on account of this contract shall be forfeited to the Company.

6. The proofs of death by which this contract matures, shall be furnished to the Company within one year after such

death, and shall contain full and true answers under oath to the questions in the Company's blanks for proofs of death, relating to the life, health and death of the person in question; and shall include (1) a statement of the extent and character of each and every claimant's interests in the policy; (2) the statement of the physician or physicians, if more than one, who attended the deceased during his last illness or within a year previous; (3) the statement of a responsible householder acquainted with the deceased; (4) the statement of the undertaker. If any of these statements be omitted, the necessity of the omission must be established, and further proofs, satisfactory to the Company, must be furnished.

7. In any suit or proceeding, at law or in equity, upon this policy, it shall be governed by, subject to, and construed only according to the charter of the Company, and laws of the State of New York in force at the date hereof, and, elsewhere than in the said State, such suit or proceeding shall be brought and prosecuted in the Circuit or District Court of the United States, and not otherwise, unless by the written consent of the Company; and no such suit or proceeding shall be brought or action commenced, against the Company under the contract after one year from the time when the right of action accrues; and if any such action, suit or proceeding be brought after that time, the lapse of time shall be conclusive evidence against the claim.

8. The provisions and requirements printed by the Company upon the back of this Policy are hereby referred to and accepted as part of this contract as fully as if they were recited at length over the signatures hereto affixed.

In witness whereof, the said The Mutual Life Insurance Company of New York has caused this Policy to be signed by its President and Secretary, at its office in the City of New York, the tenth day of December, A. D. one thousand eight hundred and seventy-eight.

ISAAC F. LLOYD, Secretary. ROBT. A. GRANNISS, Vice-President.

A surrender value will be allowed for this policy after two years [—] full payments have been made, if applied for within sixty days after a premium becomes due, either in Insurance or in cash, according to estimated value in use by the Company; provided at the date of such surrender, the same is legally made in conformity with its rules.

ISAAC F. LLOYD, Secretary.

235 Provisions and Requirements Referred to in this Policy.

Limits of Residence and Travel.—The limits of travel and residence allowed under this contract include those parts of the United States and British Possessions which lie between the parallels of 60° and 36° 30′ north latitude; also that part of Tennessee which lies east of the Tennessee river; also that part of Alabama north of 34° north latitude; also the States of Georgia and South Carolina except within 60 miles from the Atlantic Ocean; also the State of North Carolina, except within 50 miles from the Atlantic Ocean; also those parts of the United States which lie west of the meridian 92° west longitude, and at the same time north of the parallel 33° north latitude; also all those parts of the United States which lie west of the 95th meridian of west longitude, and south of 60° north latitude and except within 60 miles from the Gulf of Mexico.

Also before July 1st and after November 1st, in any calendar year, those parts of the United States which lie south of the parallel of 36° 30′ north latitude, and are not included in the above limits.

The insured has also permission to reside in the cities of Savannah, Georgia, and Charleston, S. C. and to visit the towns and cities on and in the vicinity of the Mississippi River, the Atlantic Ocean and Gulf of Mexico, within the United States, for a period of not over three days in any one place, but in case of death by yellow fever or its consequences contracted while residing in Savannah (Georgia), or Charleston, S. C. or during any visit permitted as above, then and in that case the Company shall not be liable to pay the sum insured or any part thereof, except in the cases of such persons as shall have resided for seven years continuously in either of the said cities of Charleston or Savannah; and in no case shall the said Company be liable, if death shall result from yellow fever, contracted in any such city, after that disease shall have been declared epidemic by the public authorities of said city, and before such epidemic shall have been, in like manner, declared no longer existing.

Travel is permitted in first-class vessels, by direct route, along the coast of the United States and the British North American Possessions, provided no port is entered not included at the time in the limits above allowed for travel and residence.

But travel and residence of the person at whose death this contract matures, beyond the above limits, will release the Company from all liability under this contract.

Female Risks.—Policies issued upon the lives of women are charged an extra annum premium of one-half of one per cent on the amount insured, which must be paid until the assured shall have reached the age of forty-eight years, and until the cessation of the menses.

Occupations and Employments.—The occupations and employments, engage or participation in which will release the Company from all liability under this contract are: Blasting, mining, submarine labor, areonautic travel and excursions, the manufacture, handling or transportation of inflammable, or explosive substances, service upon any railroad, steamboat, or other vessel or boat; military and naval service of every kind, whether voluntary or involuntary, whether as combatant or non-combatant, the militia in time of pease excepted.

Provisions for Payment of Premiums.—Payment of Premiums.—All premiums are due at the office of the Company in the City of New York at the date named in the policy, without previous notice; such notice being hereby expressly waived in consideration of the execution of this policy, the requirements of any statute providing therefor, to the contrary notwithstanding; but at the pleasure of the Company, suitable persons may be authorized to receive such payments at other places, but only on the production of the Company's receipt therefor, signed by the President or Secretary. No payment made to any person except in exchange for such receipt and in cash, will be recognized by the Company. Should the Company, upon any occasion, consent to renew or revive the Policy by the acceptance of premium after the same is due and payable, or by the acceptance at the option of the Company of any premium in any other way or manner than herein in anywise pro-
236 vided, such acceptance is in every case to be, and shall always be, viewed and understood by the parties in interest, as an independent act of grace and courtesy of the Company, and in no case in anywise to be considered as creating an obligation or precedent for waiving, or as a waiver of, any forfeiture or any conditions in the policy.

Agents general or other, are not authorized to make any change whatsoever in Forms of Application, for Insurance, or in Policies or Receipts for Premiums, or to extend the time of payment of any premium in any form, or to give or allow any credit therefor, or to waive forfeiture or any condition of any Application for Insurance, or of a policy or premium receipt, to name an extra rate for special risks, issue permits of any kind or bind the company in any way; they being permitted and authorized simply to solicit Applications for Policies to receive Premiums and to deliver Premium Receipts to

the assured, under the rules and instructions of the Company, and no information, statement or representation given or made by the assured or insured to any such agent, or to any other person, nor any alleged or actual knowledge on the part of any such agent, unless such information, statement or representation be reduced to writing and promptly presented by the assured to the President at the Home Office of the Company in New York City, shall be deemed notice to or binding upon the Company.

Upon any proposed surrender of this policy, and cancellation thereof, or any substitution of any Policy of any kind therefor, by [—] then apparent holder or holders thereof, claiming the sole right thereto, the manual possession and production of this policy, together with evidence of ownership satisfactory to the President or Secretary of the Company, and none other, shall thereupon, at the sole option of the Company, be conclusive evidence of ownership in the party claiming the same, and producing said Policy, as between the Company and the real parties in interest, unless notice to the contrary, in writing signed by such real parties in interest and duly acknowledged, shall have been filed previously with the President of said Company. And said delivery upon surrender and cancellation of said Policy so actually produced and given up, and the release executed by said party, so producing and claiming to own said policy of all claims thereupon, all parties in interest do hereby authorize said Company to make or receive, accept or confirm, and will, and do hereby ratify the same, and upon the same being done, do hereby release and discharge said company from any claim and liability to them, or either of them, for the same, notwithstanding the same, or any of the same, may have been done without any other express authority, consent or knowledge than that herein expressed.

Commencement of Assurance, Year, and Balance of Year's Premiums. All premiums are payable annually in advance. When the premium is made payable in semi-annual or quarterly installments, that part of the year's premium, if any, which remains unpaid at the maturity of this contract, shall be regarded as an indebtedness to the Company on account of this contract, and shall be deducted from the amount of the claim; and if any such payment be not made on or before the day it is due, the Company shall, from that day, be released from all liability under this contract; and no credit for surplus accumulated upon this Policy shall be deemed applicable to the payment of any premium, unless the previous consent of the Company be obtained in writing.

Presumption of Death. No presumption of death shall arise from disappearance until this Policy shall have been maintained in force by the payment of premiums throughout the expectation of life of the person upon whose death this contract matures, according to the Company's table of mortality, reckoned from the date of the policy.

237 Assignments. This Company will not take notice of any assignment of this policy until a duplicate or a certified copy thereof shall be delivered to the Company at its principal office; and under no circumstances, will the Company assume any responsibility for the validity of such assignment. If any claim be made under an assignment, proof of interest to the extent of the claim will be required.

It is expressly declared and agreed that none of the clauses or conditions of this Policy, or of the application thereof, shall be varied in their interpretation or legal effect by evidence of, or by the existence of any usage or custom whatsoever.

ISAAC F. LLOYD, Secretary.

(On the back):

No. 195132.
The Mutual Life Insurance Co. of New York.
Insurance on the Life of John W. Hillmon
In Favor of
Sallie E. Hillmon.
Amount, $10,000.

Date, Dec. 10th, 1878.
Term of Life, 1-2 annual payment, $121.40
Policy, 1.

$122.40

Byron Sherman, St. Louis, Dec. 13, 1878. Mo. General Agent.

Register 57.

238 EX. No. 3. M. L. J. Ex. 3. C. H: N:
No. 153, 614 $5,000.

The Connecticut Mutual Life Insurance Company of Hartford, Conn.

Age 31. Premium, $116.45.

In consideration of the application for this insurance, which is a part of this contract, and a copy whereof is hereunto annexed, and of the several answers therein contained and that the applicant doth warrant the same to be in all respects true,

and of the annual premium of One hundred & sixteen dollars and forty-five cents to be paid to them on the fourth day of March in every year during the continuance of this policy, do hereby insure the life of John W. Hillmon, (the insured) of Lawrence, county of Douglas, and State of Kansas, for the term of his natural life, subject to the conditions and agreements upon the second page of this policy, which are hereby referred to and made a part of this contract the same as if they were recited at length over the signatures hereto affixed, in the sum of Five Thousand Dollars, for the sole use and benefit of Sallie E. Hillmon, (the assured) wife of the insured, the said sum insured to be paid at the office of this Company in Hartford, Conn., to the said Assured, or to her legal representatives, ninety days after due notice and satisfactory evidence of the death of the said Insured while this contract is in full force and effect, shall have been received at said office in Hartford, Conn., or if the said Assured be not then living the said sum insured shall be payable as above to her children or to their guardian, if under age; any balance of the year's premium when not all paid at the beginning of the year, and any other indebtedness to this Company, on account of this Policy being first deducted therefrom.

In Witness Whereof, The said Connecticut Mutual Life Insurance Company have, by their President and Secretary signed and delivered this Contract, in the City of Hartford, State of Connecticut, this fourth day of March, A. D. one thousand, eight hundred and seventy-nine.

JACOB L. GREEN, President.

D. H. WELLS, Ass't Secretary.

Wife. Ann. Life.

This policy is issued and accepted upon the following express conditions and agreements, referred to on the first page and made a part of this contract.

1st. That the contract between this company and the insured is wholly expressed and contained in this policy, and the application therefor, which is a part of said contract, and a copy whereof is hereto annexed, and that the several answers contained in or endorsed upon the said application are warranted by the insured and assured to be true in all respects, and that if this policy has been obtained by or through any fraud, misrepresentation, evasion, or concealment, then the same shall be absolutely null and void; and further, that no statement or declaration made to any agent, solicitor, canvasser, examiner or any other person, and not contained in said application shall be taken or considered as having been made to or brought to the notice or knowledge of this company, and this

company shall be held and considered as having no notice or knowledge of such statement or declaration, and as having no liability by reason thereof; and the said application, a copy of which is hereto annexed, shall be taken and held to be and to contain the only answers or statements, or declarations made to this Company in behalf of this insurance.

Payment of Premiums.

2d. That this Policy shall not be in force and binding on this Company until the advance premium hereon shall
239 have been actually paid, during the life-time of the insured; and that if any subsequent premium, or instalment of premium, on this policy be not paid when due then this policy shall cease and determine, and become and be null and void; and this company shall not be liable for the payment of the sum insured herein, nor of any part thereof; and that no premium on this policy shall be considered as paid unless a receipt shall be given therefor, signed by the President or Secretary of the Company; and such receipt is the sole evidence of the authority of any agent to receive any premium on account of this policy.

Residence, Travel, Occupation, Duelling, Violation of Law.

3d. That the said insured, is under this policy, freely permitted to reside in any civilized abode in the Western Hemisphere lying north of the thirty-second parallel of north latitude, and in the United States lying south of said thirty-second parallel (excepting from the first day of July to the first day of November) and in the Eastern Hemisphere lying north of the forty second parallel of north latitude, and west of the fortieth meridian of longitude east from Greenwich; and he may also pass as a passenger by usual routes, and means of public conveyance, to and from any port or place within the foregoing limits; but if he shall, at any time, during the continuance of this policy pass beyond or be without the foregoing limits; or shall be personally engaged in making any aeronautic voyage or excursion, or in blasting, mining, or in any submarine operations, or in the manufacture, handling, use, custody or transportation of highly inflammable or explosive substances, or as an employe in any capacity upon service on any ocean, sea, sound, inlet, river, lake or railroad, or if he shall enter into any military or naval service, whatsoever, whether voluntarily or otherwise, (the militia when not in actual service alone excepted), or become or be a member of any paid fire department, without the consent of this company previously given in writing, in each and every of the foregoing cases this Policy shall be and become null and void; and further, if he shall die in

consequence of a duel; (or in the violation of any law, or in consequence thereof; or if he shall be convicted of felony; then and in each and every of the foregoing cases, this policy shall become and be null and void.

Suicide.

4th. That the self-destruction of the Insured, whether voluntary or involuntary, and whether he be sane or insane at the time thereof, is not a risk assumed by this Company under this contract; but in every such case, the Company will pay in manner and form as hereinbefore provided, only the then net reserve upon this Policy, according to the Combined Experience Table of Mortality, assuming four percentum compound interest, deducting therefrom any indebtedness on account of this policy, and shall not be deemed or held liable for any greater sum or payment; and the payment of said sum shall be a full discharge of all liability by reason of this contract.

Intemperance and Delirium Tremens.

5th. That if the Insured shall die in a state of drunkenness, or from any disease in any degree produced by or resulting from the occasional or habitual use of alcoholic or narcotic stimulants, or shall thereby injure or impair his health, whether permanently or temporarily, or shall die from any accident or violence received while in a state of intoxication, or in consequence thereof, or shall have delirium tremens then, and in each and every of the foregoing cases, this Policy shall become and be null and void.

240 Assignments.

6th. That no assignment of this policy shall be valid; but the Company shall have power, but at its own discretion, to accept a surrender and discharge of the same by the Assured.

Paid-up Insurance.

7th. That if, after the payment of three or more full Annual Premiums upon this policy, the same shall cease and determine by default in the payment of any subsequent premium when due, then this Company will grant a paid-up Policy, payable as above, for an amount to be determined as follows: from the net reserve on account of this Policy at the time of such default, there shall be deducted any indebtedness on account of this policy, and in addition, the difference for the year following such default, between the normal cost of insurance under this Policy and the normal cost of insurance under the paid-up Policy to be issued; the computations to be based upon the actuaries' or Combined Experience Table of Mortality and

four per centum compound interest; the remainder of said reserve shall be used as a single premium for paid-up insurance, at the then present age of the [Insurance] according to the published single premium tables of this Company: Provided, that this policy shall be released and surrendered to and received by this Company, and written application made for such paid-up Policy during the lifetime of the said Insured, and within one year after default in the payment of Premium hereon shall first be made.

Forfeiture of Premiums.

8th. That in every case in which this policy shall cease and determine, or shall become and be null and void, all premiums paid and moneys or credits held on account of the same shall be forfeited to this Company.

Authority of Agents.

9th. That Agents of the Company have no power or authority to make, alter, change or modify any of the terms, conditions or agreements of this Policy, or to waive forfeitures thereof; and no alteration, change, modification, waiver, or subsequent agreement whatever respecting this Policy shall be binding on said Company unless made in writing signed by the Executive officers thereof.

Premium Credit.

10th. That the sum of ..... dollars of the first annual premium hereon is acknowledged as an indebtedness against this Policy, with interest at six per cent per annum payable annually, until paid, and that said indebtedness, unless sooner demanded, shall be due and payable at the maturity or other settlement of this policy.

(Page 3 of the policy is a copy of the application by John W. Hillmon to the Connecticut Mutual Life Ins. Co. of Hartford, Conn., for a policy of insurance, dated 24th day of February, 1879, which is marked Ex. 8. M. L. J. and is set out in full elsewhere in this bill of exceptions.)

241 (On the back.)

No. 153,614.

Term of Life. Annual Premiums.

The Connecticut Mutual Life Insurance Company.

Sum insured, $5,000. On the life of

John W. Hillmon.

Annual premium, $116.45-100.

The Annual Premium on this Policy is due and payable on the Fourth day of March.

Form B. Ex'd. by J.

242 Plaintiff then offered in evidence the policy of insurance issued by the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, to John W. Hillmon, and the endorsements thereon; said policy being the policy sued on in the action against that company. Said policy is attached to the plaintiff's petition in that action, and marked "Ex. 3, M. L. J." and a copy is hereto attached.

To the introduction of which said policy the defendant, the Mutual Life Insurance Company of New York, objected on the ground that the same is incompetent, and irrelevant as against the said Mutual Life Insurance Company of New York.

Objection overruled, the defendants, and each of them, duly excepting.

Mr. Barker: When an objection is overruled, I suppose an exception will be saved without stating it each time.

The Court: So far as the rulings of the Court upon objections to testimony are concerned, they may be considered as being excepted to without the formal exception being made.

Mr. Barker: When there is an adverse ruling?

The Court: That statement, however, applies only to rulings on objections to testimony or evidence.

Mr. Atwood: That applies to both sides, of course?

The Court: Yes.

Mr. Ware: Then the stenographer can be instructed to make them as we go along?

The Court: Yes; but as to anything else, counsel will have to note their exceptions at the time.

Mr. Green: I desire to make the same exception to the introduction of the Mutual Life policy as is now made to the Connecticut Mutual policy.

The Court: It will do just as well to make that objection when you come to something later. The Mutual Life
243 policy was offered and read without objection, and I don't care at this time to have the stenographer go back and interpolate an objection that was not made. The point can be preserved later on just as well as now.

Said policy, Exhibit 3 was then read in evidence over the objection of the defendant, the Mutual Life Insurance Company of New York. Being attached to plaintiff's petition, it is not here set forth.

Mr. Green: We wish to have it understood that when an objection is made by one of the companies, the record will show that it is made by both companies; so that, when Mr. Barker, representing the Mutual Life, states an objection, it will apply to both companies, and we need not arise and make the objection for the other company.

The Court: Counsel's suggestion is very proper, and it may be stated now that whenever any counsel for the defendants make an objection without specifying that it is made especially in the interest of one defendant, it shall be considered as having been made in the interests of both defendants.

All papers, documents, records, books, pictures, cast of teeth and other objects, which are referred to by witnesses in the testimony set forth in this bill of exceptions, as exhibits, bearing marks of identification either figures or letters, or figures and letters, were offered and received in evidence, and are set forth herein, save the plaster cast of the teeth of the cadaver, which will be transmitted with the record to the Court of Appeals.

244 Sallie E. Smith, called as a witness in her own behalf, being duly sworn, was examined in chief by Mr. Wheat, and testified as follows:

Q. What is your name? A. Sallie E. Smith.
Q. State what your name was when this suit was brought?
A. Sallie E. Hillmon.
Q. You have been married since then?

Mr. Barker: We object to that on the ground that it is incompetent, irrelevant, and simply self-serving testimony.

The Court: I will instruct the jury that the fact that Mrs. Hillmon remarried since the commencement of these suits is not evidence of the death of John W. Hillmon, and the jury will not so consider it. With that statement, the objection is overruled, and the witness may answer.

To which ruling of the Court the defendants and each of them at the time duly excepted and still except.

A. Yes, sir.
Q. Whom did you marry?
Same objection as last about.

The Court: The same ruling with the same admonition to the jury.

To which ruling the defendants and each of them at the time duly excepted and still except.

A. James C. Smith.
Q. State whether that was since both of these suits were commenced? A. Yes, sir.
Q. Look at this Connecticut Mutual policy and state from whom you received it?

Mr. Barker: To that and to all the testimony of this witness concerning the Connecticut Mutual, we interpose an ob-

jection on behalf of the Mutual Life of New York, that it is wholly incompetent and irrelevant.

Objection overruled, to which ruling the defendant,
245 The Mutual Life Insurance Company of New York, duly excepted and still excepts.

A. I received this of Mr. Selig.
Q. What are his initials? A. A. L. Selig.
Q. State whether you know his signature or not? Did you ever see him write? A. Yes, sir.
Q. State whether you know his signature?
A. I think I do.
The Court: A little louder.
Witness: Yes, I know his handwriting—his signature.
Q. State whose handwriting that is, the "A. L. Selig" on this policy there? State whether that is his handwriting there? A. . Yes, sir; I think it is.
Q. State whose signature this is to this receipt?
A. A. L. Seelig's.
Q. The same man? A. Yes, sir.
Q. And from him you received this policy?
A. I did; yes, sir.
Q. State whether he said anything to you at the time you received that policy? Where was it rather that you received that policy from him, whether it was at his office or not.

Mr. Barker: The Mutual Life company objects on the ground that the same is wholly incompetent, irrelevant and hearsay as to that company.
Objection overruled, defendant Mutual Life Insurance Company of New York excepting.

Mr. Isham: I object on another ground on behalf of the Connecticut Mutual, that it must be shown that this man Seelig was an agent having at the time authority to issue that policy.
Objection overruled, defendant Connecticut Mutual Life Insurance Company excepting.

A. I received that policy at Mr. Selig's office on Massachusetts street in Lawrence, Kansas.
Q. State what day it was as nearly as you can?
A. On the 15th day of March, 1879.
246 Q. State whether he said anything at the time on the subject as to whether the premium had been paid or not?

The Court: That was the question you asked before the ruling was made to these various objections.
Mr. Barker. That is what I understood.

Q. Answer that question?
A. He told me that the premium had been paid.
Q. Now with reference to a part of that, state whose signature that is (indicating to witness)—whose writing you think that is, "A. L. Selig" on that paper?
A. It is his handwriting.

Mr. Wheat: We offer that in evidence.
Same is marked Exhibit 4.

Mr. Barker: We make the same objection on behalf of the Mutual Life of New York, that it is incompetent and irrelevant against that company.
Objection overruled, defendant excepting.

Counsel for defendant reads said exhibit to the jury, the same being in the words and figures as follows:

$60.70 Lawrence, Kan., Dec. 12, 1878.

Received of J. W. Hillmon sixty and 70-100 Dollars to be credited to the account of insurance $5000 in Conn. Mutual Life Ins. Co. this amount to be returned if application is not accepted. A. L. SELIG.

247 Q. State whether he delivered that to you at the same time he delivered the policy or not, and whether you saw it at that time or not, and when you first found that piece of paper and where?
A. Some time after I received this policy I found this receipt in it.
Q. Found the receipt?
A. Yes I found the receipt in the policy.
Q. You didn't see it at the time?
A. No I didn't see it; I didn't open the policy at the time I received it.
Q. What did you do with it—carry it home?
A. Yes I took it home and put it away.
Q. And then afterwards you found that particular piece of paper in it? A. Yes.
Q. In that same policy? A. Yes.

Cross-examination waived.
Witness excused.

248 Sallie E. Smith, recalled on her own behalf, during the examination of J. W. Green, testified as follows:

Q. To this application made the 4th day of December, 1878, can you tell me whose signature that is?
A. Yes sir; that is John W. Hillmon's.
Q. Written by whom? A. By John W. Hillmon.
Q. Your husband? A. Yes sir.

Q. I will ask you who wrote the signature "Sallie E. Hillmon by John W. Hillmon" and then "John W. Hillmon" below it. Who wrote those signatures on this application which appears to be dated the 4th of December, 1878?

A. That is John W. Hillmon's.

Q. John W. Hillmon wrote it? A. Yes sir.

Q. You think that is his handwriting? A. Yes sir.

Q. State who wrote each of those signatures on the side of those applications? A. John W. Hillmon.

Q. Your husband? A. Yes sir.

Q. State who wrote the signatures "Sallie E. Hillmon by John W. Hillmon" and then "John W. Hillmon" below that on this application dated the 24th of February 1879. This is exhibit 8. A. John W. Hillmon.

Q. You know his handwriting do you? A. Yes sir.

Q. Now look at the signature "Sallie E. Hillmon by John W. Hillmon" and "John W. Hillmon" on this application dated the 24th of December, 1878?

A. Yes sir that is John W. Hillmon's signature.

Q. This signature, "A. L. Selig" on each of these applications on the same page where John W. Hillmon did the writing that you spoke of on three of these applications. Who wrote that "A. L. Selig?" A. A. L. Selig wrote them.

Q. And the same as to these two here?

A. Yes sir, A. L. Selig those are his signatures on both of these.

249 Q. Is that the same A. L. Selig that handed you the policies? A. Yes sir the same man.

Q. The same Seelig that wrote this signature?

A. Yes sir.

Q. That is his handwriting? A. Yes sir.

* * * * * * * *

Q. State who wrote that signature "John Wesley Hillmon" if you know? A. No answer, question not pressed.

* * * * * * * *

Q. I will ask you with reference to this signature, "Sallie E. Hillmon by John W. Hillmon" and below "John Wesley Hillmon"—who wrote this signature?

A. Those are his signatures (referring to application dated December 5th, 1878.)

Q. That was written by John W. Hillmon?

A. Yes sir.

Witness excused.

250 James W. Green, a witness produced by the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Mr. L. B. Wheat, counsel for the plaintiff, testified as follows, to wit:

Q. What is your name? A. James W. Green.
Q. Where do you reside?
A. I reside at Lawrence, Kansas.
Q. You have been present as an attorney for these defendants, all or some of them, at every trial of these cases, have you not? A. I have.
Q. You have had possession of these applications during all the years of the pendency of these suits, have you not?
A. I have.
Q. When did you receive those applications in those two companies, the Connecticut Mutual and the Mutual Life, as near as you can tell? A. Prior to the first suit.
Q. Prior to the first trial? A. Yes.
Q. Prior to 1882? A. Yes.
Q. And you have had possession of them ever since except when they would be in the court room and somebody else—
A. I have been custodian of those papers ever since, excepting when I have handed them at various times to the attorneys for the plaintiff, and also to the attorneys for the defendants.
Q. That would be just temporarily, at the times of the trial of the cases, would it not? A. Yes sir.
Q. For the purposes of the trial?
A. During the trial of the case.
Q. Now, will you produce the application to the Connecticut Mutual, the first application to the Connecticut Mutual?
A. Can you give me the date of it?
Q. The last one is dated the 24th of February, I think.
[—] No sir; I can't give you the date of it, the first one. I think there is two.

By Mr. Atwood: Ask for both of them.
Q. Yes; let me have both of them. Let me have all that you have in the Connecticut Mutual—all the applications to the Connecticut Mutual.
A. There are four (handing same to counsel.)
Q. Four? A. Yes.
Q. From whom did you receive these several applications you have handed me, these four?
A. I received them from the Connecticut Mutual Life Insurance Company.
Q. State if you know J. H. Stewart, M. D.
A. Yes, I know a doctor by that name; he formerly resided in Lawrence.
Q. Where does he reside now?
A. He resides now at Minneapolis, Minnesota.
Q. Where is he at this present time? A. I can't tell.
Q. He resides at Minneapolis, Minnesota? A. Yes sir.
Q. State when you last saw him.

A. The last time I saw him was the date of the last trial of this case; I wouldn't want to swear as to just what that date was.

251 Q. Supposing that was in March, 1896, the first part of 1896; the record will show that?

A. Yes, whatever the date is; that would be my recollection.

Q. He was present at the trial at Topeka?

A. It was about that time. He was present at the trial at Topeka.

Q. State if you know where he left to go to when he left there; or did he leave. A. He left to go to Lawrence.

Q. Did you see him afterwards? A. I did not.

Q. State whether he intended to go back to Minneapolis or not; or do you know?

A. Yes; after stopping in Lawrence for a day or so he informed me he intended to go back to Minneapolis.

Q. Have you seen him in Lawrence since? A. No, sir.

Q. Have you been residing there ever since? A. Yes, sir.

Q. You would have seen him if he had been there, in all probability?

A. The probabilities are that I would.

Q. Have you heard from him in Minneapolis yourself recently? A. Yes, I have.

Q. Received letters from him in Minneapolis. Within how long a time?

A. Oh, I had a letter from Dr. Stewart within the last two weeks.

Q. State whether he had been a witness in these cases on every trial thereof? A. He has.

Q. All five trials? A. Yes, sir.

Q. State whether or not on those trials he stated who wrote that five feet eleven in this particular application dated the 4th day of December, 1878.

Counsel for the defendant objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which ruling the defendant at the time duly excepted.

A. My recollection is that he testified that he wrote the figures "5" and "11."

Q. Do you remember who the doctor was for the Mutual Life company?

A. Miller, I think.

Q. The four applications were then marked respectively Exhibits 5, 6, 7 and 8.

Q. Now, with reference to all four of these applications, I will ask you whether at the trial in 1882 in this court—these two cases were tried at the same time? A. Yes, sir.

Q. Whether, at the trial of these two cases which took place in June and July, 1882, Dr. J. H. Stewart testified as to who wrote the five feet eleven in those policies?

Counsel for the defendant objects to the question because the same is incompetent, irrelevant and immaterial. The Court overruled the objection to which ruling the defendant at the time duly excepted.

A. I don't remember whether all four of those applications were admitted in evidence at that time. I may say that my recollection is that sometimes all four have been admitted in evidence, and at other times they have not.

252 Q. This application where "J. H. Stewart, M. D." is written and dated the 25th day of February, 1879, hasn't that been introduced in evidence at every trial?

A. I wouldn't want to say that my recollection serves me well enough to so state. I presume this one has.

[A.] Isn't that your best recollection?

A. That would be my best recollection.

Q. That that one has? A. Yes.

Q. I will ask you whether at those three trials—the trial in 1882, the trial in 1885 and the trial in 1888—this Doctor Stewart we are talking of testified who wrote the "5 feet 11" in that application?

Counsel for the defendant object to the question because the same is incompetent, irrelevant and immaterial. The Court overruled the objection, to which ruling of the Court the defendant at the time duly excepted.

A. I can only answer that by saying that if this application was admitted in evidence at each of those three trials, Doctor Stewart said that he wrote the figures "5" and "11."

Q. State whether or not he stated that with reference to every one of these applications at those three trials.

Counsel for the defendant objects to the question because the same is incompetent, irrelevant and immaterial. The Court overuled the objection, to which action the defendant at the time duly excepted.

Q. That was introduced at those three trials?

By the Court:

When you say "stated" you mean testified as a witness?

By Mr. Wheat:

Yes, I mean testified as a witness in the case.

A. Yes, sir.

Q. As to each one of these applications to the Connecticut Mutual, he testified that the 5 feet 11 was written by him—each one that was introduced? A. Yes, sir.

Q. With reference to these other three applications, other than this one dated—part of it signed by Hillmon on the 24th of February and part of it signed by Stewart on the 25th of February, 1879, I will ask you whether at the last trial Doctor Stewart didn't testify as to the five feet eleven in the other three applications—that he wrote the "5 feet 11" in each of them?

Counsel for the defendant objects to the question because the same is incompetent, irrelevant and immaterial. The Court overruled the objection, to which ruling the defendant at the time duly excepted.

A. That would be my recollection.

Q. That he did?

A. It would be my recollection that those three were offered—at least those three were offered at the last trial.

Q. Well, the other one was offered, too, at the last trial?

A. Well, I don't remember.

Q. Well, that don't matter. You do remember that these other three were? A. Yes.

Q. And he said he wrote the 5 feet 11 in them, these applications? A. Yes, sir.

253 By Mr. Wheat: Now I offer all four of these applications, and draw particular attention to the height given in each.

By the Court: Do I understand you to say that the one which is dated the 24th and 25th of February was used in evidence at some one trial or other?

Witness: That was used at each of the trials.

By the Court: The last one was?

Witness. The last one.

By the Court: And that Doctor Stewart testified with reference to having written those figures in? A. Yes, sir.

Q. By Mr. Wheat: I understand you to say that previous to the trial in 1895, before Judge Thomas, that he swore that he wrote the five feet eleven in this application dated the 25th of February?

A. My recollection is that that application has been introduced in evidence at each of the trials of this case.

Q. And that he testified at the first three trials that he wrote the five feet eleven in it?

A. He testified that he—

Q. (Interrupting.) I am now speaking of the trials of 1888, '85 and '82?

A. The first three trials he testified that he wrote the figures "5" feet "11."

Q. That he wrote them? A. Yes, sir.

Q. Where it refers to the height? A. Yes.

Q. I will ask you if at that trial in 1895, before Judge Thomas, if you didn't produce this application where the doctor's signature is dated the 25th of February, 1879, deliver it to me in the court-house at Topeka during the trial of these cases and I offered it in evidence and read it there as five feet eleven, the height?

A. Well, I won't say that my recollection serves me so well that you were the one that offered it, but that would be my best recollection and that it was read in evidence there as five feet eleven.

Q. That is, on the trial in 1895?

A. That was the "Thomas" trial.

Q. Now state whether or not, by examining carefully, you can see that there has probably been some scratching done around the "11" in this application, the one dated the 25th of February?

A. Yes; it is very evident that there has been some scratching done there.

Q. Around the "11"? A. Yes.

Q. Now I will ask you whether anything was ever said or noticed, so far as you know, by anybody with reference to any scratching around that "11" until some days after that paper had been read in evidence at that trial in 1895, the fourth trial? A. Not that I know of.

Q. State whether you ever heard of it, so far as you were concerned? A. No, sir, I never discovered it.

254 Q. Nothing ever said about it in the court-house?

A. Not to my recollection; no.

Q Not until he came on the stand; there was nothing ever said in the court-house about it until he came on the stand as a witness in that 1895 trial, was there? A. Never.

Q. It had alaways passed as five feet eleven up to that time?

Counsel for the defendant objects to the question because the same is incompetent, irrelevant and immaterial. The Court sustained the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

By Mr. Wheat: Now we offer these four applications in evidence.

Counsel for the defendant objects to the same as being incompetent, irrelevant and hearsay.

By the Court: Has the signature been identified as the signature of Hillmon?

By Mr. Wheat: No, sir.

By Mr. Hutchings: Mrs. Hillmon can prove the signatures.

Q. Now I will ask you, Mr. Green, if you have one or more applications in the Mutual Life Insurance Company?

A. I have one application in the Mutual Life Insurance Company.

Q. I will ask you to produce that?

(Witness hands same to counsel.)

Q. I notice that this one to the Mutual Life is badly torn. When you originally got it it was all one paper?

A. Yes; it has been worn out by frequent use.

Said paper is marked Exhibit 9.

Q. From whom did you receive this paper?

A. From the Mutual Life Insurance Company of New York.

Q. After these suits were brought?

A. After these suits were brought and before the first trial.

Q. You have had it ever since?

A. I have been the custodian of the paper ever since.

Q. Your name is signed to the answer as one of the attorneys in this case of the Mutual Life Insurance Company, isn't it? A. I believe it is, yes, sir.

Q. And you have had possession of this paper ever since, with the exception of—

A. (Interrupting.) With the exception of the times I have handed it to other parties for examination, attorneys on the opposite side and attorneys who were associated with me.

Q. Now I will ask you if this "5 feet 11 inches" hasn't been in there just as it is now ever since you first received it; if it wasn't there when you first received it and if it isn't now just as it was then?

255 A. I have never observed whether it was or not; I have never paid particular attention to it. I should say, yes.

Q. That application has been read at all five trials, hasn't it? A. Yes, sir.

Q. And that five feet eleven has been referred to at each of the trials as being in that application? A. Yes, sir.

Q. Each of the five trials? A. Yes, sir.

Q. Now, this "Amount of insurance in other companies" is just the same now as when you got it?

A. It is so far as I know.

Q. According to your recollection?

A. I haven't any recollection about it.

By Mr. Wheat: Now we offer this in evidence.

(Admitted as against defendant, Mutual Life Ins. Co.)

And in answer to Cross-Interrogatories propounded to him by Mr. G. J. Barker, counsel for the defendant, the witness testified as follows, to wit:

Q. Please give us the date of the application in the Mutual Life Insurance Company case?

A. It is dated the 5th day of December, 1878; that is the date, I think. I think there are two dates, December 4th and December 5th.

Q. Is that correct, December 5th, 1878?

A. It sems to be dated December 5th, 1878.

Q. Now, at the time Doctor Stewart testified that certain portions of that application were in his handwriting; for instance, the figures 5 and 11, did he state how those figures happened to be put in there? A. He did.

Q. You may go on and state what he said in regard to what source his information was received from wh[illegible]n was put in there?

A. He said he derived the information from John W. Hillmon.

Q. Did John W. Hillmon tell him at that time that that was his height—did he so testify? A. He so testified.

Q. Had Doctor Stewart at that time measured John W. Hillmon? A. He had not, he so stated.

Q. What did he testify in regard to whether he had at the time those figures were written in there measured John W. Hillmon or not?

A. He stated that he hadn't measured him at that time.

Q. Now, will you take up the applications in the Connecticut Mutual and give the date of the first application in the Connecticut Mutual—I mean the earliest dated one?

A. The earliest date is December 4th, 1878.

Q. At the time Doctor Stewart testified in regard to having written in the date of the first application, concerning the height, did he explain to the jury and testify how he came to write those in? A. He did.

Q. You may state what he said in regard to that?

A. He stated that he derived his information in this, as I remember, from John W. Hillmon.

Q. State whether at that he stated that he had
256 measured John W. Hillmon?

A. He stated that he had not that time.

Q. Now, will you give the date of the next application in the Connecticut Mutual? A. January 14th, 1879.

Q. Is there still one later than that?

A. That is the latest.

Q. I thought there were four applications made to the Connecticut Mutual?

A. There is another application of December 4th.

Q. Two applications of December 4th? A. Yes, sir.

Q. Now, in regard to the statement that was in the other application of December 4th, in regard to his height, did Doctor Stewart state how that happened to be in there?

A. He did.

Q. You may explain what he said in his testimony in regard to that matter.

A. He stated that he took the statement of John W. Hillmon, or he derived the information from John W. Hillmon; that he took his word.

Q. Now, in regard to those various applications, did Doctor Stewart testify that five feet, eleven inches and a fraction was not the height of John W. Hillmon?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial.

Q. At the time he testified that he wrote the figures in there on those occasions, did he also testify in regard to the height of John W. Hillmon?

Counsel for the plaintiff objects to the question as not being proper cross-examination. The Court sustained the objection to which action and ruling of the Court the defendant at the time duly excepted.

Q. I will ask you if Doctor Stewart did not testify at that same time that he afterwards measured John W. Hillmon and that instead of being five feet eleven inches and a fraction he was five feet nine inches high by actual measurement?

Counsel for the plaintiff objects to the question because the same is not proper cross-examination. The Court sustained the objection to which action and ruling of the Court the defendant at the time duly excepted.

Q. Now, I desire to call your attention to the last application, February 24th, I believe. Doctor Stewart testified in regard to that, did he? A. Yes, sir.

Q. You have already spoken about his having testified in regard to that. They have asked you about the custody of these various applications by you that is, in regard to your being the custodian of them. I will ask you if this application has ever been out of your possession, and if so when and for about how long and what was done with them, particularly at the various trials of this case?

A. At the very first trial of this case, and for several trials since then—I can't speak distinctly as to which of them—these papers or these applications that application was delivered to the attorneys for the plaintiff.

257 Q. Now, when you speak of that application, I wish you would designate by number and date or by the number of the exhibit what application you have reference to.

A. I have reference to the application dated the 24th day of February, 1879.

Q. Is that the application in which a change appears?

A. It is.

Q. I will ask you to state when if ever you ever discovered a change in that application and under what circumstances?

A. It was during the trial of this case at Topeka at which Judge Thomas presided. I was examining the application one evening at my room at the hotel. I was sitting under the gaslight and the light happened to strike in such a way that I discovered that the paper had been scratched and that there was an appearance of the figures having been changed.

Q. That was the first time you discovered that change?

A. The first time I ever discovered it.

Q. Now, did Doctor Stuart testify in regard to that change at the last trial?

A. The doctor said that the paper evidently had been changed and that they were not his figures, as I recollect.

Q. Did he state how it had been changed?

A. I don't remember that he did. He stated how it appeared to have been changed.

Q. How did he state it appeared to have been changed?

A. By changing the figure "9" to a figure "11."

Q. Was he asked at that time whether or not he made the change or knew of its having been made?

A. He was asked that.

Q. What did he say in regard to that matter?

A. He said he had never made the change.

Q. What did he say in regard to having had no knowledge of the change having been made?

A. He stated that the first he knew of it was at the time I discovered it in my room at the hotel at Topeka. He was present at that time.

Q. Did he state at that time how he originally wrote that height in this particular application?

A. I don't remember that he did.

Q. Did he state at that time that he had measured John W. Hillmon? A. He did.

Q. Excuse me; I didn't put that as I wanted to. Did he state at that time that before that time; that is, before the time of filling out this application in that particular, that he had measured John W. Hillmon? A. He did.

Q. Did he state at that time how much John W. Hillmon measured or what his measurement was? A. He did.

Q. You may state what he said the measurement of John W. Hillmon was. A. Five feet nine inches.

Q. I will ask you to state if he testified on that subject at every trial of this case? A. My recollection is that he did.

Q. Doctor Stewart has testified upon the question of the height of John W. Hillmon at every trial of this case since it has been pending?

258 A. My recollection is that he has.

Q. I will ask you if Doctor Stuart stated at each one of those trials what his actual height was.

A. If he testified at each trial, and I think he did, as to the actual height of John W. Hillmon, he testified that his height was five feet nine inches.

Q. Did he state how it happened that he came to measure John W. Hillmon?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial. The Court sustained the objection to which action and ruling of the Court the defendant at the time duly excepted.

Q. Do you remember of his stating when he first measured John W. Hillmon? A. I do.

Q. When did he state that he measured John W. Hillmon?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial. The Court sustained the objection to which action and ruling of the Court the defendant at the time duly excepted.

Q. You have stated you discovered the change in these figures at a certain time. I will ask you if you had any knowledge of those figures having been changed before that?

A. No sir.

Q. I will ask you if you ever assented to the changing of these figures? A. No sir.

Q. Or were they ever changed by you? A. No sir.

Q. My co-counsel desires me to ask how long these applications, and this particular application, were out of your hands at any time?

A. I can't give the length of time at any one time. I know they were out of my hands over night, but whether longer than that I don't remember.

Q. And when they were out of your hands for that length of time, in whose hands were they?

A. My recollection is that I gave them, at the first trial to Mr. Wheat, and that they were out of my hands over night at that time. I don't remember of having handed them to any other person than Mr. Wheat, he representing the other side and asking me for the papers.

Q. You say they have been out of your hands only on that one occasion?

A. Oh, no; they have been out of my hands at other times, but I don't have a distinct recollection of when or at what times.

Q. Do you recollect how long they were out of your hands on other occasions? A. Probably over night at times.

Q. And then they would be in the hands of the opposite side? A. Yes sir.

259 And in answer to redirect interrogatories propounded to him by Mr. L. R. Wheat, counsel for the plaintiff, the witness testified as follows, to wit:

Q. If I understood you right, in your examination in chief you testified—well, I will ask nothing about that. This was always treated and read as five feet eleven at those three first trials? A. Yes, always.

Q. Always read at the three first trials as five feet eleven in that particular policy—application? A. Yes—

Q. And that same application was always exhibited to Dr. Stuart every time he was a witness, wasn't it?

A. I think so.

Q. And I understand you that at the three first trials he stated in substance that the five feet eleven was written by him?

A. I think he did, but put it in a general way that he had made the entries. He was asked if he recollected who made the entries in that medical examination.

Q. Do I understand you to say that he explained at each trial how he came to put it in "5 feet 11" at each of these three first trials?

A. He explained how it must have been that he put it in in that way.

Q. Didn't he state how it was? Didn't he say he did it because Hillmon told him he was five feet eleven? A. No.

Q. Didn't he say that each time that Hillmon told him he was five feet eleven? A. No, not to my recollection.

Q. I understand you to say here on re-examination that Dr. Stewart swore that he wrote that in there because Hillmon told him he was five feet eleven?

A. If I did so state I didn't intend to so state.

Q. I thought you didn't; I wanted to give you a chance to correct that.

A. I don't think Dr. Stuart had anything to do with that.

Q. That is, the Mutual Life Insurance Company of New York? A. I stated it inadvertently, if I so stated.

Q. That is, over Theodore Wiseman's signature?

A. Possibly.

Q. And Miller's both?

A. I wouldn't say; I notice it purports to be signed by G. G. Miller.

Q. And isn't one of those heights signed by Theodore Wiseman too? A. Possibly.

Q. And John Eldridge's signature is there, too, isn't it?

A. I don't find Theodore Wiseman's here.

Q. I will ask you if underneath one of those "five feet eleven" in the medical examination, there is not the signature of Dr. Miller?

A. It is very badly torn and the name is nearly obliterated, but I should say that it was Miller's signature.

Q. The Miller that was medical examiner for the Mutual Life at that time, according to your understanding?

A. It is V. G. Miller, M. D.

Q. The Miller who gave testimony in this case sometimes?

260 A. Yes, he gave testimony in this case.

Q. Is he dead now or alive? A. He is dead.

Q. Now in the other place where it is five feet eleven and where the amount of the policy is given, I will ask you if that is not signed by Hillmon and by Theodore Wiseman both?

A. Yes.

Q. Theodore Wiseman was the agent, wasn't he, of the Mutual Life Insurance Company? A. I don't know.

Q. Isn't he the man that has been a witness here at the different trials?

A. He has been a witness here at different trials.

Q. It is the same Theodore Wiseman that has given evidence in this case?

A. Yes sir, the same Theodore Wiseman that has given evidence in this case.

Q. And the same Theodore Wiseman that you referred to in your opening statement? A. The same man.

Q. You only referred to one Wiseman? A. That is all.

Q. And that was this man whose name is signed to that?

A. Yes sir.

And in answer to recross-interrogatories propounded to him by Mr. Barker, counsel for the defendant, the witness testified as follows, to wit:

Q. You were asked by my friend on the other side if the height in these applications to the Connecticut Mutual had been treated as the height of Hillmon on these trials. I will ask you to state if, after Dr. Stuart discovered the mistake, they were so treated or considered—after Dr. Stuart discovered the mistake or the change in this application if there was any such matter considered?

A. I don't understand that the height of Hillmon was considered to be five feet eleven at any time.

By the Court: I don't understand that the witness has so testified; he simply testified that those figures there were considered as five feet eleven at the different trials.

Q. That is, they were so considered up to the time of the last trial when this change was discovered, was it not?

A. Yes sir.

Q. Now you have been asked in regard to Dr. Stuart explaining as to how these things happened to be written in. I will ask you if Dr. Stuart could ever explain or did ever explain how it happened to be five feet eleven in this last application, until he discovered the change?

A. He couldn't understand how that the figures five feet eleven were there, but he stated it must have been through inadvertence in taking the figures from the former applications.

Q. That was the statement of Dr. Stuart before discovering the change? A. Yes.

Q. That was the reason and the only excuse he could
261 give of its being in there? A. Yes.

Q. You have already stated before this last application was made, he had measured John W. Hillmon?

A. Yes, sir.

Q. And you have stated what his measurement was?

A. Yes sir.

Q. I don't know whether you have testified as to when that measurement took place.

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial.

The Court sustained the objection to which action and ruling of the Court the defendants and each of them at the time duly excepted.

Witness excused.

262 EX. No. 5. M. L. J. EX. H. C. H. N.

These blanks are to be filled at the Home Office.

No..... Age..... Yrs
Am't, $.....
Ann. Prem $..... H. $.....
Cr. Prem. $..... Ex. $.....
.....L. Term.....years, Table.....
.....P. Life, Table.....
.....P. End.....years, Table.....
.....
Policy dated.....187
Policy written by.....
Examined by.....

Agents must not fill the above blanks.

Approved.....

Application for Insurance in the Connecticut Mutual Life Insurance Co. of Hartford, Connecticut.

Statement of Particulars by the Person whose life is proposed for insurance, which forms a part of the Contract of Insurance.

1. Name of the person whose life is proposed for insurance?
Write the name in full.
John W. Hillman.
Occupation? To be stated specifically. Stock dealer.
Residence? Place, Lawrence County, Douglas State, Kansas.

2. A. How much insurance is desired? Ans. $5000. Five thousand dollars.

B. Is the policy to be for the term of Life? Ans. Yes. Or Endowment Insurance maturing at the end of....years (or on previous death)? Ans.....

C. Are the premiums to be payable during the whole term of the policy? Ans. Yes by Table..... Or are the premiums to be paid in full in....years. Ans. ....by Table .....

D. Is the premium to be paid annually or semi-annually? Ans. Semi-annually.

E. Is the premium to be paid in full in cash, or with part credit for the first year? Ans. In cash.

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3. A. When and where were you born? Ans. In Montgomery County, State or country, Indiana, On the 11th day of the month of January in the year 1848.

B. What will be your Age at next Birthday? Ans. Thirty-one years. Are you married? Ans. Yes. Or single? Ans.....

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4. Is there now any insurance on your life? Ans. Yes.

B. If in this Company, state the No. of Policy and amount. Ans. No....for $..... No....for $.....

C. If in other Companies, state the name of each Company and amount insured in each. Ans. New York Life Co. for $5000, in the.....Co. for $..... In the.....Co. for $..... In the.....Co. for $.....

D. Has any Company ever declined to grant insurance on your life? Ans. No. If so, what company and how long since. Ans.....

E. Has any opinion ever been sought from, or any consultation ever held with, any officer of any Life Insurance Company, or any Physician or Surgeon as to whether your life was safely insurable? Ans. Yes by Physician.

F. If so, was any decision or opinion given that you were or that you were not, safely insurable? Ans. Yes, that I was a good risk.

263 5. A. Have you ever resided out of the United States? A. Ans. No.

B. Or south of the southerly line of Tennessee? B. Ans. Yes.

C. If so, where and for what period? C. Ans.....

D. What diseases did you have during this period? D. Ans. None.

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6. A. Have you been successfully vaccinated? Ans. Yes.

B. What is the present state of your health? Ans. Very good.

7. Have you ever had any of the following diseases? Answer (Yes or No) opposite each.

Apoplexy? No. Diptheria? No. Fistula? No. Syphilis? No. Paralysis? No. Bronchitis? No. Piles? No. Rheumatism? No. Insanity? No. Spitting of blood? No. Affection of liver? No. Gout? No. Epilepsy? No. Habitual cough? No. Affection of spleen? No. Neuralgia? No. Habitual headache? No. Asthma? No. Fever and ague? No. Dropsy? No. Fits? No. Scarlet fever? No. Disease of the heart? No. Scrofula? No. Consumption? No. Dyspepsia? No. Palpitation? No. Smallpox? No. Pneumonia? No. Colic? No. Aneurism? No. Yellow fever? No. Pleurisy? No. Rupture? No. Disease of the urinary organs? No. Cancer or any tumor? No.

If you have a rupture state whether you habitually wear a truss.

State the number of attacks, character and duration of all the diseases which you have had.

8. Have you had any other illness, local disease or personal injury? And if so, of what nature? How long since? And what effect on general health? No

9. Is there now existing any disorder or any infirmity or weakness? No.

10. Are you, or have you ever been, addicted to the use of alcoholic beverages, opium or other stimulants? No.

State Your Family History.

11. No grandparents living, ages.....health.....all grandparents dead, ages....cause of death, unknown.

No father living, age....health....Father dead, age 42. cause of death, killed by rock falling on him in a mine.

No mother living, age....health.... Mother dead, age 34. cause of death, abscess.

2 Brothers living, ages, 26 & 33, health, good. No brothers dead, ages....cause of death.....

2 Sisters living, ages 24 and 28, health, Good. No sisters dead, ages....cause of death.....

12. A. Has any branch of your family been subject to insanity or to any pulmonary, scrofulous, or other hereditary disease? A. No.

B. Have your ancestors generally reached Old Age? B. Yes.

13. Are you now, or have you ever been, in any Military or Naval Service? If so, when, how long, and in what capacity? 1 year in Cavalry as a Private.

14. How long since you were attended by a physician? For what diseases? Give name and residence of such physician.....

Name and residence of your usual Medical Attendant. Have none. Has known me....years.

264 Name and residence of an intimate friend. John Eldridge, Lawrence Ks. Has known me 7 years.

15. Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in answer to the foregoing questions, and with which the officers of the Company ought to be made acquainted? No.

16. Have you reviewed the answers to the above questions and are you sure that they are correct? Yes.

17. For whose benefit is this Insurance to be effected? Write all names in full. Sallie E. Hillmon. Relationship to the Life insured. Wife. In case of endowment insurance, state here to whom the same is to be paid if the person insured survives the term.

It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and that no statements respecting the Physical Condition, Habits, Personal or Family History of the Person whose Life is proposed for Insurance, other than those above made, have been made to any Agent, Solicitor, Examiner, or other person, in behalf of the Company; and it is acknowledged and agreed by the undersigned that this Application shall form a part of the contract of Insurance, and that, if there be, in any of the Answers herein made, any untrue or evasive Statements, or any Misrepresentations or concealment of Facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the Company; And it is further declared by the undersigned that the party making this Application has an "Insurable interest" in the life above proposed for insurance, to the full amount above applied for.

Dated at Lawrence, Kansas, this Fourth day of December, 1878.

Witness to the signing hereof, A. L. SELIG.

Signature of the person or persons for whose benefit the Insurance is to be effected. (Write the name in full.)

SALLIE E. HILLMON.
By JOHN W. HILLMON.

Signature of the person whose life is proposed for insurance. (Write the names in full.) JOHN W. HILLMON.

Instructions as to signatures.—A husband may sign for his wife, thus: "Mary Jones by John Jones." When Insurance

is desired for the benefit of minor children, it should be signed, e. g. "John Jones as guardian (or trustee) for Anna B.. Lucy M. and Charles Jones, my children, or ("children of.....")

When the policy is taken in the person's own name, one signature is sufficient.

265 EX. No. 6. M. L. J. EX. E. C. H. N.

Application for Insurance in the Connecticut Mutual Life Insurance Co. of Hartford, Connecticut.

Statement of Particulars by the Person whose Life is proposed for Insurance, which forms a part of the contract of Insurance.

1 Name of the person whose life is proposed for Insurance. Write the name in full. John W. Hillmon. Occupation? To be stated specifically. Stock Dealer. Residence? Place, Lawrence, County, Douglas, State, Kansas.

2 A How much insurance is desired? Ans. $10000. Ten thousand dollars.

B Is the Policy to be for the Term of life? Ans. Yes, Or Endowment Insurance maturing at the end of .... years (or on previous death)? Ans....

C Are the premiums to be payable during the whole term of the Policy? Ans. Yes by Table .... Or are the premiums to be paid in full in .... years? Ans .... by Table .....

D Is the premium to be paid annually or semi-annually? Ans. Semi-annually.

E Is the premium to be paid in full in cash, or with part credit for the first year? Ans.....

3 A When and where were you born? Ans. In Montgomery County, State or country, Indiana, on the .... day of the month of ..... in the year 18..

B What will be your age at next birthday? Ans. thirty-one years. Are you Married? Ans. Yes. Or Single? Ans. .....

4 A Is there now any insurance on your life? Ans.....

B. If in this company, state the No. of Policy and Amount. Ans. No .... for $.... No. .... for $ .....

C If in other companies, state the name of each company, and amount insured in each. Ans. In the ..... Co. for .....$..... In the..... Co. for $..... And amount insured in each. In the..... Co. for $..... In the..... Co for $.....

D Has any company ever declined to grant Insurance on your life? Ans. No. If so, what company and how long since? Ans.....

E Has any opinion ever been sought from, or any consultation ever held with, any officer of any Life Insurance Com-

pany, or any physician or surgeon, as to whether your life wa
safely insurable? Ans. Yes, by Physician.

F If so, was any decision or opinion given that you we
or that you were not, safely insurable? Ans. Yes, I wa
safely insurable.

5 A Have you ever resided out of the United States?
Ans. No.

B Or south of the southerly line of Tennessee? B An
Yes.

C If so, where, and for what period? C Ans..... I
What diseases did you have during this period? D An
None.

6 A Have you been successfully vaccinated? Ans. Yes

B What is the present state of your health? Ans. Ver
good.

266 7 Have you ever had any of the following diseases
Answer Yes or No opposite each.

Apoplexy? No. Diphtheria? No. Fistula? No. Syp
ilis? No. Paralysis? No. Bronchitis? No. Piles? N
Rheumatism? No. Insanity? No. Spitting of Blood? N
Affection of Liver? No. Gout? No. Epilepsy? No. Habi
ual cough? No. Affection of Spleen? No. Neuralgia? N
Habitual Headache? No. Asthma? No. Fever and Ague
No. Dropsy? No. Fits? No. Scarlet Fever? No. Disea
of the heart? No. Scrofula? No. Consumption? No. Dy
pepsia? No. Palpitation? No. Small-pox? No. Pne
monia? N. Colic? No. Aneurism? No. Yellow Fever
No. Pleurisy? A No. Rupture? No. Disease of the U
nary Organs? No. Cancer or any tumor? No. If you hav
a rupture, state whether you habitually wear a truss?

State the number of attacks, character and duration of a
the diseases which you have had?

8 Have you had any other Illness, Local Disease or pe
sonal injury? And if so, of what nature? How long sinc
And what effect on general health? No.

9 Is there now existing any disorder, or any infirmity
weakness? No.

10 Are you, or have you ever been, addicted to the use
alcoholic beverages, opium or other stimulants? No.

State Your Family History.

11 No Grandparents living, ages ..... health ..... A
Grandparents dead, ages, all old, cause of death, unknown.

No father living, age .... health ..... Father dead, a
42, cause of death, killed by a rock falling on him in a mine.

No mother living, age .... health..... Mother dead, a
34, cause of death, abscess.

2 Brothers living, ages, 26 & 33, health Good. No brot
ers dead, ages ..... cause of death.....

2 Sisters living, ages 24 & 28, health Good. No sisters dead, ages ..... cause of death.....

12 A Has any branch of your family been subject to insanity? or to any Pulmonary, Scrofulous, or other Hereditary disease? A No.

B Have your ancestors generally reached Old age? B Yes, all over 60 years.

13. Are you now, or have you ever been, in any Military or Naval Service? If so, when, how long, and in what capacity? One year in Cavalry as a Private.

14. How long since you were attended by a physician? For what diseases? Give name and residence of such physician.....

Name and residence of your usual Medical Attendant. Have none. Has known me .... years.

Name and residence of an intimate friend. John Eldridge, Lawrence, Kans. Has known me 7 years.

15. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in answer to the foregoing questions, and with which the officers of the Company ought to be made acquainted? No.

16. Have you reviewed the answers to the above questions, and are you sure that they are correct? Yes.

17. For whose benefit is this insurance to be effected? Write all names in full. Sallie E. Hillmon.

267 Relationship to the Life insured. Wife. In case of Endowment Insurance, state here to whom the sum is to be paid if the person insured survives the term.

It is hereby declared and warranted that the above are fair and true Answers to the foregoing Questions; that no statements respecting the Physical Condition, Habits, Personal or Family History of the Person whose Life is proposed for Insurance, other than those above made, have been made to any Agent, Solicitor, Examiner or other person, in behalf of the Company; and it is acknowledged and agreed by the undersigned that this Application shall form a part of the Contract of Insurance, and that if there be, in any of the Answers herein made, any untrue or evasive Statements, or any misrepresentations or concealment of Facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the Company. And it is further declared by the undersigned, that the party making this Application has an "insurable interest" in the life above proposed for insurance, to the full amount above applied for.

Dated at Lawrence, Kansas, this fourth day of December, 1878.

Witness to the signing hereof.....

Signature of the person or persons for whose benefit the I surance is to be effected.

SALLIE E. HILLMON.

(Write the names in full) By JOHN W. HILLMON.

Signature of the person whose life is proposed for insu ance.

JOHN W. HILLMON.

Instructions as to signatures: A husband may sign for hi wife, thus: "Mary Jones by John Jones." When insuranc is desired for the benefit of minor children, it should b signed, e. g. "John Jones as guardian (or trustee) for Ann B., Lucy M., and Charles Jones, my children," or ("childre of.....")

When this policy is taken in the person's own name, on signature is sufficient.

268 Ex. No. 7. M. L. J. Ex. T. A. F. Ex. F. C. H. N

Declined.

Application for Insurance in the Connecticut Mutual Life In surance Co., of Hartford, Connecticut, which forms part of the Contract of Insurance.

1. Name of the person whose life is proposed for insurance Write the name in full. John W. Hillmon. Occupation? To be stated specifically. Stock dealer. Residence? Place Lawrence County, Douglas State, Kansas.

2 A. How much insurance is desired? Ans. $5000. Five thousand dollars.

B. What form of policy is desired? Ans. Ordinary Life

3. How are the premiums to be payable? Ans. Semi Annually.

4 A. When and where were you born? Ans. In Mont gomery County, State or country Indiana, on the eleventh day of the month of January in the year 1848.

B. What will be your age at next birthday? Ans. Thirty one years. Are you married or single? Ans. Married.

5 A. Is there now any insurance on your life? Ans. Yes.

B. If in this Company, state the No. of policy and amount. Ans. No. ..... for $..... No. ..... for $.....

C. If in other companies, state the name of each company and amount insured in each.

Ans. In the New York Life Co., for $5000. In the Mutual Life Ins. Co. of N. Y. for $10,000.00. In the ..... Co. for $..... In the .....Co. for $.....

D. Is any application or negotiation for insurance upon your life in any company now pending? Ans. No.

E. Has any Company ever declined to grant insurance

upon your life? Ans. No. If so, what company, how long since and for what cause.. Ans. .....

F. Has any opinion ever been sought from, or any consultation ever held, with any officer, agent or solicitor of any Life Insurance Company, or any physician or surgeon, as to whether your life was safely insurable? Ans. Yes, by physician.

G. If so, what decision or opinion was then given; that you were or that you were not safely insurable? Ans. That I was safely insurable.

6. Have you ever resided out of the United States? B. If so, where, and for what period? Ans. No.

C. Or south of the southerly line of Tennessee? Ans. Yes. D. What diseases did you have during that period? Ans. None.

7 A. What is the present state of your health? Ans. Very good.

B. Is there now existing any disease or disorder, infirmity or weakness? Ans. No.

C. Are you deaf or dumb or blind? Ans. No. D. Have you now, or have you ever had, any affection of hearing, speech or eyesight? Ans. No.

269 8. Have you ever had any of the following diseases? Answer Yes or No opposite each. Apoplexy? No. Pleurisy? No. Fistula? No. Gravel? No. Paralysis? No. Diphtheria? No. Abscess? No. Syphilis? No. Sunstroke? No. Bronchitis? No. Piles? No. Rheumatism?‡ No. Insanity? No. Spitting of blood? No. Affection of Liver? No. Gout? No. Epilepsy? No. Habitual Cough? No. Jaundice? No. Neuralgia? No. Dizziness or vertigo? A. No. Asthma? No. Affection of Spleen? No. Dropsy? No. Habitual Headache? No. Scarlet Fever? No. Fever and Ague? No. Scrofula? No. Fits? No. Dyspepsia? No. Disease of the Heart? No. Small-pox? No. Delirium Tremens? No. Chronic Diarrhea? No. Palpitation? No. Yellow Fever? No. Consumption? No. Colic? No. Aneurism? No. Cancer or any tumor? A. No. Pneumonia? No. Rupture?* No. Disease of the genital or urinary organs? No.

*If you have a rupture state whether you now wear a truss, and whether you agree to do so habitually? Ans .....

‡If you have had inflammatory rheumatism, state how many attacks, in what years, duration of such attacks, and whether they were accompanied by cough, shortness of breath, pain in the chest, or palpitation of the heart? Ans.....

State the number of attacks, character and duration of all the diseases you have had.

9. Have you had any other Illness,, Local Disease or Personal injury or malformation? If so, of what nature? How

long since? And what effect on general health? Ans. No.

10. When were you last successfully vaccinated? Ans. Never.

11. Have you ever made, and do you now make, habitual or occasional use of alcoholic or narcotic stimulants? Describe particularly your past and present habits in this respect. Ans. No.

State your family history

12. Paternal grandfather living, age, dead, health. Paternal grandfather dead, age, old cause of death unknown.

Paternal grandmother living, age, dead, health.....Paternal grandmother dead, age, old, cause of death unknown.

Maternal grandfather living, age, dead, health....Paternal grandfather dead, age, old, cause of death, unknown.

Maternal grandmother living, age dead, health....Maternal grandmother dead, age, old, cause of death unknown.

Father living, age, health....Father dead, age 42, cause of death, killed by rock falling on him in a mine.

Mother living, age, health....Mother dead, age 34, cause of death, abscess, she did not have anything like consumption.

Brothers living, 2, ages 26 & 33, health, very good. Brothers dead, none, ages....cause of death.....

Sisters living, 2, ages 24 & 28, health very good. Sisters dead, none, ages....cause of death.....

13. Have any of your grandparents, or any of their descendants, died or suffered from insanity, or any pulmonary, scrofulous or other hereditary disease? Ans. No.

14 A. Are you now, or have you ever been, in any military or naval service? If so, how long, and in what capacity? Ans. One year in cavalry as a private.

B. Have you ever applied for a pension? Ans. No.

15. How long since you were attended by a physician? For what diseases? Give name and residence of such physician? I have not been attended by a physician since I can remember.

Name and residence of your usual medical attendant? A. I have none. Has known me .... years.

Name and residence of an intimate friend. John
270 Eldridge Lawrence, Ks. Has known me 7 years.

16. Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted? Ans. No.

17. Have you reviewed the written answers to the above questions, and are you sure that they are correct and true? Ans. Yes.

18. For whose benefit is this insurance to be effected? Write all names in full. Sallie E. Hillmon. Relationship to

he life insured. Wife. In case of endowment insurance, tate here to whom the sum is to be paid if the person insured urvives the term.

It is hereby declared and warranted that the above are in ll respects fair and true answers to the foregoing questions; nd that no answers respecting any matter inquired of in said uestions other than those above made, have been made to any gent, solicitor, examiner or other person in behalf of the ompany; and it is acknowledged and agreed by the undersigned that this application and warranty are a part of the onsideration for and shall form a part of the contract of insurance; and that if there be, in any of the answers herein nade, any untruth, evasion, or concealment of facts, then any olicy granted upon this application shall be null and void; nd all payments made thereon shall be forfeited to the company. And it is further declared by the undersigned that he party making this application has an insurable interest in the life above proposed for insurance, to the full amount above applied for.

Dated at Lawrence, Kansas, this twenty-fourth day of December, 1878.

Witness to the signing hereof. A. L. Selig.

Signature of the person or persons for whose benefit the insurance is to be effected.

SALLIE E. HILLMON,
By JOHN W. HILLMON.

(Write the names in full.)

Signature of the person whose life is proposed for insurance.

JOHN W. HILLMON.

(Write the names in full.)

Indorsed upon the back: No. 7841. Life of John W. Hillmon. Connecticut Mutual Life Insurance Company of Hartford, Conn. (Coat of arms.) Rec'd Jan. 14th, 1879.

Questions to be answered by the medical examiner of the Connecticut Mutual Life Insurance Company, respecting Mr. John W. Hillmon, a person whose life is proposed for insurance in the sum of $5000, in an application bearing date the 24th day of December, 1878.

The medical examiner will please give an explicit answer to each of the following questions, and ask such others as he may deem proper, under the circumstances of the case, giving any information elicited thereby; and make the examination in all respects thorough, exact and circumstantial.

He should carefully read the accompanying application for

insurance before making the examination, and note any points in the same requiring special attention.

The certificate of the personal or family physician of the person examined is to be filled up and presented to the medical examiner if he considers it requisite.

Be particularly careful to ascertain whether the an-
271 swers to the questions in the application from the 4th to the 17th inclusive are correctly and understandingly given; if not, he should see that they are so given before proceeding with the examination.

The signature of the person examined is to be attached in the presence of the medical examiner.

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1. Description of the person examined. Height? 5 ft. 11 ins. Color? White. Weight? 166 lbs. Circumference of the chest? Under forced expiration, 37½ inches. Under forced inspiration, 41 inches. General appearance—healthy or unhealthy? Healthy. Figure? Erect. Temperament? Sanguine. Descended from what race? (As English, Scotch, etc.) Unknown. Other remarks.....

2. Is the person examined dumb, or deaf or blind (whether partially or wholly), or has he any natural or other infirmity or deformity? Ans. No.

3. Has his health been affected by any southern or foreign residence? Ans. No.

4. Is there any disease of the head, external or internal, as discharges at the ears, etc.? A. No.

Is there now, or has there ever been, any disease of the brain or nervous system, as indicated by vertigo, affected speech or vision, irregular action of muscles, paralysis, or by affection of any kind? Ans. No.

Are there now or have there ever been any indications of insanity, or any mental disorder, or any tendency thereto, either his own person or family history? Ans. No.

5. Has he any tendency to cough, catarrh, vitiated expectoration, spitting of blood, difficulty of breathing or disease of the throat? Ans. No.

6. How many inspirations are there in a minute? Ans. 16.

Is the respiration full, free, distinct and perfectly healthy in every part of both lungs? Ans. Yes.

Are the respiratory organs free from any suspicion of disease? Ans. Yes.

7. What are the rate, strength and volume of his pulse? Ans. 72-normal.

Is the heart's action uniform, free and unobstructed? Ans. Yes.

Are its sounds and impulses healthy? Ans. Yes.

Are the heart and blood vessels free from any indications of disease? Ans. Yes.

8. A. Has he now, or has he had, any disease of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs? Ans. No.

B. Are there any indications about the person that should make an examination of the urine desirable? Ans. No.

Blank for Examination of Urine to Be Used When Desirable.

Approximate quantity in 24 hours. Frequency of micturition. Color. Reaction and Sp. Gr. Albumen. Sugar. State whether any other abnormal element is suspected.

9. Has he a rupture? State the kind, and whether single or double, and whether reducible, and whether he wears a truss. No.

10. Has he experienced any injury? State what and its effects upon constitution and health. Ans. No.

11. Has he ever been affected by any constitutional disease? State what, and its effects upon his health. Ans. No.

12. Has he ever suffered any surgical operation? State what and from what cause, and its effect upon his constitution and health? No.

13. State ages and health of parents, if living; if dead, their ages and causes of death. Father killed in coal mine aged 42. Mother died of abscess at 34.

272 14. Is there any predisposition, whether hereditary or acquired, to any constitutional disease? State to what disease? Ans. No.

15. Do you believe him to be entirely free from any and every disease or disorder whatsoever? Ans. Yes.

16. Do you believe him to be strictly temperate and correct in his habits? Ans. Yes.

Are there any signs of present or former dissipation? Ans. No.

17. Do you consider him in all respects safely insurable? Ans. Yes.

John W. Hillmon. Signature of person examined to be attached in the presence of the medical examiner.

Date of above examination at (Place) Lawrence, Kansas, on the 24th day of December, 1878.

(Signed) J. H. STUART, M. D.,
Medical Examiner.

Where graduated, at Bellevue Hosp. Med. College.

When graduated, March 1st, 1867.

Indorsed in lead pencil on back: "Must be successfully vaccinated and so state."

"Want of vaccination."

273 Ex. No. 8. M. L. J. Ex. 7. C. H. N. Ex. 8. A. P. B. No. 12. O. P. S.

Copy of application written by.... Copy of application examined by... These blanks must be filled at the Home Office. No. 153614. Age 31 yrs. Am't, $5,000. Ann Prem. $116.45/100H. $60.55/100 Cr. Prem. $.....Ex. $..... A. P. Life Table, Form B. . P. End....Years, Table..... Policy dated March 4" 1879. Policy written by E Examined by.....	Application for insurance in the Connecticut Mutual Life Insurance Co. of Hartford, Connecticut, which forms a part of the contract of insurance. 1. Name of the person whose life is proposed for insurance? Write the name in full. John W. Hillmon. Occupation? To be stated specifically. Stock dealer. Residence? Place, Lawrence. County, Douglas. State, Kansas.

2 A. How much insurance is desired? Ans. $5000. Five thousand dollars.

B. What form of policy is desired? Ans. Ordinary life.

3. How are the premiums to be payable? Ans. Semi-annually.

4 A. When and where were you born? Ans. In Montgomery Co., State or Country, Indiana, on the 11th day of the month of January in the year 1848.

B. What will be your age at next birthday? Ans. 32 years. Are you married or single? Ans. Married.

5 A. Is there now any insurance on your life? Ans. Yes.

B. If in this company, state the No. of policy and amount. Ans. No. No. for $ .... No .... for $....

C. If in other companies, state the name of each company, and amount insured in each. Ans. In the New York Life Co. for $10,000.00; In the....Co. for $.....; In the Mutual Life N. York Co. for $10000.00. In the .....Co. for $.....

D. Is any application or negotiation for insurance upon your life in any company now pending? Ans. No.

E. Has any company ever declined to grant insurance upon your life? Ans. Yes. If so, what company, how long since and for what cause? Ans. Conn. Mutual, because I was not vaccinated.

F. Has any opinion ever been sought from, or any consultation ever held with, any officer, agent or solicitor of any life insurance company, or any physician or surgeon, as to

whether your life was safely insurable? Ans. Yes, with physician.

G. If so, what decision or opinion was then given; that you were or that you were not safely insurable? Ans. That I was safely insurable.

6 A. Have you ever resided out of the United States? B. If so, where and for what period? Ans. No.

C. Or south of the southerly line of Tennessee? Ans. Yes.

D. What diseases did you have during that period? Ans. None.

7 A. What is the present state of your health? Ans. Very good.

B. Is there now existing any disease or disorder, infirmity or weakness? Ans. No.

C. Are you deaf or dumb or blind? Ans. No. D. Have you now, or have you ever had, any affection of hearing, speech or eyesight? Ans. No.

274 8. Have you ever had any of the following diseases? Answer yes or no opposite each: Apoplexy? No. Pleurisy? No. Fistula? No. Gravel? No. Paralysis? No. Diphtheria? No. Abscess No. Syphilis? No. Sunstroke? No. Bronchitis? No. Piles? No. Rheumatism?† No. Insanity? No. Spitting of blood? No. Affection of liver? No. Gout? No. Epilepsy? No. Habitual cough? No. Jaundice? No. Neuralgia? No. Dizziness or vertigo? No. Asthma? No. Affection of spleen? No. Dropsy? No. Habitual headache? No. Scarlet fever? No. Fever and ague? No. Scrofula? No. Fits? No. Dyspepsia? No. Disease of the heart? No. Small-pox? No. Delirium tremens? No. Chronic diarrhea? No. Palpitation? No. Yellow fever? No. Consumption? No. Colic? No. Aneurism? No. Cancer or any tumor? No. Pneumonia? No. Rupture?* No. Disease of the genital urinary organs? No.

*If you have a rupture state whether you now wear a truss, and whether you agree to do so habitually? No rupture.

†If you have had inflammatory rheumatism, state how many attacks in what years, duration of such attacks, and whether they were accompanied by cough shortness of breath, pain in the chest, or palpitation of the heart? Ans. Have not.

State the number of attacks, character and duration of all the diseases which you have had.

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9. Have you had any other illness, local disease or personal injury or malformation? And if so, of what nature? How long since? And what effect on general health? Ans. No.

10. When were you last successfully vaccinated? Ans. February 20, 1879, by Dr. J. H. Stuart, Lawrence, Kans.

11. Have you ever made, and do you now make, habitual or occasional use of alcoholic or narcotic stimulants? Describe particularly your past and present habits in this respect. Ans. No.

State your family history.

12. Paternal grandfather living, age .... health ..... Paternal grandfather dead, age, old, cause of death, unknown.

Paternal grandmother living, age .... health ..... Paternal grandmother dead, age, old, cause of death, unknown.

Maternal grandfather living, age ....health .... Maternal grandfather dead, age, old cause of death, unknown.

Maternal grandmother living, age .... health .... Maternal grandmother dead, age, old, cause of death, unknown.

Father living, age .... health .... Father dead, age 42, cause of death, killed by a rock falling on him in a coal mine.

Mother living, age .... health .... Mother dead, age, 34, cause of death, abscess.

Brothers living, 2 ages 26 and 33, health good. Brothers dead, none, ages .... cause of death ....

Sisters living, 2, ages, 24 and 28, health, good. Sisters dead, none, ages .... cause of death.....

13. Have any of your grandparents or any of their descendants died or suffered from insanity, or any pulmonary, scrofulous or other hereditary disease? Ans. Not to my knowledge.

14. Are you now, or have you ever been, in any military or naval service? If so, how long, and in what capacity? Ans. One year in cavalry as private.

B. Have you ever applied for a pension? Ans. No.

15. How long since you were attended by a physician? For what diseases? Give name and residence of such physician. Have not been attended by physician since I can remember.

Name and residence of your usual medical attendant? Have none.

275 Has known me.....years.

Name and residence of an intimate friend. John Eldridge, Lawrence, Ks. Has known me 7 years.

16. Is there any fact relating to your physical condition, personal or family history or habits, which has not been stated in the answers to the foregoing questions, and with which the Company ought to be made acquainted? Ans. No.

17. Have you reviewed the written answers to the above questions, and are you sure that they are correct and true? Ans. Yes.

18. For whose benefit is this insurance to be effected? Write all names in full. Sallie E. Hillmon. Relationship to the life insured. Wife.

In case of endowment insurance, state here to whom the sum is to be paid if the person insured survives the term.

It is hereby declared and warranted that the above are in all respects fair and true answers to the foregoing questions; and that no answers respecting any matter inquired of in said questions, other than those above made, have been made to any agent, solicitor, examiner or other person in behalf of the company; and it is acknowledged and agreed by the undesigned that this application and warranty are a part of the consideration for, and shall form a part of the contract of insurance; and that if there be in any of the answers herein made any untruth, evasion or concealment of facts, then any policy granted upon this application shall be null and void; and all payments made thereon shall be forfeited to the company. And it is further declared by the undersigned, that the party making this application has an insurable interest in the life above proposed for insurance, to the full amount above applied for.

Dated at Lawrence, Kansas, this 24th day of February, 1879.

Witness to the signing hereof. A. L. Selig.

Signature of the person or persons for whose benefit the insurance is to be effected. (Write the names in full.)

SALLIE E. HILLMON, By JOHN W. HILLMON.

Signature of the person whose life is proposed for insurance. (Write the names in full.) JOHN W. HILLMON.

(Indorsed upon the back) No. 153614. Life of John W. Hillmon. Connecticut Mutual Life Insurance Company of Hartford, Conn.

(Coat of arms) Rec'd March 1st, 1879.

Questions to be answered by the Medical Examiner of the Connecticut Mutual Life Insurance Company, respecting Mr. John W. Hillmon a person whose life is proposed for insurance in the sum of $5000. in an application bearing date the 24th day of Feb. 1879.

The Medical Examiner will please give an explicit answer to each of the following questions, and ask such others as he may deem proper, under the circumstances of the case, giving any information elicited thereby; and make the examination in all respects thorough, exact and circumstantial.

He should carefully read the accompanying application for insurance before making the examination, and note any points in the same requiring special attention.

The certificate of the personal or family physician of the person examined is to be filled up and presented to the Medical Examiner, if he considers it requisite.

Be particularly careful to ascertain whether the an-
276 swers to the questions in the application, from the 4th to the 17th inclusive, are correctly and understandingly given; if not, he should see that they are so given before proceeding with the examination.

The signature of the person examined is to be attached in the presence of the Medical Examiner.

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1. Description of the person examined. Height? 5 ft. 11 in. Color? White. Weight? 166 lbs. Circumference of the Chest? Under forced expiration, 38 inches. Under forced inspiration, 41 inches. General appearance—healthy or unhealthy? Healthy. Figure? Erect. Temperament? Nervo-sanguine. Descended from what race? (as English, Scotch, etc.) Unknown. Other remarks.....

2. Is the person examined dumb or deaf, or blind (whether partially or wholly) or has he any natural or other infirmity or deformity? Ans. No.

3. Has his health been affected by any southern or foreign residence? Ans. No.

4. Is there any disease of the head, external or internal, as discharges at the ears, etc.? Ans. No.

Is there now, or has there ever been, any disease of the brain, or nervous system, as indicated by vertigo, affected speech or vision, irregular action of the muscles, paralysis or by affection of any kind? A. No.

Are there now, or have there ever been, any indications of insanity, or any mental disorder or any tendency thereto, either in his own person or family history? Ans. No.

5. Has he any tendency to cough, catarrh, vitiated expectoration, spiting of blood, difficulty of breathing, or disease of the throat? Ans. No.

6. How many inspirations are there in a minute? Ans. Sixteen.

Is the respiration full, free, distinct and perfectly healthy in every part of both lungs? Ans. Yes.

Are the respiratory organs free from any suspicion of disease? Ans. Yes.

7. What are the rate, strength and volume of his pulse? Ans. 65—normal.

Is the heart's action uniform, free and unobstructed? Ans. Yes.

Are its sounds and impulses healthy? Ans. Yes.

Are the heart and blood-vessels free from any indications of disease? Ans. Yes.

8 A. Has he now, or has he had, any disease of the stomach, liver, spleen, kidneys, intestinal canal, or urinary organs? Ans. No.

B. Are there any indications about the person that should make an examination of the urine desirable? Ans. No.

Blank for Examination of Urine, to be used when desirable. Approximate quantity in 24 hours. Frequency of micturition. Color. Reaction and Sp. Gr. Albumen. Sugar. State whether any other abnormal element is suspected.

277 9. Has he a rupture? State the kind, and whether single or double, and whether reducible, and whether he wears a truss? No.

10. Has he experienced any injury? State what, and its effects upon constitution and health? Ans. No.

11. Has he ever been affected by any constitutional disease? State what and its effects upon his health? Ans. No.

12. Has he ever suffered any surgical operation? State what and from what cause, and its effect upon his constitution and health. No.

13. State ages and health of parents, if living; if dead, their ages and causes of death? Father killed in a coal mine, aet. 42. Mother died of abscess, aged 34.

14. Is there any predisposition, whether hereditary or acquired, to any constitutional disease? State to what disease. Ans. No.

15. Do you believe him to be entirely free from any and every disease or disorder whatever? Ans. Yes.

16. Do you believe him to be strictly temperate and correct in his habits? Ans. Yes.

Are there any signs of present or former dissipation? Ans. No.

17. Do you consider him in all respects safely insurable? Ans. Yes.

John W. Hillmon. Signature of person examined to be attached in the presence of the Medical Examiner.

Date of above examination at (Place) Lawrence, Kans., on the 25th day of Feb. 1879.

(Signed) J. H. STUART, M. D., Medical Examiner.

Where graduated, Bellevue Hosp. Med., New York.
When graduated, March 1st, 1867.

278 Ex. No. 9. M. L. J. Ex. 6. C. H. N. Ex. 7. A. P. B.

Form A.

The particular attention of applicants is called to the installment feature which is explained in the company's documents.

W. R. G.

Application for Insurance in

The Mutual Life Insurance Company of New York, 140 to 146 Broadway, corner of Liberty Street, New York City.

The following questions will be answered by the person proposed for insurance. (Hillmon)

1. A. Give your full name. John W. Hillmon. Residence, Town, Lawrence, Kansas, county, Douglas, State, Kansas. Place of business. Lawrence, Kansas.

Occupation or employment; if more than one, state all. Trader in live stock. Former residence, if recently changed, Indiana. Former occupation if recently changed, Freighting on frontier.

In giving the occupation of the person, it is not sufficient to state, (for example) that he is a merchant or mechanic, but the particular branch of business, or the actual trade, must be specified.

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2. A. Give the name of the person for whose benefit the insurance is proposed. B. Residence. C. Post-office address. D. Relationship. E. State whether this person has an interest in the life proposed for insurance for the full amount applied for. F. Are you aware that the company will not be liable for insurance procured on any single life for over $30,000 (the prescribed limit).

A Sallie E. Hillmon. B. Lawrence, Kansas. C. Lawrence, Kansas. D. Wife. E. Yes. F. Yes.

3. A. Do you wish the policy made payable in one sum or in installments? One sum.

3 B. If in installments, how many?..... 3. C. Do you wish such installments to be annual, semi-annual, or quarterly? .....

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3. A. State the amount of insurance applied for. B. The kind of policy desired. C. Whether the premium is to be paid annually, semi-annually or quarterly. D. If for the benefit of the wife of the person proposed for insurance, state precisely whether it shall be paid to her children, to his children, or the children or the two, if she be not living at its maturity. E. If an endowment policy is applied for, state to whom it shall be paid in case of the death of the beneficiary before the maturity of the contract.

A. $10,000 00/100. B. Ordinary life. C. Semi-annually. D. Children of the two. E. .....

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4. A. State your place of birth. B. The date of birth. A. Indiana. B. 11th of January, 1848.

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5. A. What is your age at the nearest birthday? B. Weight? C. Height? D. Are you married? A. 31 years. B. 166 lbs. C. 5 ft. 11 inch. D. Yes.

279 6. A. Are you now insured in this company? B. If so, for how much? C. Give the number and amount of each policy? A. No. B. ..... C. ....

7. Is your life now insured in any other company? If yes, give the name of each company and the amount in each? No.

8. Have you made any proposal or opened a negotiation with any person for insurance upon your life in any company upon which a policy has not yet been issued? If so, give the name of each company, and the amount proposed in each. Yes, in New York Life, $10,000.00, Hartford, Conn. $5,000.00.

9. Are you engaged in the manufacture or sale of intoxicating drinks? Have you ever been so engaged? State full particulars. No. No.

Dated at Lawrence, Kansas this 5th day of Dec., 1878.

Signature of the person proposed for insurance.

John Wesley Hillmon.

In the presence of Theo. Wiseman.

Application—Form B.

Questions to the person proposed for insurance to be submitted to the Medical Examiner who will witness the signature thereto.

1. Are you the person described in question 1, Form A of this application? Are your full name, residence and the other particulars there mentioned, correctly answered and recorded? Have you carefully read the answers given in Form A, and is the signature thereto your own proper signature? Yes. Yes. Yes.

2. Has any application for insurance upon your life ever been made to any company upon which a policy has not been granted? Has any unfavorable opinion upon the insurableness of your life ever been given by a physician? In either case, state full particulars. Yes. No.

3. Are you now in good health? Have you always enjoyed good health? Yes. Yes.

4. Have you been subject to, or had any of the following disorders or diseases: Headaches, severe, frequent or protracted; loss of consciousness; dizziness; fits or convulsions;

paralysis; delirium tremens; sunstroke; apoplexy; insanity; habitual cough; asthma, bronchitis; pleurisy; inflammation of the lungs; spitting or coughing of blood; consumption or any form of trouble referable to the lungs; shortness of breath, palpitation of the heart, difficulty in swallowing or any other symptom indicating disease of the heart or neighboring vessels; dyspepsia, habitual constipation, chronic diarrhea, dysentery, bilious, renal or hepatic colic; hemorrhoids; any other disease of the stomach or bowels; jaundice, liver complaint of any form; yellow fever, dropsy, swelling of the feet, hands or eyelids; difficulty in urinating, excessive or scanty secretion of the urine, gravel or any symptom pointing to bladder or kidney trouble; any disease of the genital or urinary organs; syphilis, neuralgia, rheumatism, suppurating glands, general debility, gout, palsy, eruptions or disease of the skin; cancer, erysipelas, open sores, lumps or swellings of any kind, fistula, varicose veins. No.

5. Have you been subject to or had any difficulty with your eyesight or sense of hearing? No.

6. Has your weight recently increased or diminished? If so, to what extent, and how rapidly, and to what cause
280 do you attribute it? No.

7. Have you ever had inflammatory rheumatism? If so, how many attacks? In what years? Duration? How severe? Were they accompanied by cough, shortness of breath, pain in the chest, palpitation of the heart? No.

8. A Are you ruptured? B What form? Single or double? C Is it reducible? D. Is a suitable truss worn? A No. B. ..... C. ..... D. .....

9. A Have you ever had any malformation, or injury or undergone any surgical operation? B. If so, state fully its nature, duration and results? A. No. B. .....

10. Have you any predisposition, either hereditary or acquired, to any constitutional disease? (As consumption, rheumatism, syphilis, insanity?) No.

11. How long since you were successfully vaccinated? Never.

12. A. Describe fully your habit in regard to the personal use of alcohol or other stimulants, narcotics and tobacco. B. What has been your habit in this respect through life? Use no tobacco, use stimulants very moderate.

13. How long is it since you were attended by a physician or have professionally consulted one? For what disease? Give the name and residence of that physician. That of your usual medical adviser. Not since childhood and have no recollection of being attended at all. Have no physician.

14. State, so far as you know, what was the age at death, cause of death, duration of final illness, and state of previous health, of each of the following persons, if deceased. What is the age and present state of health of each of them, if now living?

	Age if Living.	Condition of Health.	Age at Death.	Cause of Death.	How Long Sick.	Previous Health.
Father...			42 yrs.....	Accident....	No time	Good....
Mother..			34 yrs.....	Abscess	About 7 or 8	
Brothers	24 yrs.....	Good....			years.....	Good....
2..	33 yrs.....	Good....				
Sisters...	27 yrs.....					
2.....	22 yrs.....					
Father's	mother....		Died old....	Old age.....	Don't know.	Good....
Father's	father.....		Died old....	Old age.....	Don't know.	Good....
Mother's	mother....		Don't know.	Don't know.	Don't know.	Good ...
Mother's	father.....		Don't know.	Don't know.	Don't know.	Good....

In giving the cause of death, avoid all indefinite terms, such as "General Debility," "Change of Life," "Fever," "Exposure," etc. If the word childbirth be used, how long after delivery did death occur, and were there any symptoms of disease of the chest, such as cough, expectoration, etc.

15. Have your grandparents, or any of their descendants, died or suffered from Consumption, Scrofula, Insanity, Gout, Rheumatism, or any pulmonary or hereditary disease? If so, what was the age of such person at death? His or her relationship to you? The cause of death? Answer in detail. No.

16. Do you resemble physically the paternal or maternal side of your family? Paternal.

17. Is there anything or has there ever been anything, in your physical condition, family or personal history or habits, tending to shorten your life, which is not distinctly set forth above? No, nothing.

281 (The following declaration and agreement must be signed by the person in whose favor a policy is applied for and by the person whose life is proposed for insurance.)

It is hereby declared and agreed that all the statements and answers to the printed questions written upon the forms A and B, which, together with this Declaration and Agreement, constitute an application to The Mutual Life Insurance Company of New York, for an insurance of the amount above mentioned upon the life of the person proposed for insurance above named, are offered to the said company as a consideration of the contract applied for; each of which statements and answers, whether written by his own hand or not, every person whose name is hereto subscribed, for himself and for every other person who may in any event have or claim any interest under the policy granted adopts as his own, admits

to be material, and warrants to be full, complete and true, and to be the only statements given to the company in reply to its inquiries, and upon which, should the insurance applied for be granted, the company's contract will be founded. And in consideration of the issuing of the policy applied for, the applicant hereby agrees that the question of intent or materiality shall not be raised in any action on said policy, and specifically waives the provisions of any law to the contrary. And this application is submitted to the said company, with the following express covenants and agreements: 1. That it will constitute no contract of insurance, until a policy shall first have been actually issued and delivered by the said company, after the payment in cash of the first premium thereon, during the continuance of the life proposed for insurance, in the same condition of health as described in the application. 2. That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy, and that in particular, no insurance shall be claimed to be thereby granted against death by self-destruction, nor shall any insurance thereby granted remain in force after health shall have been impaired by narcotics or alcoholic stimulants, or after the insured shall, without the consent of the company, in writing, signed by the President or Secretary, pass or remain beyond the limits of residence and travel, or engage in any of the occupations or employments, specified upon the company's form of policy; and that the entire contract contained in the said policy and in this application taken together shall be construed and interpreted, as a whole, and in each of its parts and obligations, only according to the Charter of the said company and the laws of the State of New York in force at the date thereof, the place of the contract being expressly agreed to be the principal office of the said company in the city of New York. 3. That all unwritten or verbal statements or information, if any, made or given by or on behalf of said applicant, at any time, in any way, to any person or persons whomsoever, or to said applicant by any person or persons whomsoever, and not by the applicant presented, in writing, to the officers of the company at its office in New York City, before the delivery of the policy, shall not be deemed notice to the company, or in any way affect the contract of insurance. 4. That in any distribution of surplus, the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest
282 under the contract now proposed; that no return of the premiums paid, or any portion thereof, or of a surrender

value, either in cash or in paid-up or other insurance, for said policy, or for additions made or claimed thereto, shall be made by, or claimed from the company under the laws of any of the United States now or hereafter enacted; and the said applicant, in consideration of the issuing of the policy applied for, hereby waives all benefit and advantage of any such law. 5. That any fraud or attempt at fraud on the part of any person interested or named in the said policy, by false swearing, production of false or fraudulent papers, simulated death, pretended accident, fraudulent disappearance, or otherwise, shall forfeit all claim on this company, and be a perpetual bar to any recovery under the policy. 6. That said person whose life is proposed for insurance is not now afflicted with any disease or disorder, and that he does not now, and that he will not, practice any pernicious habits that tend to the shortening of life; that the said company shall have the right at any time, if a policy shall be issued, to dispute the truth of the application, and the person accepting said policy hereby waives the benefit of any statute or statutes of limitation in conflict herewith.

I hereby declare that I have read the above declaration and agreement and the above questions and written answers, and that the answers as written are correct and true, and I hereby for myself, and for all others who may in any event have or claim any interest in the insurance hereby applied for, do request and authorize any physician or surgeon, having any knowledge or information, acquired professionally, or otherwise, touching the matters herein referred to, mentioned or involved, to disclose the same fully at any time, and from time to time at the instance of said company, hereby waiving any privilege whatsoever and howsoever connected therewith.

Dated at Lawrence, Kan., this 5th day of Dec., 1878, in the presence of V. G. Miller, M. D. Medical Examiner.

Signature of the applicant,

SALLIE E. HILLMON,
By JOHN W. HILLMON,

Signature of the person proposed for insurance,

JOHN WESLEY HILLMON.

A wife may sign by her husband, and children by their father, thus: Wife—Mary Smith by John Smith. Children—Ellen Brown, Thomas Brown, by William Brown.

Alteration of Policies. Changes in the manner of paying premiums (as from yearly to half-yearly or quarterly, or the reverse) can only be made at the end of a year, dating from the commencement of a policy; and when such a change is desired by a policy holder, the policy must be forwarded to the office of the company for the proper and requisite endorsement.

A change of interest in a policy can only be made on the written request of the legal owner of the policy, and with the consent of the company. The dates of payment cannot be changed after a policy has been issued, and the amount assured can only be increased (if desired) by a new policy. The fiscal (or business) year of the company closes on the 31st of December. A policy issued in any year must be dated within that year; it cannot be dated prior to the commencement, or subsequent to the close, of the fiscal year of the company.

Assignments. A wife cannot legally assign a policy issued under the married women's act for the benefit of herself and children. But see Special Notice to Applicants and Policy-holders as to policies issued subsequent to June 23d, 1873, printed on outside page.

283 This Company will not take notice of any assignment of this Policy until a duplicate or a certified copy thereof shall be delivered to the Company at its principal office; and under no circumstances will the Company assume any responsibility for the validity of such assignment. If any claim be made under an assignment, proof of interest to the extent of the claim will be inquired.

Extra Rates.—Permits are required for travel or residence beyond the limits assigned in the Policy, and for hazardous occupations; for which application must be made to the principal office. Extra rates, in such cases, are always charged, as a percentage on the amount assured, and not on the amount of premium. An Extra Rate of ½ of 1 per cent. is charged on the lives of Females until one year after they shall have safely passed the climacteric.

Receipts for Premiums, to be valid, must be issued from the office and be signed by the President or Secretary.

Form C. Medical Examiner's Report.

1. Give the name of the person examined. Do you know him to be the person upon whose life Insurance is asked in the Application, and the same person described in forms A & B? Are his residence and occupation there correctly stated? Yes. Yes. Name, John W. Hillmon.

2. Is the risk affected by anything in his residence or occupation? A. No.

3 A. Give his Weight. B. Height. C. Measure of Chest under clothing. D. At forced expiration. E. On full inspiration. F. Number of respiration per minute. G. Figure and general appearance. H. Measure of abdomen. I. Race. K. Describe color of Eyes and Hair, and any special marks of identification. A. 166 lb. B. 5 ft. 11 inch. C. 39 D. 38. E. 42. F. 17. G. Erect. H. 36. I. White. K. Dark Hair. Brown. None.

4 A. Is the Respiratory Murmur clear and distinct over both lungs? B. Is the character of the Respiration full, easy and regular? C. Is there entire absence of indications of Disease of the Organs of Respiration or their Appendages? A. Yes. B. Yes. C. Yes.

5 A. Is the character of the Heart's action uniform, Free and Steady? B. Are its Sounds and Rhythm Regular and Normal? C. Is there entire freedom from indications of Disease of this Organ or of the Blood-vessels? A. Yes. B. Yes. C. Yes.

6 A. State the Rate and other Qualities of the Pulse. B. Does it intermit? C. Is it Irregular or Unsteady? The rate of pulse must be written out in full. A. Sixty-eight. B. No. C. No.

7. Has the applicant ever had any affection of the Brain or Nervous System? Not.

8. Has the party ever had any serious illness, constitutional disease or injury, if so, state expressly. A. How long since? B. Its nature. C. Its duration? D. Whether any effect is perceptible upon the heart, lungs, kidneys, or other organs. A. No. B. .... C. .... D. ....

9. Is there anything discovered by you which influences the character of the risk, and which is not fully set forth in the answers? No.

10 A. In your judgment, is the person examined safely insurable? B. Do you think it advisable to seek for any further information concerning him? If so, request the person examined to obtain from his medical adviser the necessary information in writing. A. Yes. B. No.

284 11 A. Review the Family Record, and inquire into and explain obscure causes of death, such as "Dropsy," "Change of Life," "Cold," "Exposure," "Childbirth," "Debility," etc. In case the applicant states "He does not know" the cause of death or duration of illness, ascertain and state the reason why. B. Have you done this? A. Grandparent died before his birth. B. Yes.

I certify that the answers to the questions above are in my own handwriting, and that I have made in private a physical examination of the person proposed for insurance.

Dated at Lawrence, Kansas, this 5th day of December, 1878.

V. G. MILLER, M. D., Medical Examiner.

Note.—This blank must be attached to the Medical Examiner's Certificate on the application.

The Mutual Life Insurance Company, of New York, to the Medical Examiner:

Sir—If from any circumstances the history of the applicant suggests disease of the urinary organs, (such as pallor, recent impairment of vision, dyspepsia, dyspnoea, swelling of feet, irregular micturition, or unnatural changes in quantity or appearances of urine), and in all cases where the application is for $10,000 and over, the Examiner is required to make an examination of the urine, and report its condition as to the following particulars. The urine should be examined within 24 hours after its passage.

1. Name of Applicant? John W. Hillmon. Was specimen passed by him? Yes.

2. Color? Pale Citron yellow. Acid or Alkaline? Acid. Specific Gravity? 1.016.

3. Does it contain Albumen? No. Or sugar? No.

4. Does the microscope show the presence of casts, blood corpuscles or pus corpuscles? No.

Dated at Lawrence, Kansas, Dec. 5, 1878.

V. G. MILLER, M. D., Medical Examiner.

(On the back)

Name of person assured, J. W. Hillmon.

Application to The Mutual Life Insurance Company of New York, 140 to 146 Broadway.

No. of Policy, 195132.

Kind of " Life Due 18..

Date of " 10 day of Dec., 1878.

Am't of " $10,000.

Age of Party, 31 Years.

....year ½ Ann'l Premium, $121.40.

....% extra....

Policy fee,.....1.

$122.40

Received Dec. 9, '78, Mutual Life Ins. Co., N. Y.

Lawrence Byron Sherman, General Agent, St. Louis, Mo.

Edition June, 1878. Blank 1.

285 (Separate paper attached to application)

Office of Board of Education,
Cor. Henry and Vermont Sts.

Lawrence, Kan., Mar. 27, 1879.

I vaccinated Mr. John W. Hillmon with fresh animal virus on the 20th day of February last. On the 5th day following, I examined his arm and found at both points of insertion of

the virus, well marked pustules forming, indicating a very satisfactory result.

J. H. STUART, M. D.

286 "EXHIBIT No. A., Oct. 99. W. C. H. Judge."
Ex. 9. C. H. N. Ex. 5.A. P. B.

Medical Examiner's Report. [New York Life Ins. Co.]
Where over $10,000 is required, the examination of applicant by two Examiners is necessary.
The blanks are to be filled by the Medical Examiner in his own handwriting.

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1. Name (in full) of the person examined.
The Examiner will satisfy himself of the identity of the person examined with the person described on the other side.
John W. Hillmon. How long have you personally known the party whose life is proposed to be insured? Only a short time.

2. Please state the following particulars as fully and exactly as possible: Weight, 166 lbs. Race, White. Height Ft. In.
5 11
Measure round the abdomen 35 in. Circumference of the chest under the Vest.
Ordinary state. Expanded
37 ½ 40 ½
Figure. Erect. Is the general appearance that of health and vigor? Yes. Hair, dark Eyes, Hazel Complexion, fair. Is the skin clear and healthy? Yes. Is the Gait firm and elastic? Yes. Is the Muscle Hard and Strong? Yes. Temperament, Sanguine. Are the Bones Large or Small? Medium.

3 A. Whether any signs of affection of the head or of predisposition to it? A. No.
B. Whether Paralysis, Vertigo, Tremors, Catchings of any part, or any other nervous affection? B. No.
C. Are the functions of the Muscular and Nervous systems in a healthy state? C. Yes.

4. If any rupture, state whether reducible or not, and if a truss is worn. None.

5 A. Is the respiratory murmur clear and distinct over both lungs? A. Yes.
B. Is the character of the respiration full, easy and regular? B. Yes.
C. Are there any indications of disease of the organs of respiration? C. No.
D. Number of respirations per minute? D. Sixteen.

6 A. Is the character of the heart's action uniform, free and steady? A. Yes.

B. Are its sounds and rhythm regular and normal? B. Yes.

C. Are there any indications of disease of this organ or of the blood vessels? C. No.

7 A. State the rate and other qualities of the party's pulse. A. 72 Normal.

B. Does it intermit? B. No.

C. Does it become irregular or unsteady? C. No.

8. State whether subject to any cutaneous Eruption on any part of body, and if so, of what nature. No.

287 9. Whether habitual cough or expectoration, occasional difficulty of breathing, or palpitation? No.

10 A. Are the functions of the abdominal and urinary organs in a healthy condition? A. Yes.

B. Are there any indications of Bright's disease of the kidneys? B. No.

11. Has the person any predisposition, either hereditary or acquired, to any local or constitutional disease? No.

12. Have the person's parents, brothers or sisters, been afflicted with pulmonary or other diseases, hereditary in their nature? No.

13 A. Has the person ever had any severe injury or illness? A. No.

B. If so has it had any effect on his constitution? B.....

C. Is there any indication that he is not now entirely well? C. No.

D. Whether deaf, dumb, blind or lame? D. No.

14 A. Does the party habitually use ardent spirits, wine or malt liquors? A. No.

B. If so, to what extent? B. ....

C. Are there any indication that would lead you to suppose that the applicant had led, or leads, other than a sober and temperate life? C. No.

15. If the person's weight be much over or under the average, or if the family history, or if any disease or injury, or any other circumstance connected with him (or her) should seem to affect seriously the character of the risk, the reason for recommending it should here be given.

16 A. Have you reviewed, with the party examined, his answers to the queries in the annexed application? Yes.

B. If so, did he acknowledge that they were all fully understood and truthfully answered by him? B. Yes.

17. The Medical Examiner will, as far as possible, obtain from the party examined, the history of his grandparents, and fill up the annexed spaces.

	Age if Living.	Condition of Health.	Age at Death.	Cause of Death.
Father's Mother ..	All dead.		Unknown.	Unknown.
Father's Father...			"	"
Mother's Mother..			"	"
Mother's Father ..			"	"

18. Does the party examined (as far as can be ascertained) resemble, physically, the paternal or maternal side of his family? Paternal.

19. The Medical Examiner will require the party examined to signed his name in this space at the time of the ex-
288 amination and in his presence.

JOHN W. HILLMON.

20 A. Were you to divide according to the probable longevity all insurable persons of same age and sex as applicant into three classes, would you place the party examined in the first and best class, second or third class? Note.—The limits of each class will be clearly defined by the understanding that each class is to embody an equal number of individuals. A. First.

B. Do you recommend that a policy be issued? (Yes or No). B. Yes.

In reviewing the family record, the Medical Examiner should invariably explain obscure causes of death, such as "Dropsy," "Change of Life," "Cold," "Exposure," "Childbirth," "Debility," etc., and in case the party examined states "he does not know" the cause of death or duration of illness, the Medical Examiner should ascertain and state the reason why; and should question and report upon the point of possible hereditary disease.

The Medical Examiner is earnestly requested to answer the above questions minutely, and to propose such other queries as in his judgment are necessary for a full elucidation of the risk.

Should the examination develop points of doubt as to the safety of a risk believed on the whole to be good, the Examiner may send a letter direct to the Company at New York with full explanations. This letter will be considered strictly confidential.

The Examiner will feel the responsibility of his position, bearing in mind that in deciding whether to accept or decline a risk at a distance, the Company place great reliance upon his statements. If hereafter it should turn out that this examination had not been thorough—that due care had not been used—that the party examined was not so good a subject as had been represented,—it would be not only detrimental to the interests of the Company, but injurious to the Examiner.

The Examiner will require the party examined or agent to procure the family physician's certificate, as it may contain important suggestions, unless such certificate is clearly unnecessary.

I certify that the answers to the questions above are in my own handwriting, and that I have made in private a physical examination of the person proposed for insurance.

J. H. STUART, M. D.
Medical Examiner.

Examined at Lawrence, Kans., this 31st day of Oct. 1878.

Additional Remarks.

App'd with the understanding his mother did not die of consumption, Nov. 30, 1878. C. W. H. T. Received Nov. 11, 1878, Home Office. J. W. Hillmon's $5,000. Must have full details of parents death. Would he accept 15 payt life? 11-11

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289 "Exhibit No. B. Oct. 99. W. C. H. Judge." ex. S. C. H. N. No. 11. O. P. S.

Medical Examiner's Report. [New York Life Ins. Co.]

Where over $10,000 is required, the examination of applicant by two examiners is necessary.

The blanks are to be filled up by the Medical Examiner in his own handwriting.

1. Name (in full) of the person examined.

The examiner will satisfy himself of the identity of the person examined with the person described on the other side.

John W. Hillmon.

How long have you personally known the party whose life is proposed to be insured? Only a short time.

2. Please state the following particulars as fully and exactly as possible. Weight, 166 lbs. Race, White. Height, Ft. In. 5 11

Measure round the abdomen, 35

Circumference of the chest under the vest:

Ordinary state. 37 1/2. Expanded, 40 1/2.

Figure, Erect. Is the general appearance that of health and vigor? Yes. Hair, Dark. Eyes, Hazel. Complexion, Fair. Is the skin clear and healthy? Yes. Is the gait firm and elastic? Yes. Is the muscle hard and strong? Yes. Temperament? Sanguine. Are the bones large or small? Medium.

3 A. Whether any signs of affection of the head, or of predisposition to it? A. No.

B. Whether paralysis, vertigo, tremors, catchings of any part, or any other nervous affection? B. No.

C. Are the functions of the muscular and nervous systems in a healthy state? C. Yes.

4. If any rupture, state whether reducible or not, and if a truss is worn? None.

5 A. Is the respiratory murmur clear and distinct over both lungs? A. Yes.

B. Is the character of the respiration full, easy and regular? B. Yes.

C. Are there any indications of disease of the organs of respiration? C. No.

D. Number of respirations per minute? D. 16.

6 A. Is the character of the heart's action uniform, free and steady? A. Yes.

B. Are its sounds and rhythm regular and normal? B. Yes.

C. Are there any indications of disease of this organ or of the blood vessels? C. No.

7 A. State the rate and other qualities of the party's pulse? A. 72, normal.

B. Does it intermit? B. No.

C. Does it become irregular or unsteady? C. No.

8. State whether subject to any cutaneous eruption
290 on any part of body, and, if so, of what nature? No.

9. Whether habitual cough or expectoration, occasional difficulty of breathing, or palpitation? None.

10 A. Are the functions of the abdominal and urinary organs in a healthy condition? A. Yes.

B. Are there any indications of Bright's disease of the kidneys? B. No.

11. Has the person any predisposition, either hereditary or acquired, to any local or constitutional disease? No.

12. Have the person's parents, brothers or sisters, been afflicted with pulmonary or other diseases, hereditary in their nature? No.

13 A. Has the person ever had any severe injury or illness? A. No.

B. If so, has it had any effect on his constitution? B. ....

C. Is there any indication that he is not now entirely well? C. No.

D. Whether deaf, dumb, blind or lame? D. No.

14 A. Does the party habitually use ardent spirits, wine, or malt liquors? A. No.

B. If so, to what extent? B. ....

C. Are there any indications that would lead you to suppose that the applicant has led, or leads, other than a sober and temperate life? C. No.

15. If the person's weight be much over or under the average, or if the family history, or if any disease or injury or any other circumstance connected with him (or her), should seem

to affect seriously the character of the risk, the reason for recommending it should here be given. ....

16 A. Have you reviewed with the party examined, his answers to the queries in the annexed application? A. Yes.

B. If so, did he acknowledge that they were all fully understood and truthfully answered by him? B. Yes.

17. The Medical Examiner will, as far as possible, obtain from the party examined, the history of his grandparents and fill up the annexed spaces:

	Age if Living	Condition of Health.	Age at Death.	Cause of Death.
Father's mother....	Dead.		All of advanced age Above 60	Unknown.
Father's father.....				
Mother's mother....				
Mother's father.....				

18. Does the party examined (as far as can be ascertained), resemble, physically, the paternal or maternal side of his family? Paternal.

19. The Medical Examiner will require the party examined to sign his name in this space at the time of the examination and in his presence. JOHN W. HILLMON.

291 20 A. Were you to divide according to probable longevity all insurable persons of same age and sex as applicant, into three classes, would you place the party examined in the first and best class, second or third class? Note.—The limits of each class will be clearly defined by the understanding that each class is to embody an equal number of individuals. A. 1st.

B. Do you recommend that a policy be issued? (Yes or No.) B. Yes.

In reviewing the Family Record, the Medical Examiner should invariably explain obscure causes of death, such as "Dropsy," "Change of Life," "Cold," "Exposure," "Childbirth," "Debility," etc. And in case the party examined states "he does not know" the cause of death or duration of illness, the Medical Examiner should ascertain and state the reason why; and should question and report upon the point of possible hereditary disease.

The Medical Examiner is earnestly requested to answer the above questions minutely and to propose such other queries as in his judgment are necessary for a full elucidation of the risk.

Should the examination develop points of doubt as to the safety of a risk believed on the whole to be good, the Examiner may send a letter direct to the Company at New York, with full explanations. This letter will be considered strictly confidential.

The Examiner will feel the responsibility of his position, bearing in mind that in deciding whether to accept or decline a risk at a distance, the Company place great reliance upon his statements. If hereafter it should turn out that this examination had not been thorough—that due care had not been used—that the party examined was not so good a subject as had been represented—it would be not only detrimental to the interests of the Company, but injurious to the Examiner.

The Examiner will require the party examined or agent to procure the family physician's certificate, as it may contain important suggestions, unless such certificate is clearly unnecessary.

I certify that the answers to the questions above are in my own handwriting, and that I have made in private a physical examination of the person proposed for insurance.

J. H. STUART, M. D.,
Medical Examiner.

Examined at Lawrence, Kans., this 4th day of December,

1878.

Additional Remarks.

App'd Dec. 10, '78. C. W. H. T. Urine must be examined and found healthy before delivery of pol. Send certf. to this office, 12/10, '78.

Received Dec. 10, 1878. Home Office.

292 It is admitted by the defendants herein, and each of them, that the plaintiff herein made due proofs of death, and that if she is entitled to recover in these actions, she should recover with interest from the 1st day of October, 1879.

293 L. B. Wheat, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Hutchings:

Q. State your name? A. L. B. Wheat.

Q. In reference to this case being tried now, you may state when you first became counsel in the case?

A. I think it was on the 14th day of May, 1879, that I was first employed in relation to the matter. I have been an attorney in it ever since.

Q. Have you been present at all the trials we have had?

A. I have.

Q. You were present at the trial which was held in 1882 at which Judge Foster presided? A. I was.

Q. Now, I will exhibit to you this application to the Connecticut Mutual Life Insurance Company, which is marked

"Ex. 8," being an application dated the 24th day of February, 1878, and get you to state when you first saw that application, if you ever saw it before.

A. You refer to it as dated the 24th of February. That is the date over Hillmon's signature. Over Stuart's signature it is dated the 25th.

Q. In order that the jury may understand,—that is the application where there has, apparently, a change been made in the figures in regard to height?

A. Yes; that is the particular one we have been talking about.

Q. Now you may state when you first saw that application, if you ever saw it before?

A. I first saw this application in June, 1882, in the west courtroom of the courthouse of this county, Leavenworth, in court. It was in the presence of Judge Foster, presiding, and I first saw it there during the trial of these cases.

Q. What year did you say that was?

A. That was in June, 1882; I can't state just what particular date it was, but it was early in the trial of that case. By looking at the records, you can get to it very closely. I
294 won't say it was the first day, but it was very near the commencement of that trial.

Q. Do you know from what custody it came when you first saw it?

A. It came from the custody of James W. Green.

Q. The witness who has just left the stand?

A. Just left the stand; yes.

Q. You may state to the jury whether in 1882, at the time you have described, you had occasion to examine that apppli-cation carefully with reference to those figures "5 feet, 11?"

A. I examined it right then and there in the courtroom myself, and Mr. John Hutchings who is now dead, and I think Mr. Samuel A. Riggs also, and several others.

Q. You may state whether or not at that time there was in fact or apparently any change or scratching or alteration in that application?

A. I think at that time that the "5 feet, 11" was two straight—the eleven was represented by two ones, and now you can notice there is three up-and-down marks that you can see where the "11" stands, and by putting a magnifying glass on here you will see one of them has two up-and-down marks.

Q. When did you have occasion to see that application again, if you ever did?

A. Well, I saw it during that trial several times. I can't say it was used during the argument. It was used right along through the case. It was read in evidence, and seen right along in the case. It was just a straight "5—11" when I first

saw it—when it was first produced by James W. Green. I remember well there was a good many of us looking at it.

Q. After that trial when did you see it again, if you ever did?

A. On the trial before Judge Brewer in June, 1885, in the same court-room in this court—same courthouse.

Q. What was its condition at that time?

A. The same as at first so far as I have any recollection of it, and I recollect it was a straight five-eleven; because if there had been any such thing as it is now, or any such look, I would have seen it at once.

295 Q. When did you ever have occasion to see it again after the trial of 1885, if you ever did?

A. Again in March, 1888, at the trial in Topeka, before the Honorable O. P. Shiras, I think his name is; Judge Shiras any way. I saw it on that trial.

Q. What was its condition then as to being scratched or otherwise?

A. It was straight five feet eleven, without any scratching at all.

Q. When did you have occasion next to see it?

A. I next saw it in 1895, in January. I called on Mr. Green for it. That is when I next saw it.

Q. What was the occasion then of calling for it?

A. I wanted it to introduce in evidence. I called on Mr. Green for it there in the United States court room in Topeka. It was in Topeka when Shiras was there, too.

Q. The trial was then being had?

A. The trials of the cases were then proceeding, and of course it was the three cases; it wasn't just two.

Q. You are speaking now of the trial in 1895?

A. Yes; 1895; the trials were in progress.

Q. Before what Judge?

A. Before the Honorable Judge Thomas; I forget his given name.

Q. What was the condition of that application at that time?

A. It was straight five feet eleven, and there was no such marks of erasure as there is now.

Q. Now I want you to state to the jury when it was you discovered—

A. (Interrupting.) Since I am on the stand I would like to explain that I introduced it—called on Mr. Green for it, and I took it and introduced it—

Mr. Barker: To what he did with it, we object.

Witness: It was introduced in evidence.

Mr. Barker: Mr. Wheat, I desire respectfully to make an objection to the Court. What he did with it is incompetent

and irrelevant. It is only in regard to its condition he is inquiring about.

296 The Court: Anything that enables him to recall the fact to his mind is proper for him to state.

Mr. Hutchings: That was the purpose of it—rather to fix the time.

Q. You may go on.

A. I introduced this application with several others in evidence, I forget how many, I think more than we introduced here today, and I read this one in evidence amongst others—five ft. eleven.

Q. What was its condition then as to being changed or not?

A. It was just as it always had been before, so far as my remembrance goes. I noticed no difference; I looked at it carefully; looked at every one of them. I remember reading it to the jury, this particular five feet eleven.

Q. Now when, with reference to the time you read it to the jury, as five feet eleven, did you discover that it had been changed?

A. I didn't discover it then; there was no change in it then so far as I could see.

Q. I say, when, with reference to that time, did you discover it?

A. The first I heard of it was when Dr. Stuart came on the stand in 1895, at the trial, and testified to this change. I would state that I took either this or another magnifier like it, and got hold of the application pretty soon and looked at it through the magnifier, and you could then see the erasure in the paper, the cutting in the paper, plainer than you can now; it had a fresh appearance; didn't present the old appearance that it presents now. You see it is nearly four years since then. It presented a fresh appearance as though it had been freshly cut. That was in 1895.

Q. Now this Dr. Stuart you speak of was a witness at each of these trials, I believe it has been stated here. Now you may state to the jury who produced Dr. Stuart as a witness—whose witness he was at each trial.

A. He was a witness for the defendants.

Q. Defendant [incurance] companies?

A. Defendant insurance companies; yes.

297 Q. You may state now whether you were present at the time that he gave testimony in each of these trials?

A. I was, at every trial of the cases that he has given in testimony, I was present. It half seems to me as though there was one trial at which he was not present; but I won't say that for certain. There have been so many that there have been absent ones; but at every trial that he gave testimony I was present and heard him throughout.

Now in the conduct of this case, you may state whether
s fallen to your lot as counsel for the plaintiff, at each
to attend to the matter of introducing this documentary
ence?

I can't be positive as to that, but I think it has been at
trial. I examined a great many witnesses in addition,
t fell to my lot to present what would be called the techni-
pening of the case—the showing of the policies, and the
ications, then with reference to the proofs of loss, and
ng the case in prima facie shape. It was my lot to either
d to the evidence directly or to superintend it, and the
counsel acted in accordance with my directions; in other
s, I conducted that branch of the case at every trial.

Now in introducing this documentary evidence, you
state what course has been pursued with reference to
cross-examination of Dr. Stuart—whether these docu-
s have been exhibited to him or not?

At every trial at which he was present this policy has
shown him—this particular application, I mean—and
al others signed by him; I won't say how many at each
I will not say that at every trial all four of these were
duced in evidence, but this was introduced at every trial.

Let's confine it to this particular one. You say it was
ited to Dr. Stuart; you may state, in that connection,
her Dr. Stuart's attention was directed particularly to
particular part of it?

His attention was particularly directed to the five feet
n at every trial. I think also his attention was drawn
particularly to the personal knowledge clause; I know
it was sometimes; but amongst other parts that his
attention was drawn to at any rate was the five feet
n in this application at every trial that he was a wit-
at.

Now do you remember what Dr. Stuart testified to at
various trials in relation to that entry there, five feet
n. when his attention was particularly called to it and
paper exhibited to him?

Every time that he testified about that five feet eleven,
at every trial that he was present at, down to the time of
895 trial—that is, each of the trials that he was present
'82, '85 and '88—not saying that he was present at every
but each time that he was present and testified he said
he wrote the five feet eleven—must have done it—did do
I can't remember just the words, but the substance of it
that he wrote it.

You may state whether or not at those trials up to the
of 1895, it was suggested by anybody, or attention called

by anybody, to any erasure or scratching or change as it appears there now?

A. No, sir; it was straight five feet eleven, and it was commented on.

Q. Of course it is hardly necessary, in view of the questions already asked and answered, but it has been stated that the paper was in your possession off and on,—you may state whether or not you ever changed that paper?

A. I never changed the paper. The paper was five feet eleven, straight five feet eleven, every time I saw the paper before the trial of '95. Dr. Stuart drawed attention to the erasure, and it was marked as it is now. Before that it was five feet eleven and nothing more or less, just five feet eleven, straight.

Cross-examination

By Mr. Barker:

Q. I understand you first saw this application in 1882?

A. Yes, sir; that is the first time I saw it.

Q. At the trial of the case? A. Yes.

Q. Mr. Green had the custody of it at that time?

A. That is my recollection.

299 Q. And he allowed the attorneys upon the opposite side to have it and examine it, did he not? A. Yes.

Q. You all had it and examined it?

A. O, yes; we asked him for it and if he wasn't too busy with something else he would give it to us.

[A.] Just as gentlemen ought to be and as in customary about such things.

Q. Sometimes you had it a longer time and sometimes a shorter time?

A. It must have been so. I don't remember of having it over night myself, but I wont say I didn't.

Q. And you discovered at that time those figures "5 feet, 11"? A. We saw them in that application.

Q. You saw it in that application? You saw it in 1882?

A. '82; yes, sir.

Q. Now I will ask you if there was any controversy at that time in regard to those figures being in there five feet eleven?

A. No, sir; there was no controversy about it being five feet eleven.

Q. No dispute about it being any other at that time?

A. No, sir.

Q. Then you saw it again in 1885? A. Yes, sir.

Q. And you state that you examined it minutely at that time? A. Looked at it to see the 5 feet eleven.

Q. Why should you examine it so minutely if there hadn't been no controversy about it?

A. Examined them all along.

Q. You simply ran them over at that time?
A. Ran them over to find the five feet eleven, the place where it was.
Q. Simply to find the place where it was? A. Yes, sir.
Q. Now you saw it again when? A. In 1888.
Q. And up to that time there had been no controversy in regard to that matter?
A. No, sir; it stood five feet eleven all around.
Q. There hadn't been any dispute in regard to it then?
A. No, sir.
Q. Did you make a minute examination of it then?
A. I looked at it.
300 Q. But I ask you if you made a minute examination of it, and if you did why you did so?
A. Now I will tell you why.
Q. I asked you first if you did?
A. Yes, I did; I looked at that every time—every one of these applications.
Q. I asked you if you looked at it at that time minutely?
A. I said I did; and you asked me why also, didn't you?
Q. Yes; I asked you why.
A. Well, I will say why now. Dr. Stewart on the first trial—we first looked at it to see about the five feet eleven. I had heard from some source—
Q. (Interrupting) So far as that is concerned—

Mr. Atwood: Let him state it. You have asked him for the reason.

Mr. Barker: I will withdraw that part of it if he wants to go into a discussion; we will leave it stand without the reason why. I will withdraw that part of the question.

Q. Now I will ask you if Dr. Stuart did not, on each one of those trials say that he had measured Hillmon, John W. Hillmon, and that he measured five feet nine inches?
A. That is my recollection, that every time he swore, he swore that he measured five feet nine inches, on measurement.
Q. And he swore every time, did he not, that five feet eleven inches was not a correct statement?
A. He said he was five feet nine inches on actual measurement.
Q. I know; but he also said that five feet eleven was not a correct statement, did he not?
A I can't say as to those words; he said he was only five feet nine.
Q. I didn't ask you to give his exact language?
A. I thought you insisted that I should.
Q. Didn't he say in sustance that that five feet eleven,—that there was some mistake in regard to that; that that was not his correct height?

A. He said it was not his correct height; yes. He explained; he stated how it came to be written there that way.

Q. Now in regard to the discovery of this mistake,—that was in eighteen hundred and what?

A. 1895, January, I think. I can't say when Stew-
301 art came on the stand, whether it was January or whether it had run into February. It was when you were in the defendants' evidence in the 1895 trial.

Q. Then attention was called—

A. (Interrupting) Just what day it was I can't say, but it was during that trial, the latter part of January or the first part of February, would be my recollection.

Q. I will ask you to state if you didn't upon cross-examination of him at that time, ask him how it happened that this was written five feet eleven when he was only five feet nine, and that if he didn't say there must have been a mistake or some inadvertence, and he couldn't explain how it happened?

A. No, sir; I don't think the attorneys for the plaintiff asked him that question. I think the attorneys for the defendants asked him how it was.

Q. I will ask you if you didn't ask him that very question?

A. I don't think I did; don't think I ever asked him that question.

Q. If you didn't ask him if he could state how it happened except it must have been by inadvertence?

A. I didn't say inadvertence.

Q. Didn't he say so?

A. No, sir; I don't think he said inadvertence. He answered the question how it came to be written, by defendants' counsel, not in answer to questions by plaintiff's counsel.

Q. Well, the change there would appear to be from five feet nine to five feet eleven, would it not?

A. I didn't figure it out that way at the time. The matter was fresh—

Q. (Interrupting) Of course the paper will show for itself.

A. Shows for itself whatever it shows.

Q. It was for the interest of your client to have it five feet eleven? That is the way you desired to have it, isn't it?

A. I want it according to facts.

Q. I know; but it was for your interest to have it five feet eleven, was it not?

A. I believe five feet eleven was the right height.

Q. I am asking you if that wasn't the way you desired to have it?

A. I never thought upon that subject. Of course I was pleased when I saw the application had it five feet eleven, if that is what you mean by desire.

302 Q. But if it had been written five feet nine and changed to five feet eleven, it would have been to your interest, would it not?

A. We would never have introduced it if it hadn't been the fact.

Q. I will ask you if it had been written in there five feet nine, and was changed to five feet eleven, then that change would have been in the interest of your client?

A. I shouldn't think it would have been in the interest of my client to have a changed paper.

Q. I say if it was changed and appeared that way, that would be to your interest?

A. I shouldn't think so; I think it would damage us. You are asking what I think. I thought the plaintiff's case was damaged when I saw the scratching there, just so as to get up a slur over the five feet eleven; that is what I thought.

Q. I ask you if you didn't regard it as a change made in the interest of your client?

A. I thought the scratching was against the interest of our client.

Q. But it was to the interest of your client to have it five feet eleven? (No answer) Now you have been in this case a long time?

A. Just depends on what you call a long time. If you are talking about eternity it would be short; for a lifetime, however, it would be a long time. It was the 14th of May, 1879, the day I was employed in this matter.

Q. You have a large interest in this case?

A. I have a contingent fee.

Q. That fee is dependent upon recovery? A. Yes sir.

Q. Haven't you more than a contingent fee? Haven't you an assignment of the plaintiff's cause of action?

A. No, sir; never had any assignment of the plaintiff's cause of action in any shape manner or form. She never signed any such a thing, and I wouldn't have taken it if it had been offered. Never heard of her having made an assignment.

Q. Isn't it a fact you claimed a lien upon these policies for ten thousand dollars before any suit had been commenced?

A. I don't remember whether we did or not—no; no, sir; I didn't claim a lien; didn't do it in that way. I said I thought we had a lien.

303 Q. I asked you if you didn't claim a lien of ten thousand dollars? Answer, Yes or No.

A. It would depend on the construction of my language. If you want the language used, I can give it to you. I didn't intend to make a claim for a lien. I think I said I thought we had a lien for ten thousand dollars; I thought we had a

lien, and they asked how much it was, and I said I thought it ought to be about ten thousand dollars. I think that is the language I used. I think I ought to be permitted to say why I used those words.

The Court: Just answer the question, and if there is any explanation, your counsel will ask for it, or you may explain when Judge Barker is through.

Q. You say you never noticed any change in that until your attention was called to it by Dr. Stuart?

A. By Dr. Stewart testifying on the subject on the stand; that is the first time I ever noticed any change.

Q. That is the first time you ever noticed it?

A. That I ever noticed the paper had been erased or cut, or anything there except the straight eleven, is when he was on the stand testifying about it in 1895.

Redirect Examination

By Mr. Hutchings:

Q. You said something about making some explanation in relation to your claim for lien. You may do so now with the permission of the Court?

A. On, I think it was, the 15th of September, 1879,—if it wasn't, it was about that time; my memory is kept fresh as to the dates by looking frequently at the papers which bear, I think, that date; it is the date of the so-called releases that are referred to in the pleadings in this case,—on that day William J. Buchan and the plaintiff in the action, then Sallie Hillmon, the lady sitting there, came into the office of Clough & Wheat on Delaware street in this city. They came together; they both of them said a few words to me, but I had seen Buchan some time before and therefore he didn't say much of anything. Mrs. Hillmon asked me—

304 Mr. Barker: As to the conversation which took place between him and his client, and what was said there between them, we object on the ground that it is incompetent, irrelevant and hearsay.

Witness: It explains why I used those words.

The Court: Without giving the words or who spoke to you, you may state whether the possession of the policies was requested.

Witness: Yes, sir; the two came there and they requested the possession—they requested that I deliver to them four certain policies of insurance that had previously been delivred to me. They were either in my sole custody, or, you might say, the custody of Clough & Wheat, my partner; but they had been delivered to me and I considered them in my custody. They were there in my vault in my office at the

time; these two policies of insurance, among others, were asked for; the possession of them was demanded and I asked why they wanted them. I can't give the reason without stating this. I asked why they wanted them; and they declined to give me any answer as to why they were wanted—why they wanted them. They were demanded from me. I took a little time for consideration and walked to the back end of the office and back again and thought the matter over a little, and I says, "Why do you want them?" and they again declined to give me the reason why they wanted them. Says I to them: "This thing looks to me like a fraud. I want to understand why you want them." They still declined to give me any reason why they wanted them but again demanded them. I walked back again and thought the matter over a little and came back to them and says I, "I think I have a lien on these policies—" I think I said, "I think I and my associates have a lien on these policies." I think I brought my associates in, and on that account declined to deliver them unless that lien was paid; and thereupon—may I state who made the
305 next remark? I was asked how much the lien was. Mr. Buchan, if I may state it, asked me how much the lien was—

Mr. Barker: I understood the Court to say that the conversation was not to be given.

The Court: He may give any reasonable detail of the circumstances under which he, as counsel for defendant stated, claimed a lien on these policies. That is offered for the purpose of showing the financial interest of this witness in the controversy.

Witness: My claim for a lien was bona fide. Mr. Buchan asked me how much it was. I then didn't know how to fix it, and thinks I to myself—

Mr. Barker: We object to what he thought.

Witness: This is the reason why; it comes in in the explanation. I want to say that it occurred to my mind—I remember it distinctly. May I give the reason for saying it?

The Court: State what you said.

Witness: Well, I can't be sure whether I said just straight ten thousand, but I think I said ten thousand dollars—that I fixed ten thousand dollars as the amount of the lien. I didn't mean to fix the figure at that exact sum—

Mr. Barker: I object to his stating that he didn't mean what he said.

The Court: It may stand.

To which ruling of the Court the defendants and each of them at the time duly excepted.

Witness: I stated ten thousand dollars. I am not pretending to give the exact words. I think I said ten thousand dollars.

Q. Well, Mr. Buchan didn't get the policies?
A. No, sir; they didn't get them.
Q. He didn't pay the ten thousand dollars?
A. No, sir; didn't offer to.
Q. That is all.

A. He asked me why I noticed this—these figures
306 —and I think I ought to be permitted to say why I examined these every time so closely and why I looked the papers through every time.

Mr. Barker: We object.

Q. Well, with the permission of the Court, you may state.
A. They asked the question and withdrew it after I began to answer it. I think it is justice to me that I be permitted to state why.
Q. They asked you if you examined that particularly and why you did so, and now you may explain why.

Mr. Barker: I withdrew that question and it is not before the Court.
The Court: He may answer.
Mr. Barker: We object to it as incompetent, irrelevant and immaterial.
Objection overruled, to which ruling the defendants and each of them duly excepted.

A. As stated by Mr. Green, if I understood him right, at these different trials as already stated, that Mr. Stewart stated at every trial—swore that Hillmon actually measured five feet nine inches, and here it was five feet eleven in the policies; and in the arguments we did what would be called "ringing the changes" on its being five feet eleven in this application made on the—dated the 24th over the signature of Hillmon and the 25th over the signature of Stewart—this application here that we have been talking about; that that appeared, according to the testimony, to have been dated and written out after the time Stewart fixed as that at which he had made the measurement five feet nine. It is dated after the time he had fixed in these previous trials as the time he had made the measurement, some little while before that; and the others being five feet eleven also, we rung the changes on that, being still written five feet eleven right straight through, and that was commented on, and there was particular points made in the talk to the jury, and in the bluffing outside.

307 Q. What?

A. In the talk to the jury and in all the talk amongst the lawyers outside—discussion outside, around the courtroom,—about that application still standing—the last application having been written five feet eleven after a time when some of these witnesses swore to Hillmon's having been measured as five feet nine; and that was the reason why we made a careful examination of the papers every time that came in, to get it before the jury that it was straight five feet eleven in every particular every time, and therefore it was a particular thing. That was the reason I was careful about the five feet eleven every time, and drew attention to it first. I never thought of any change in it and never suspected any thing of that sort until it was mentioned by Dr. Stuart, but it made us look for the five feet eleven and examine it carefully every time.

By Mr. Barker:

Q. From whom did you receive these policies, and when did you get them?

A. I got these policies, I think, the 14th day of May, 1879. I received them in the office of Mr. Borgolthaus; I think his name is R. J. Borgolthaus. It is the Borgolthaus whose name is signed to this petition, and I received them in his office. The plaintiff, Sallie E. Hillmon, was present; R. J. Borgolthaus was present; Samuel A. Riggs was present, and I think some one or two other persons who were about the office of Mr. Borgolthaus were there. Whether I got them personally from Sallie E. Hillmon, or whether Borgolthaus handed them to me, or not, I can't say. I think all of us had them there in our hands on that day, and they were given to me there whilst we were all present. They were given to me to bring to Leavenworth for certain purposes, it don't matter what unless you want to know. They were given to me, and I took them there, and I think that was the 14th day of May, 1879.

Q. You either received them from the plaintiff or in her presence?

A. In her presence and from Borgolthaus, and with her knowledge and consent, right then and there.

Witness excused.

308 The plaintiff next offered in evidence the testimony of Dr. N. Simmons given upon the trial in 1896.

It is admitted by the parties that Dr. Simmons is dead.

Said testimony was thereupon read to the court and jury, and is in words and figures as follows, to wit:

Dr. N. Simmons, witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct Examination by Mr. Hutchings.

Q. State to the jury your name, place of residence and occupation? A. N. Simmons, residence Lawrence.

Q. What is your occupation?

A. Occupation is practicing medicine.

Q. How long have you been engaged in the practice of medicine? A. About 42 years.

Q. Were you acquainted with John W. Hillmon in his lifetime? A. Yes, sir.

Q. I will get you to examine this picture marked No. 3, and state whose picture it is, if you know?

A. I judge that to be the picture of Hillmon.

Q. Is it a good picture of him, as you knew him?

A. Yes, sir.

Q. Did you have at any time any transaction with John W. Hillmon? A. Yes, sir.

Q. I will get you to state what you know, if anything, in reference to the condition of his nose. State the facts that came under your observation in relation to it.

A. Well, I think it was about the year 1873, perhaps, he received an injury to his nose, and I saw him after he received that injury, before it had healed, when he consulted me in regard to it—binding it, etc.

309 Q. Where was the injury located, and what was the nature of it?

A. The injury was located on the left side of the nose, and it was a lacerated wound, as if it was made by a dull instrument that lacerated the skin, and was not a clean cut wound—like it was made with a dull instrument or rock, that tore it; on the left side near the center of the nose, and down on the left cheek.

Q. What has been the extent of your practice?

A. With the exception of a month or two at a time, for over 42 years.

Q. Are you also a surgeon?

A. I have attended to that business all the time.

Q. Are you educated as a surgeon?

A. I have taken the regular degrees of medicine in college.

Q. State what appearance, if any, an injury of this kind, received in life would leave?

A. Well, if permitted, I would like to state that question in my own way.

Q. State what you can?

A. In the first place, when I saw the wound and examined it, it was swollen considerably. There was a bruise connected with the wound, and it was swollen, and it would be a pretty difficult matter for me to tell what the extent or result of the wound would be after it finally healed, so far as that is concerned; and it would be a very difficult matter for me to tell what the result would be—at least, the after effects.

310 Q. State whether in your opinion an injury of the kind you have spoken of would cause, after death, a more rapid decay of the parts than there would be in the sound parts about it?

By the Court: Can you tell from your examination of that wound, when it was in existence,—First, can you tell sufficiently as to the extent of it to say what would be the result afterwards—can you?

A. Well, I don't know as I can. I couldn't say whether I could. The fact that the wound was a bruise to a considerable extent, and not a very deep wound—

Q. State whether in your opinion, if the cartilage of the nose was affected by this injury that you saw, it would begin a more rapid decay at that point after death, than on the sound part of it?

311 A. This has reference to the cartilage of the nose?

Q. Yes, sir. (Question read.)

A. I want to answer that again just as I did it in this way: In 3 or 4 weeks' and one month's time perhaps, so far as the cartilage was concerned, it might not show much change; it would be different from any other part. After a considerable length of time it might break down more rapidly and show decomposition more rapidly than if the cartilage was uninjured, but it would take some time before that was manifest.

Q. What time?

A. That would depend upon the weather and surroundings of the corpse. If the surroundings would decompose it rapidly it would break down sooner. But in an ordinary spring when the ground is cold, I should think it would take a month or two at any rate before anything would be manifest. So that the tissues might be influenced earlier.

Q. How tall a man was Mr. Hillmon, according to your recollection?

A. Well, I walked about with him in business transactions. I would take him to be very nearly my own height.

Q. How tall are you? A. Five feet 11.

Q. Eleven inches?

A. Five feet eleven inches. Nearly—I can't say exactly, but he was something near it.

Q. Will you describe to the jury by your finger the place on your nose where you say the injury to Mr. Hillmon's nose was?

A. It was located near the center of the nose; up and down, and then run off on the cheek—left cheek—from
312 an inch to an inch and a half. Something like that; of course I didn't take any measurements at the time.

Q. I will get you to state whether you noticed at any time, during your acquaintance with Mr. Hillmon, any defect in his teeth? A. I did not.

Cross-examination

By Mr. Barker:

Q. Your acquaintance with Mr. Hillmon was slight—you saw him at the time the nose was injured?

A. I saw him a great many times outside of my few business transactions—I was not very intimately acquainted with him at all.

Q. So he came to your house to be treated for this injury?

A. Yes, sir.

Q. And you think that was in 1873?

A. I think likely it was, I am not positive.

Q. And that would be over one quarter of a century ago?

A. Quite a while.

Q. And after you treated him, you gave him some treatment for this injury, did you? A. Yes, sir.

Q. And then you didn't see him for some time after that?

A. No, sir, didn't see him until after he was well.

Q. You only treated him once? A. Once—that's all.

Q. When you saw him after he was well, you didn't make any examination of this injury? A. No, sir, I did not.

Q. Of his face? A. No, sir.

Q. You don't know how long it was from the time you saw him in 1873 until you saw him again—that is,
313 whether a term of years elapsed or not—whether he was out on the plains or gone away?

A. I couldn't say positively; I saw him occasionally.

Q. You couldn't say positively whether you saw him in 1873 at all, could you?

A. I couldn't say positively; he was coming and going in the neighborhood.

Q. I will ask you if you remember what season of the year it was when you saw him? A. When he was hurt?

A. Yes, sir, whether it was in the fall or spring, or what season?

A. I couldn't say what season it was—I think it was—I don't think it was in the summer—it might have been in the summer possibly, but I don't think it was—he paid his bill and I made no record.

Q. Would you say it was in the fall or spring—or can you? A. I couldn't be positive.

Q. Can't you fix the season of the year? A. No, sir.

Q. In regard to his height; that was a mere guess?

A. That's comparison.

Q. You never stood up together? A. No, sir.

Q. You never measured him? A. I never measured him.

Q. You never walked together for the purpose of seeing how high you were, or never discussed the question of height with him? A. No, sir, not at all.

Q. Nothing stronger than your guess of the height of that man.

Q. Is that just your guess on what you saw?

A. That's all of it—walking about together. I guess he was something similar to my own.

314 Q. Your walking about was simply casual; you never walked to determine the subject of height, and it was not discussed—the height—and you never thought about his height until this case was brought?

A. I sold him a large stack of hay.

Q. Your attention—you were looking at the hay, and not at the height of Mr. Hillmon? A. No, sir, not specially.

Q. Now in regard to this injury of the face: You have described it before, haven't you? A. Yes, sir.

Q. Now I will ask you if you have not described it this way: "I think up against the side of the nose it was not cut clean through the skin, but farther down it was?"

A. Yes, sir.

Q. Up here on the side of the nose it was not (indicating)?

A. The cut was deepest on the bridge of the nose, or near the center of the nose.

Q. Didn't you testify contrary to that—"I think upon the side of the nose it was not cut clean through the skin, but farther down it was?"

A. On top of the nose it was cut deeper than on the side and on the cheek it run out on the cheek, and cut deeper on the cheek than down on,—

Q. The deepest cut was out on the cheek?

A. Yes, sir, and up on the nose.

Q. On the side of the nose it was not cut?

A. It was not cut down deep; it was bruised.

Q. Now, which way did the cut run; down the nose, as we say, or across?

A. No, sir, it run across—run from near the center of the nose.

Q. Out under the eye?

A. Yes, sir, out under the eye.

Q. Tell how about the width or size of that wound—

315 could you tell anything about that from the condition it was in, or was the face so swollen you couldn't get at that?

A. The points that the tools hit seemed to show where it had struck, but it was bruised to such an extent as it wouldn't show whether it was a clean cut wound.

Q. Was the bone, the nasal bone broken in this way?

A. I couldn't say whether it was or not; it was so swollen. I think it was done the evening before I saw it.

Q. Was the nose put out of its place in any way—out of line? A. It was badly out of line from being swollen.

Q. Is this all you can say about it?
A. That's all I can say about it.
Q. You stated that you saw him afterwards, but you did not know how long it was after this injury that you saw him?
Ans. I saw him a short time before he went away—before he went west.
Q. At that time, or any other time did you notice the appearance of this injury? A. No, sir.
Q. You saw him frequently after that, and you saw nothing upon his face to indicate where this injury was?
A. I didn't examine, no, sir.
Q. You saw him this spring you say?
A. I saw him this spring (that he went away), but I didn't have any conversation with him.
Q. Did you see any indication of this injury upon his face?
A. No, sir.
Q. In regard to this photograph, you think that's a pretty good photograph of Mr. Hilmon?
A. Pretty fair as I remember him.
Q. You have testified in regard to this case before, haven't you Dr., and the first time you testified, a good many years ago, didn't you testify that wasn't a very good picture of him, but you recognized it as a picture of Mr. Hilmon?
316 A. Yes, sir.
Q. That's a fact? A. Yes, sir, that's a fact.
Q. What makes you say it is a pretty good picture now?
A. Well, it ain't a pretty good picture of anybody.
Q. Didn't you say it was not a very correct likeness?
A. I think it gives the outlines very well.
Q. On the previous trials didn't you state it was not a very good picture, but you thought you recognized it?
A. I may have stated it in that way—in that language, perhaps.
Q. Can you state it any stronger now?
A. Well, I do not know; I think it is about the same.
Q. You think the same now as you did then?
A. I think about the same—it's a fair representation of Mr. Hilmon, and it is now.
Q. Look at this picture, Dr. (handing witness picture marked by stenographer in blue pencil Ex. "A.")
Q. Do you recognize that picture?
A. That's a picture of Mr. Hilmon.

Witness excused.

The photograph identified by the witness as a picture of John W. Hillmon is marked, "exhibit number 10" of the trial of 1899.

A. E. Wellman, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief Mr. Hutchings, and testified as follows:

Q. What is your name? A. A. E. Wellman.
Q. Where do you reside? A. Topeka, Kansas.
Q. What business do you follow?
A. Stationary engineer.
Q. How long have you lived in Topeka?
A. Lived there some thirteen or fourteen years.
Q. Where did you formerly reside?
A. In Jefferson county.
Q. How long did you live in Jefferson county, and in what rt of the county?
A. I lived in Jefferson county since—about thirty-eight ars I have lived in Jefferson county—since I first came here.
Q. Did your family—your father live in that vicinity?
A. Yes, sir.
Q. How long did you live there in Jefferson county?
A. About eighteen years, before I left the county.
Q. Were you acquainted with John W. Hillmon?
A. Yes, sir.
Q. How long did you know him?
A. O, I had known him some five or six years; or longer.
Q. Where were you living in the spring of 1879, say in the onth of April? A. I was living in Lawrence.
Q. Lawrence, Kansas? A. Yes, sir.
Q. Do you remember the circumstance of a dead body be- g brought to Lawrence in April, 1879, as the body of John . Hillmon? A. Yes, sir.
Q. Did you see that body? A. Yes, sir; I did.
Q. Where did you see it?
A. At Bailey & Smith's undertaking establishment.
Q. You may state who, in your opinion, that was—whose dy it was.

Mr. Barker: We object to that as incompetent.
The Court: In what respect is it incompetent?
Mr. Barker: To call for an opinion of the witness on 8 a matter of that kind; it is not a subject of expert testimony.

Objection overruled; to which ruling the defendants and ch of them at the time duly execepted.

A. I thought it was Hillmon.

Cross-examination

y Mr. Barker:
Q. You reside in Topeka now? A. Yes, sir.
Q. And have lived there for how many years?

A. Twelve or thirteen years I presume.
Q. What business are you engaged in?
A. Here of late, stationary engineering.
Q. Before that?
A. I have been a policeman ten years there.
Q. You were on the police force there? A. Yes, sir.
Q. You say you lived in Jefferson county at one time?
A. Yes, sir.
Q. What years did you live in Jefferson county?
A. I left there, let's see—well, I have forgotten now just when.
Q. Well, where did you go from there?
A. To Lawrence.
Q. How long did you live there in Lawrence?
A. O, I was only in Lawrence about two years, or something like that.
Q. What two years were they?
A. I think it was—I think I went there in 1878, I think.
Q. You think you went there in 1878?
A. I think it was 1878.
Q. You think you lived there in 1878 and '79? A. Yes.
Q. You are clear in regard to that, are you?
A. I think so.
Q. Can you say you were living in Lawrence in 1879 at all? A. I think so; yes, sir.
Q. Were your parents living there?
A. My mother was.
Q. You were living with your mother? A. Yes, sir.
Q. How old were you in 1879?
A. I was twenty years old.
Q. What business were you engaged in at that time?
A. I was laboring—common laboring work.
319 Q. For whom?
A. O, different parties; I don't remember now just—
Q. How did you happen to go down to Bailey & Smith's?
A. I was up on the street and —
Q. (Interrupting) Did Levi Baldwin come after you?
A. No, sir.
Q. Do you remember who did?
A. No, sir; no one came after me as I know of.
Q. Were you informed by any one that the body of John W. Hillmon was down there? A. Yes, sir.
Q. Do you remember who it was who informed you, Mr. Wellman?
A. I couldn't say positively. I know it was spoken of that the remains—
Q. (Interrupting) I asked you if you remember who it was told you?

A. No; I don't remember positively; I can't recall to memory right now.
Q. Who do you think it was?
A. I don't know. My cousin and myself were together, and there was others talking, and some one mentioned it.
Q. Who is your cousin? A. Fallace Wellman.
Q. Then you went down to Bail & Smith's place? A. Yes.
Q. Do you remember what time in the day it was you went down there? A. I don't positively; no, sir.
Q. Who went with you, Mr. Wellman?
A. My cousin.
Q. Anybody else?
A. Well, there was a string of people going down the street.
Q. String of people going in and out there, was there?
A. Yes, sir.
Q. Quite a good many people in there while you were in there, was there? A. Yes; several.
Q. In there looking at the remains? A. Yes, sir.
Q. I beg your pardon, I didn't understand you. You said several people, did you?
A. Several people in there; yes, sir.
Q. Do you recall who they were?
A. I don't know that I can, any one but my cousin.
Q. You don't remember anybody else?
320 A. No; I don't.
Q. You think you don't remember the names of anybody else? A. No, I think not.
Q. You didn't have any trouble in getting in there?
A. No, sir.
Q. No one tried to prevent you from going in?
A. No, sir.
Q. It was public. You didn't remain there, of course, but a very short time?
A. O, probably three or four minutes; something like that.
Q. Three or four minutes, and then went out?
A. (No answer.)
Q. Of course, having been informed that Mr. Hillmon was down there, you went down there expecting to see his body, didn't you? A. Yes —
Q. You went down there expecting to see it?
A. (No answer.)
Q. Are you acquainted with Mrs. Hillmon?
A. I know her when I see her.
Q. How long have you known her?
A. I haven't been personally acquainted with her at all, any more than I know her when I see her.
Q. That is all, Mr. Wellman.

Witness excused.

George P. Ware, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Hutchings, and testified as follows:

Q. What is your name? A. George P. Ware.
Q. Where do you reside? A. Lawrence, Kansas.
Q. How long have you resided in Lawrence?
A. Since the fall of 1870.
Q. Since the fall of 1870? A. Yes, sir.
Q. What is your business now?
A. I am street commissioner.
Q. Street commissioner of the city of Lawrence?
A. Yes, sir.
Q. Did you know John W. Hillmon?
A. I had a slight acquaintance with him. I was introduced to him.
321 Q. I will get you [—] state whether or not you saw him more than once.
A. I saw him perhaps half a dozen times.
Q. Now I will get you to state to the jury what in your opinion was the height of John W. Hillmon?

Objected to as incompetent, irrelevant, immaterial, and not a proper subject for expert testimony—testimony of that kind.

The Court: What kind of testimony would be proper in a case of that kind?

Mr. Barker: For somebody to testify who knew his height—somebody who had some knowledge on the subject, and not a mere guess or opinion.

Objection overruled; to which ruling the defendants and each of them duly excepted.

A. I would think he was in the neighborhood of six feet tall.

Cross-examination

By Mr. Barker:

Q. When did you see him last, Mr. Ware, if you remember,—what year?
A. It was the year that he went to Medicine Lodge; I don't know whether it was '78 or '79. I think it was '79 though.
Q. You think you saw him then, do you? A. Yes, sir.
Q. That year. Where did you see him?
A. I saw him on Henry, on the south side.
Q. I understood you to say that your acquaintance with him was quite limited? that you wouldn't say you had seen him to exceed five or six times? A. That is the idea, sir.
Q. Am I right in regard to that? A. That is correct.

Q. You were not intimate with him at all? A. No, sir.
Q. Now this matter of height,—you never measured eights with him at all? A. Never did.
Q. Never saw him measured? A. No, sir; never did.
Q. And at that time there was no question in regard to his height? That is, there was nothing up that way that 22 would call your attention to his height? A. No, sir.
Q. Isn't it a fact, that so far as the question of eight is concerned, it is a mere guess, Mr. Ware?
A. Well, it was a matter of opinion; that is all.
Q. Your opinion from having seem him a few times?
A. Yes, sir.
Q. And your attention never having been called to the uestion of his height? A. No, sir.
Q. And that matter not being in controversy? A. No, sir.
Q. Any more than you would have if you had seen any ther stranger a few times on the street and was asked in egard to his height? A. (No answer).
Q. And you say it was in the neighborhood of six feet? It as there or thereabouts, was it?
A. I would take it that he was very close to six feet tall.
Q. How?
A. That would be my opinion, that he was very close to ix feet.
Q. What do you mean by "in the neighborhood"?
A. Well, close to it; that would be my opinion of it.
Q. Five feet, six, seven, eight or nine?
A. O, closer than that; five feet ten or eleven; along there.
Q. Five feet ten or eleven? A. (No answer).
Q. Now isn't it a fact that your attention never was called o his height until after this case was commenced; that it was ears before you thought anything about it?
A. That is correct.
Q. Until this controversy arose, you had even forgotten ou had ever seen the man?
A. O, no; I remembered that I had seen him.
Q. But you had no recollection in regard to his height hen?
A. I remembered of seeing him on the street when he was talking, or being talked of; that is all.
Q. And you never estimated in your own mind, or expressed any estimate of his height, until after this suit was brought and until after this controversy in regard to who that was that was down there at Bailey & Smith's came up; you never made any estimate of his height either in your own mind, or expressed any estimate? A. I did not.

323 Redirect examination

By Mr. Hutchings:

Q. Did you reside in Lawrence in April, 1879?

A. I lived in Lawrence in 1878 and '79; yes, sir.

Q. You were living there at the time the body was brought back there that was said to be Hillmon's?

A. Yes, sir; I was.

Q. You may state whether or not you heard the discussion about the height of John W. Hillmon?

A. No, sir; I didn't at the time; just simply heard that the dead body of John W. Hillmon had been—

Mr. Barker: We object to what he heard as incompetent, and ask to have it taken from the jury.

The Court: That may stand, but not as evidence that that was the body of John W. Hillmon.

To which ruling of the court the defendants and each of them at the time duly excepted.

Q. I believe you didn't see the body when it was there?

A. No, sir.

Q. Were you at Lawrence at the time?

A. I was there at the time; yes, sir.

Q. But you didn't go to see the body?

A. I didn't go to see it; no, sir.

The Court: I wish to make it plain to the jury that when the witness says that he heard that the body of John W. Hillmon was brought back to Lawrence, he simply mentions that for the purpose of fixing the time of his residence there, but it is no evidence whatever that that body was the body of Hillmon.

Witness excused.

324 Joseph Rahskopf, called as a witness on the part of the plaintiff, and being duly sworn, was examined in chief by Mr. Hutchings, and testified as follows:

Q. What is your name? A. Joseph Rahskopf.

Q. Where do you reside? A. Lawrence, Kansas.

Q. How long have you resided there?

[—] I have been there since 1867.

Q. What business [of] occupation do you follow?

A. I am in no particular business just now.

Q. Were you acquainted with John W. Hillmon?

A. I was slightly acquainted with him.

Q. Do you remember the circumstance of a body being brought there to Lawrence in 1879 which was said to be Hillmon's? A. Yes sir.

Q. Did you see that body? A. I did.

Q. When and where did you see it?

A. I seen it out at the cemetery.

Q. I will get you to state to the jury, in your opinion, how tall a man was John W. Hillmon?

Objected to as incompetent.

Objection overruled to which ruling of the court the defendants and each of them at the time duly excepted and still except.

A. To the best of my judgment I think he was a man between five feet ten and five feet eleven—as near as I could judge; I wouldn't be positive.

Q. Now I wish you would state to the jury the circumstances in the first place state to the jury how long you knew Hillmon—how long you had known him at the time the body was brought there?

A. I got acquainted with himin 1878. I was introduced to him by some gentlemen. I was not intimately acquainted with him. I had some conversation with him. I have seen him on the streets more or less.

325 Q. I will get you to look at this photograph that is marked Exhibit No. 10, and ask you to state to the jury, in your opinion, whose photograph it is?

A. Well I would take that for Mr. Hillmon's photograph.

Q. Now you may state to the jury the circumstances under which you went out to the cemetery and what you saw there?

A. I was invited by Mr. Van Hausen and Mr. J. Burnham—

Mr. Barker: Who invited him and how he went out there is immaterial.

Q. Well you went out there at some one's invitation?

A. They asked me to go out there with them and I went out with them, just merely to see the body taken up. It was the second time they took him up when I was at the cemetery.

Q. What was the condition of this corpse that you saw out there at the cemetery?

A. Well the condition was just as a corpse would naturally be that had laid for four or six weeks.

Q. How was it situated?

A. It was in the casket—in the coffin.

Q. Was there anything done while you were there with reference to the corpse?

A. Yes sir they brought him into a position to take his photograph while I was there.

Q. What was the condition of the hair and the face of the corpse?

A. Well the hair was rather badly mussed up by handling him, turning him, and bringing him into position to take his photograph.

326 Q. Did you see the photograph after it was taken; or did you see the position that the body was in [was] the photograph was taken?

A. Yes sir, I stod right on the left side of the casket when it was taken.

Q. I will show you a picture of a cadaver, which will be marked Exhibit No. 13, and get you to state whether or not you can recognize that as the photograph of that cadaver that you saw in the cemetery?

A. Yes sir, that is the one that was taken. He was in that position when he was taken, when I was there.

The Court: I think that would be No. 12, wouldn't it?

Mr. Hutchings: Yes No. 12 instead of 13.

Q. You may state whether the corpse was photographed in more than one position?

A. I rather think it was but I couldn't say positively that I was there when that was taken. I rather think I was, but I wouldn't be positive that I was.

Q. I exhibit to you another photograph of a cadaver, to be marked Exhibit 13, and will get you to state whether or not you were there at the time that photograph was taken?

A. I ain't certain whether I was there when that was taken or not. I rather think I was.

Mr. Hutchings: I will state that it will be shown that [it will be shown that] that is another picture of that cadaver. It is agreed between us, isn't it, that that is a picture of that cadaver?

Mr. Barker: It is a picture of the cadaver; there is no doubt about that.

Q. Now you may state to the jury whose body, in your opinion, it was you saw in the cemetery there?

Objected to as incompetent; objection overruled, to which ruling the defendants and each of them at the time duly excepted and still except.

A. In the condition it was in?

Q. No. Whose body in your opinion was it that you saw there?

A. Well my best judgment is that it was Mr. Hillmon's body.

327 The Court: Is that second picture, Exhibit 13, offered in evidence?

Mr. Hutchings: Yes sir.
Mr. Barker: Yes that was handed to the jury by consent.
Q. Now did you examine that body? A. Yes sir I did.
Q. Did you examine its hands? A. Yes.
Q. State to the jury what if anything you noticed in relation to its hands or either of its hands?
A. My attention was called by Dr. Miller to look at his hands, and consequently I answered the question and examined the hands, and both of his feet, and I didn't see anything particular about his hands except I remarked that—

Mr. Barker: Wait a moment.
The Court: What you remarked would not be proper. What you noticed would be proper.

Witness: Well, his hands were the hands of a man that didn't work very hard, and the appearance was like they were used to handling lines and reins of teams, or something like that; and if I recollect right I saw the mark of a ring but I couldn't say positively on which finger, whether it was the little finger or the next finger; and I couldn't say on which hand, neither.
Q. Now then did you lok at the face of the cadaver, and if so, state whether you noticed anything in relation to the nose?
A. Yes; I recollect that there was something like a scar on his nose, and it had decayed in some degree. I never knew that he had a scar on his nose in his lifetime, but at the time I saw the corpse I saw that scar; but I didn't know about what the cause of it was.
Q. Now in this picture of the cadaver, No. 13, I will get you to look at that picture and state where this scar was upon the nose that you noticed with reference to the mark on that picture?

Objected to as incompetent, irrelevant and not being the best evidence; the picture being introduced in evidence,
328 speaks for itself and shows the condition of the nose.

The Court: The question is, Where on the picture?
Mr. Hutchings: Where on the body was that spot that you noticed as compared with the spot that appears on the nose in the picture?
The Court: He may answer.

To which ruling of the Court the defendants at the time duly excepted and stil except.

A. Well I would think the scar waas about on the middle of the nose, not quite that far down, I think, and on the left side running from the center on the left side down, that is, down towards his cheek.

Cross-Examination

By Mr. Barker:

Q. You are still living in Lawrence are you, Mr. Rahskopf?

A. Yes sir.

Q. You were living there, you have already stated, in 1878 and possibly '79? A. Yes sir.

Q. I understood you to say that you- acquaintance with Mr. Hillmon was very slight? A. Yes sir.

Q. Isn't it a fact that you had not seen him to exceed three times, and didn't you so state?

A. I think I made a statement to that effect—I seen him on the street several times.

Q. It is a fact you have no recollection of ever having seen him but three times? A. (No answer.)

Q. And you were not intimately acquainted with him at all?

A. I was not intimately acquainted with him at all—that is what I should call intimately. I was acquainted with him but—

[—] I know but isn't it a fact that you have testified twice in this case already that you have no recollection of having seen him but three times? A. Yes sir.

Q. And it is a fact you have no recollection of having seen him but three times? A. Yes sir.

Q. Now in regard to his height,—I will ask you if
329 having seen him three times, and the question of his height not being involved in any way, you can say now in regard to his height?

A. Well, the way I would judge of that—

Q. I know; but can you do that?

A. Let me tell you how I can do it.

Q. I am not asking you how you can do it; I am simply asking you if you can do it?

A. Certainly I can, if I can tell you how I can do it.

Q. Now let me ask you if you didn't testify in this case in 1895 before Judge Thomas at Topeka, and in 1896 before Judge Williams at Topeka, and if you were not asked to state how high he was, and if you didn't state you couldn't tell how high Mr. Hillmon was, and if you didn't state—I will read it. I wish to withdraw that last question and make it a little more definite. I will ask you if in 1896, before Judge Williams, this question wasn't asked you, "State whether you remember how how high he was," and if you didn't answer, "I couldn't state as to that; to the best of my judgment I think he was about five feet"? A. No, sir.

Q. Did you not make that statement?

A. No, sir, I did not.

Q. Then I will ask you if you didn't state on the trial of that case before Judge Williams in 1896 that you couldn't tell how high he was?

A. Well, for the reason I didn't measure him; but then as to my stating he was five feet, that isn't so. That would be a very small man.

Q. You say you didn't say that? A. I didn't say that.

Q. Now, I am calling your attention to the testimony on the subject of height given before Judge Williams in Topeka in 1896. This question was asked you, "You don't have any definite knowledge in regard to his height or weight, anything of that sort," and if you didn't answer, "No, sir, only from my judgment."

Mr. Hutchings: I submit that doesn't contradict the
330 witness. A. I suppose that is—that is correct.

Q. Wasn't this question asked you—that is, didn't you, before on the trial of this case, state that you couldn't give his height and that you didn't have any ready guess? and to that didn't you answer, "Well, I wouldn't swear positively about his height. That is my opinion or guess as near as I can judge"?

Mr. Hutchings: We object on the ground that that does not tend to contradict the witness and it encumbers the record.

Objection overruled.

Q. Did you not answer the question in that way?

A. Well, I might; I might have answered it in that way.

Q. Then is your statement now in regard to his height any more than a guess?

A. Well, I suppose it is; I didn't measure him. If I had measured I could say positively just what it was, but I didn't measure him and consequently I can't say positively. That is merely my opinion, as I am five feet ten myself.

Q. I am not asking you in regard to that now. Now, you said you went out to the cemetery? A. Yes, sir.

Q. And that the body had been taken up? A. Yes.

Q. And you saw the body photographed there, did you?

A. Yes, sir.

Q. Do you remember who was present at that time?

A. Yes, sir—I don't know as I can remember all, but I can tell you some of them that was there.

Q. State as near as you can now who was present?

A. Well, there was Dr. Patterson, Mr. J. Farnham, and Mr. Van Hausen and Dr. Miller, and quite a number of others that I don't just recollect their names, were there at the time.

Q. Was the coffin opened while you were there?

A. Yes, sir, they just was opening it when I got there.

Q. Did you see the people who were present? Were
331 they in a position to see the coffin when it was opened?
A. What is that?
Q. Were they in a position where they could see the coffin when it was opened—were they around close by?
A. Yes. They were just getting it into position to take a photograph of him, when I got there; just had got it out and opened it.
Q. Now you spoke, while you were there, about examining the hands?
A. That was afterwards—after the photograph was taken
Q. After the photograph was taken? A. Yes.
Q. Then you made this examination of the hands after the photograph was taken? A. Yes, sir.
Q. You examined, I understand, both of his hands?
A. Yes, sir.
Q. His right hand as well as his left? A. (No answer)
Q. You saw no scars upon his hands?
A. No, I did not see no scars, no particular scar on his hand—not to my recollection.
Q. You looked at them quite minutely, did you not?
A. Well, yes.
Q. Now, you have spoken something about his hands having the appearance of having handled lines?
A. Lines and reins.
Q. In driving? A. Yes.
Q. You think that handling lines would make their appearance upon the hands so you could tell by the appearance of a man's hands that he had been a rangeman, do you?
A. Well, I thought so, according to my judgment; I might have been mistaken, but that was my opinion.
Q. That is your judgment of this man, from his hands, that he had been driving? A. Yes, sir.
Q. Now, what would you say in regard to the difference in the appearance of a man's hands in handling tools like reins?
Wouldn't they make some general appearance upon a
332 person's hands? A. No, sir.
Q. You think there would be a distinction between a man who handled lines and a man who handled tools?
A. Yes, I would think so.
Q. Other people made an examination of his hands there did they not? A. Dr. Miller did.
Q. Dr. Miller made a critical examination there?
A. I don't know as to that whether he did or not. He was the one that drew my attention to them in the first place.
Q. Didn't you see him examining the hands?
A. Yes, sir, I did.
Q. Didn't you see him applying a glass to the hands—examining the hands with a glass?

A. No, sir, not to my recollection, I didn't see him.

Q. Could you say at this length of time whether you saw a glass there or not? A. No, I couldn't say as to that.

Q. Now, I believe you described his hands generally; if not you may describe to some extent?

A. Well, his hands did not seem like—

Q. (Interrupting) I mean the size of his hands; I mean the hands of the body that you saw out there?

A. It was an ordinary hand, not a very large hand, an ordinary hand; I couldn't say as to the size.

Q. Was it not a long, large, bony hand?

A. I rather think it was rather a large hand.

Q. Bony hand? A. Yes.

Q. It was a long, large bony hand, was it not?

A. Well, not so very long. I just considered it an ordinary hand.

Q. Just an ordinary hand? A. Ordinary hand.

Q. On the other trials of this case, both of them, haven't you spoken of his hands as long, rather large bony hands?

A. I don't know.

Q. Is that your recollection now in regard to it—

A. No, sir.

333 Q. Your attention having been called to his hands?

A. I did'nt think he had a very large hand.

Q. I said rather large.

A. Well, rather large. I said ordinary; that is what I call rather—

Q. (Interrupting.) Now I understand you to say something about a ring mark—that you saw something of that sort.

A. Well I—

Q. I will ask you first if you can tell which hand it was?

A. No, I couldn't tell which hand.

Q. Can't recollect anything in regard to which hand?

A. No, sir it wasn't very plain, neither, as I recollect at the time; and I don't believe I would have noticed if the doctor hadn't called my attention to it.

Q. I am not asking you what the Dr. did; I am asking you if you know which hand it was on?

A. No, I couldn't tell you on which hand it was.

Q. And you say that whatever mark there was there was very dim? A. Was dim, yes; the ring mark was dim.

Q. Very dim was it not?

A. Well, it wasn't so dim but what I could tell there was a ring there.

Q. You could tell that? A. Yes, sir.

Q. You can tell that now, can you?

A. I rather think—when I come to think over the matter, I do recollect of a ring mark. I had almost forgotten about the ring mark.

Q. How?

A. I say I had almost forgotten about the ring mark; but it being recalled to my mind, I recollect now, and it refreshes my memory that I did see a ring mark, dim mark, but I couldn't say on which hand.

Q. Couldn't say in regard to that? A. No, sir.

Q. Now other people had the same opportunity to see it that you had? A. I suppose so.

Q. At the trial of this case in 1896 didn't you answer this question: "State whether there was any ring mark"—that was the question—and didn't you answer: "I couldn't say positively whether I saw ring marks or not. I remember making some remark in regard to the hands."

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Wasn't that your answer in regard to the question of ring marks, that you couldn't say positively whether you saw ring marks or not?

A. Well, I couldn't say—I couldn't recall at the present time whether I did or not; but to think over the matter, I did afterwards; yes.

Q. I know, but I am asking you whether you didn't make that statement at the trial of this case in 1896?

A. I think that is correct; yes.

Q. You think you did make the statement there?

A. Yes.

Q. That you couldn't say that you saw the ring marks?

A. Yes; but to think over the matter afterwards, I recalled it to memory.

Q. I know; but I am only asking you in regard to what you said at the trial in 1896? A. Yes.

Q. And you stated then you couldn't remember any ring marks and you say now that you now remember seeing ring marks?

A. Yes, sir; after thinking it over and my attention having been recalled to it I remember it. I had forgotten it.

Q. By whom was your attention called to those ring marks—I mean since 1896 at the time you couldn't say whether you saw ring marks or not?

A. It was sometime afterwards, and when I come to think it over at the time—

Q. I asked you with whom you talked and who called your attention to these ring marks, since 1896.

A. I couldn't tell you if [you] had any talk.

Q. I will ask you if you had any talk with any person to-day in regard to ring marks? A. To-day?

Q. Yes. A. I don't know whether I have or not.

Q. You can't remember to-day whether you had any talk in regard to ring marks or not to-day; but you are able to state that you saw ring marks eighteen or nineteen years ago are you? A. Yes, I can.

Q. Twenty-one years ago? I will ask you to state if you haven't had a conversation with Dr. Patterson to-day
335 in regard to ring marks? A. No, sir, I did'nt.

Q. Have you had a conversation in his presence in regard to it? A. No, sir.

Q. You remember that fact?

A. I do, that I had no conversation in regard to it at all—in regard to Mr. Hillmon.

Q. In the trial in 1895 before Judge Thomas, did you not state in answer to the question, "State whether you looked at the left hand of the corpse," and you stated, "Yes, I looked at both hands?" A. Yes, sir.

Q. That is correct? A. Yes, sir.

Q. And to the question, "Do you remember any marks on either of the fingers," did you not answer, "I didn't notice marks, but I couldn't make a statement now just what the condition was." Wasn't that your answer to that question?

A. Well, that depends on what condition it was to be in; I wasn't exactly—

Q. I know; but the question is whether you made that answer in substance?

A. Yes, I did; that is, as to what condition it was.

Q. Were you not asked, "I asked if there was any ring marks" and to that question did you not answer, "I couldn't say positive I saw ring marks or not." Wasn't that your answer to the question in 1895? A. I guess it was.

Q. It was correct, then, was it?

A. Well, there is an open question there that I couldn't positively—there might be a possibility that there was.

Q. Might be a possibility? A. Yes.

Q. But that is the way you answered the question?

A. (No answer audible.)

Q. To this question, "State whether or not you remember any mark or anything about the nose? and did you not answer, "I couldn't say as to that whether I did or not at that time; it had been so long. It seems to me I did notice a scar on the nose, but I couldn't say."

336 A. Well, I had reference to his nose while he was living.

Q. I know but wasn't that the manner in which you answered that question? A. I guess it is.

Q. You couldn't tell in regard to the nose at that time, could you?

A. Why, yes, I could positively tell because it was very plain to see. I didn't need no [mycroscope] at all to see it.

Q. I know; but of course your recollection in 1896 in regard to those matters would be as good as it is now.

Mr. Hutchings: We object to that as argumentative. The witness has stated that he referred then to the time that he was living.

Mr. Barker: I am speaking about the mark on the nose of the corpse.

Witness: That isn't the way I answered it. I answered in regard to his living time. I never noticed any mark on his nose; that is what I understood, and that is what I answered.

The Court: Does that refer, Mr. Barker, to the mark on the corpse or to the [remark] on Hillmon when he was alive?

Mr. Barker: He wasn't examined at all in regard to any mark on Hillmon's nose. The whole examination was in regard to the mark on the corpse—I mean at that time.

Mr. Hutchings: That is not my recollection of it; I have the notes taken at the time by your—

Q. Taking into consideration your limited acquaintance with Mr. Hillmon and your opportunities for observing him and the fact that you never measured or saw him measured, do you feel as if you could state with any degree of accuracy in regard to his height—taking all those matters into consideration? A. Well the only way I could tell—

Q. I know; but I am not asking you to tell how you could do it, but I am asking you, taking those matters into
337 consideration do you feel you could speak with any degree of accuracy with regard to his height—taking into consideration the matters I have spoken about, the length of time you knew him and your opportunities for observing him?

A. I could, standing right by the side of him, which I did.

Q. That is the way you—

A. (Interrupting.) That is the way I could tell, by standing beside the man, and knowing what I measured, and I think he was pretty near the same height I was and a little—I thought, a little taller.

Q. You think you could speak with some little degree of accuracy, do you, in regard to that—taking everything into consideration?

A. Well, that is as near as I could come to it I wouldn't want to be positive.

Q. But on the other trial of this case you stated that it was a mere guess, did you not?

A. Why certainly; it is all a guess with me—certainly; I never measured him.

Redirect Examination

By Mr. Hutchings:

Q. How tall are you, Mr. Rahskopf? A. Five feet ten.

Q. And you have stood up by the side of Hillmon?

A. Yes, sir; I have stood up by the side of him and talked to him.

[—] And upon that you based your opinion?
A. And upon that I based my opinion.
Q. Counsel asked you if that was a mere guess. A. Yes.
Q. Do you mean by guess—

Mr. Barker: We object to that as not cross-examination.
The Court: O well, the witness stated it was his opinion or
ıess. You just asked him whether that was a mere guess,
ıd it is proper for counsel for the plaintiff to ask him what
: means by "guess."
Mr. Barker: Isn't that for the jury to say. Isn't it a ques-
tion of fact instead of a question of law whether it is
38 a mere guess.
The Court: He may answer the question.

A. I have reference to the height, not [the other to] the
art.
Q. Well, what do you mean by guess?
A. Well, to the best of my judgment, and I am a pretty
ood judge.
Q. You have testified at every trial of this case, haven't
ou?
A. I don't know that I have testified at every trial; this
s the fourth one.
Q. This is the fourth trial? A. Yes.
Q. That you have testified at? A. Yes, sir.
Q. Now you spoke about your recollection being refreshed
oncerning those ring marks on the finger? A. Yes, sir.
Q. I will get you to state, if your recollection was refreshed
n that matter by the fact of reading the testimony that
ou gave the first time you testified? A. Yes, sir.
Q. And in these later trials in 1895 and '96, you had for-
gotten that circumstance?

Mr. Green: We object to the question as leading.
Mr. Hutchings: I suspect the question is leading.
The Court: Yes it is leading.
Mr. Hutchings: Well he has already stated.

Q. Do you remember the name of the photographer who
took these photographs? A. Yes, Mr. Layman I think.
Q. Layman? A. Yes.
Q. Did you know him? A. I used to know him.
Q. Was he a photographer there in the city of Lawrence?
A. Yes, sir.
Witness excused.

339 Dr. John D. Patterson, called as a witness on the part of the plaintiff, being duly sworn, testified as fol-
lows:

Direct Examination

By Mr. Hutchings:

Q. State to the jury your name, place of residence and occupation.

A. John D. Patterson. I reside in Kansas City; I am a practicing dentist.

Q. How long have you been engaged in the practice of dentistry? A. Thirty-two years.

Q. Did you formerly reside in Lawrence, Kansas?

A. Yes, sir.

Q. Were you residing there in 1879? A. I was.

Q. Did you know Dr. Stewart?

A. Very well, at the time I lived there.

Q. What connection, if any, did you have with him in Lawrence in 1879,—that is, association I would rather say?

A. Well, adjoining office with a door opening between.

Q. You had communicating offices? A. Yes, sir.

Q. Do you remember the circumstance of a body being brought to Lawrence in April, 1879, that was said to be the body of Hillmon? A. I do.

Q. Now, if you had anything to do in connection with that body or saw it, I wish you would state to the jury in your own language the facts about it; what you did.

A. I was employed by an agent of the company—a Mr. Tillinghast—to take models of the teeth and jaws of that body; and with Mr. Tillinghast and I believe another man, maybe, another insurance man, I did so,—working over the body three or four days—very difficult to get impressions and then make models—until I finally secured models that were satisfactory under the circumstances. The body was in an outhouse across the alley from Bailey & Smith's store—a little further down the alley.

Q. You did finally make a model, did you?

A. Yes, sir.

340 Q. I will get you to state to the jury what kind of teeth that cadaver had.

A. Seemingly good teeth; teeth were all present.

(Counsel here exhibits a model to witness.)

Q. I will get you to state whether or not this that is handed to you now is the model that you made of the teeth of that corpse? A. It is.

Q. Is it a correct model?

A. Approximately correct; I might do better now. The jaws were very capacious, as you will see; all the teeth are in the mouth—all thirty-two teeth; a slight irregularity only; an unusually perfect set of teeth.

Q. What irregularity was there that you discovered, if any?

A. There is an irregularity in the lower front teeth. There is an irregularity here—a little shortness there in that tooth.

Q. What tooth?

A. That is the lateral incisor upon the left-hand side.

Q. That is an upper jaw tooth?

A. Yes, sir; that we speak of. They are very unusual in their regularity.

Q. Now as to that upper incisor?

A. It is that tooth there (indicating).

Q. You say it is slightly shorter?

A. Shorter than its mate on the opposite side, as you will see. That is one of the facts—it gives evidence of having been worn by a pipe stem or something of that order, considerably at that point—more than any other point on the front teeth.

Q. Now, you may state whether, in your opinion, from the examination of that body in making that model, the shortness of that tooth might have made an appearance as though there was an absent tooth.

Objected to by defendants as incompetent, irrelevant and immaterial.

Mr. Barker: He can describe the appearance and any one else can tell as well as he what it would show.

341 Mr. Hutchings: No; he examined the teeth and jaws and it depends on the build of the mouth.

The Court: If he can answer the question from his examination of the corpse, he may do so.

To which ruling and action of the court the defendants at the time excepted and still except.

Q. Yes; in the shape of the lips and knowledge that you derived of the shape of the jaws and mouth and lips and teeth.

A. Well, the straight lines drawn—or lip—drawn evenly around the upper teeth, the major part of that tooth would not appear, while the others would—in the front part of the mouth. I can show it to you here, if you wish—show it to the jury. Compare the opening—that is, the opening to the jaws, evenly, and you will see the shortness of the lateral compared with the teeth on the other side.

Q. Now how long were [—] engaged in working about the —?

A. I can't remember; three or four days, being out and in several times a day.

Q. In order to make this model, what did you have to do?

A. Make an impression of the teeth and from that make the model.

Q. How did you get into the mouth?

A. Pried it open and washed it out. The jaw was—the shot entered here, you understand; and this was hanging loose, this condile. The end of the jaw was shot off I believe on this side so that there wasn't much difficulty in prying it open. The body was not rigid. It was very well preserved at that time.

Q. Now during that time, or soon after the time you had been working with this body, as you say some days, I will get you to state whether or not you saw a photograph of what you at that time believed to be that—the living person—that person living? A. How is that?

Q. Whether since the time, or after you were working with that body, you saw a photograph that you believed to be a photograph of that body when alive and living.

A. I did, a few days after I was through my work.

342 Q. Who exhibited to you that photograph?

A. I think it was Dr. Morris, the coroner.

Q. The coroner of Douglas county? A. Yes.

Q. Now what kind of a photograph or picture was that?

A. I saw two —

Objected to as incompetent, irrelevant, and not the best evidence.

Mr. Hutchings: This is preliminary.

The Court: Yes, it may be preliminary, unless you ask him to describe the photograph itself, the person shown on the photograph. You wouldn't be authorized to state from that that it was a photograph of Hillmon or a photograph of somebody else, unless he knew.

Mr. Hutchings: It is in line with this other testimony.

The Court: You expect to follow the testimony of this witness up by other testimony identifying that picture?

Mr. Hutchings: Yes; I expect to show there was a picture of that kind taken by Mrs. Hillmon to the coroner, Dr. Morris, and that Dr. Morris showed it to this witness and he recognized it.

Witness: I am not positive. Dr. Morris was there in his own store, and I think he had it. I wouldn't swear to that positively.

The Court: If you say you propose to connect the photograph that he has in his hand with a photograph of Hillmon, he may answer the question.

Mr. Hutchings: We certainly do, and we submit that the existence of such a photograph is admitted by the opening statements of both counsel, and the loss of it.

The Court: That would be immaterial to consider that at present, because if you show there was such a photograph, you can certainly show its existence to make the connection.

Mr. Hutchings: Of course we don't expect to make
343 the connection by this witness.

Q. Where did you see that picture?

Mr. Barker: To the introduction of this testimony we desire to save an exception as incompetent and irrelevant.

Objection overruled; to which ruling of the Court the defendants and each of them at the time duly excepted and still except.

A. I saw it in the store in which Dr. Morris was interested at that time.

Q. How many pictures were there on the tintype?

A. There were two—supposed to be Mr. Hillmon and Mr. Brown.

Mr. Barker: We ask to have that stricken out, what they were supposed to be.

The Court: That may be stricken out.

Mr. Barker: Because the witness doesn't claim to have any personal knowledge.

Mr. Hutchings: We are willing it should be stricken out.

Witness: I never saw any of these men up to this time that I know of, in life.

344 Q. You saw a tintype there with two pictures on it?

A. Yes.

Q. What was their positions?

A. They were standing.

Q. You may state, if you remember, their relative heights.

A. One was very heavy—considerably taller than the other, and larger also.

Q. You may state whether you recognized the taller of those pictures as being the picture of this cadaver when living?

Objected to as incompetent, irrelevant and immaterial; objection overruled, defendants excepting.

A. I was told it was a picture of Mr. Hillmon.

Defendants move to strike out the answer; motion sustained, plaintiff excepting.

By the Court: The purpose is to establish the identity between the taller person, whose picture was taken whilst living, and the cadaver that you saw.

Witness: I surely thought it was the picture of the man I had been working over those three or four days.

By the Court: I don't know as it is a question of what you thought it is a matter of judgment. What the witness thought will be stricken out.

Witness: It was my judgment, then.

By Mr. Barker: We will ask to have stricken out his last answer, as being wholly incompetent and immaterial.

By the Court: Wherein is it incompetent and immaterial?

By Mr. Barker: I think, so far as that is concerned, that for a witness to attempt to carry shadows and [and] identify one he doesn't know by a picture that is not shown to be a good picture, or anything of that sort, that it is wholly incompetent. In the first place, in order to make a picture of that sort competent at all, its identity would have to be thoroughly established.

By Mr. Hutchings: We will establish it.

By the Court: That is true; it must be at some time established or else this witness' testimony as to that, as to the comparison, should be excluded; and not only must it be
345 shown that there was such a picture containing the two figures, but that the representation of the taller man was a fair picture of Hillmon. Unless it is shown, this testimony drops out.

By Mr. Hutchings: We promise to show all that.

Witness: There was another picture, a separate picture, of Mr. Hillmon shown at the same time.

Q. Now, your recollection is that these pictures were shown you by Dr. Morris of Lawrence? A. Yes sir.

By Mr. Isham: It seems to me, if the Court, please, that this is altogether too remote to be in any respect whatever a competent instrument of evidence. This witness never saw the original of that picture, which he says was simply shown to him by somebody and was told it was a photograph of Mr. Hillmon. He never saw Hillmon. He never saw living the person whose half decomposed cadaver he saw photographed when wrenched out of position and the face distorted, as can be seen by these pictures. He never saw either of those individuals living; and for him to attempt to testify to the identity of those persons shown by those pictures, is like the testimony of a lunatic about two drifting clouds in the sky. It is impossible in the nature of things, and it is too remote to be respectably offered in a court of law. It is utterly too remote; it is beyond the range of facts.

By the Court: I don't understand that the pictures which the witness refers to having seen, are pictures of the cadaver with the features tortured out of resemblance. I understand that the pictures which he has in mind, and referred to, were pictures of Hillmon. Now, it is incumbent uopn the plaintiff to show hereafter that those pictures were fair photographs or representations of John W. Hillmon in his lifetime. Now, if, in his judgment, the cadaver which he saw was the dead

body of the person whose picture he saw, that I think
346 is competent evidence, and it is only to that extent that it is admitted.

(The last question was then repeated by plaintiff's stenographer as follows: Now your recollection is that these pictures were shown you by Dr. Morris of Lawrence?
A. Yes sir.)

By the Court: The witness referred to a second picture as the picture of John W. Hillmon. That statement should be stricken out because the witness did not know John W. Hillmon.

By Mr. Hutchings: Yes; that was not responsive.

347 Q. Now I don't know but you stated, but I will ask you again to state, what the condition of this corpse was that you worked with there two or three days, at the time you went to work on it—whether it was distorted, or what condition it was in?

A. It was in a very good state of preservation; the third and fourth day it got to be a little different.

Q. Did you see this cadaver afterwards and if so where after you had finished your work with it?

A. Yes. I went out to the cemetery with Dr. Stewart; he asked me to go out with him and I saw the body taken up, examined and photographed.

Q. Who was the photographer who took the photographs?

A. Layman.

Q. Now describe to the jury what took place there when this body was taken up. What was done with the body if anything before these photographs were taken?

A. The body was propped up in the box, and I think a slab was put in beneath the shoulders and head so that it stood out of the coffin somewhat, and pictures were taken. Before the pictures was taken, Dr. Stewart went up to the head and twisted his finger in a tuft of hair and yanked it out—pulled it out—and opened his pocket book and put it in his pocket book. The hair was very badly disarranged and full of dust—earth—clay out there, and the face was also covered with dirt; and the eyes were very much sunken at that time, and decomposition had taken place very rapidly indeed I wouldn't have recognized the corpse with the man I had been working over had it not been for the teeth.

Q. There had been then a very great change since—

A. A very great change indeed. Whether it had turned warm or decomposition had set in before he went to the grave I don't know. It was a cool day when he was taken up, as I remember; but decomposition had taken place very rap-

idly. I don't remember how long it was; however, the change was very great.

Q. After Dr. Stewart pulled out a lock of hair in the manner you have described you may state what if anything
348 was done to compose the hair before the picture was taken? A. Nothing whatever.

Q. Now I will get you to state whether or not you noticed any mark of any kind upon his body—whether you made any examination of the hands or any other part of the body, and if so describe to the jury what you saw?

A. I looked on while others were handling the feet and hands and so on; and upon the litttle finger of the left hand there was a mark as if a ring had been worn—depressed all around the finger and of a lighter color than the dark brown parchment like color which a dead body will take on—upon the little finger of the left hand. The body lay up hill with the head to the south and the feet to the north, or a little southwest and northeast and I was standing at his side, and I know it was the left hand because on account of the position which I remember in which I stood.

Q. Now, you have testified, I believe, as a witness at each trial of the case, have you, doctor? A. I have.

Q. Do you remember the trial that was had at Topeka in 1895 before Judge Thomas?

A. I remember; I was there; Judge Thomas tried the case once; yes sir.

Q. Do you remember at that trial of a ring being produced by the plaintiff and submitted to you for examination?

A. Yes sir it was produced at more than one trial—I don't remember. I remember a ring was handed to me, yes.

Q. Now I will get you to state whether or not you remember that ring being presented to you at the prior trials?

A. I think so; I am sure I had it more than once.

Q. Now you may state to the jury whether or not from an examination of that ring and this mark upon the finger, on your opinion the size, shape or width of the ring could have made the mark on the finger?

Objected to as calling for incompetent, irrelevant and immaterial testimony and not a proper subject of expert testi-
mony.

349 Objection overruled, to which ruling the defendants and each of them at the time duly excepted and still excepts.

A. I think so; I think it could.

Q. You may state in your opinion whether the wearing of that ring upon that finger would have made that mark?

Objected to as calling for incompetent, irrelevant and immaterial testimony and not a subject of expert testimony, and further that the witness has not shown himself competent to testify.

Mr. Hutchings: I withdraw the question; I think everybody knows that has ever seen a ring on a man's finger.

Witness: I can qualify if you desire.

Q. Very well.

A. In medical studies and dental studies, I passed a great deal of time in dissecting rooms, and a ring worn and removed will have just the same appearance that was on this hand, when you find it in the dissecting rooms where rings have been removed before the bodies come into the dissecting room, you understand; and those marks appear very frequently.

Mr. Barker: We ask to have stricken out the last statement of this witness in regard as to what took place in dissecting rooms, as wholly incompetent and irrelevant in this case.

The Court: The motion is overruled.

To which ruling of the Court the defendants and each of them at the time duly excepted and stil except.

Cross-Examination

By Mr. Barker:

Q. You have already stated that you were living in Lawrence in 1879? A. I was.

Q. And practicing your profession there? A. I was.

Q. You had been living there then sometime?

A. I went there in 1868, I believe.

350 Q. And was living there in 1879? A. Yes, sir.

Q. You have already stated that you had no acquaintance with John W. Hillmon? A. None whatever.

Q. Didn't know him by sight even?

A. I may have seen him, but if I did I never knew him.

Q. You were called upon by Mr. Tillinghast to make a cast of the teeth of the body which was over there in Bailey and Smith's establishment? A. I was.

Q. Bailey & Smith at that time were the principal undertakers in the city of Lawrence, were they not?

A. They were.

Q. Their main office was on Massachusetts street?

A. Yes, Massachusetts street—the main street.

Q. And this undertaking establishment extended back.

A. Well, this was an out-house back [—] which they used for different purposes, a shedlike place.

Q. There is where the body was when you saw it first?

A. Yes, sir.

Q. Do you remember on what day of the month and wha
month you first saw the body?

A. No, I don't except my recollection is that the man wa
[burried] in March and laid in the ground in the cold Marc
weather; so it must have been the last of March or the fir
of April. That is all the recollection I have.

Q. That is as definite as you can be in regard to that; tha
being in 1879? A. I suppose it was 79.

Q. Do you recollect whether it was 79 or not?

A. Except from my recollection of the case. I know th
case developed in 1879; yes.

Q. Do you remember who was in this room where the bod
was when you first went in? A. Nobody.

Q. You went in when there was no one there?

A. Mr. Smith always went in and let me in, and while
was there no one was in there; and [—] I went out I locked th
door and took the key to Mr. Smith or some one in his stor
There was no one whatever in there with me. I was not i
structed not to take any one in with me, but I didn
351 want anybody and didn't need anybody and I suppose
my business was of a personal, private nature. So n
one was there with me whatever.

Q. Of course, in order to make a cast of the teeth you ha
to examine them and did examine them, I mean the teeth
the cadaver? A. Yes, sir.

Q. You have alreadpy stated that the cadaver had remar
ably good teeth—

[—] That is quite right—very strong.

Q. And I believe you stated, perhaps in some other exam
ination than this, that they were quite large?

A. Yes, sir.

Q. More than ordinarily large teeth?

A. Yes, they were more than ordinarily large.

Q. I wish you would describe them in that matter fully
in regard to the size of the teeth, whether they were unusual
large, or whatever the facts were?

A. I have seen larger teeth, but they were unusually larg
larger than usual.

Q. Unusually large? A. Yes.

Q. And the teeth were all perfect, were they not?

A. Except they were—yes, the teeth were perfect excep
they were a little worn by attrition and mastication.

Q. I believe you stated there was no evidence of any de
tistry having been done upon them? A. Absolutely non

Q. No fillings? A. No fillings.

Q. No decays? A. No decays.

Q. Nothing of that sort? A. No, sir.

Q. You were several days in making this cast, were you—a day or two? A. (No answer audible.)

Q. The teeth were not discolored either, were they?

A. Why, when I tackled them they were all covered with the debris of putrefaction.

Q. I mean discoloration?

A. They were yellowish teeth. I think they were as clean as usual, as people's teeth usually are that are not brushed well; but they were all covered with sordes, various kinds of decaying mucus and blood—all covered with blood.

352 Of course, I cleaned them off thoroughly before I commenced work on them.

Q. And this was the cast of teeth which you produced there—which you made there—and this was at the instance of someone on behalf of the insurance companies? A. Yes.

Q. Do you remember what you did with this cast after you had made it? A. Gave it to Mr. Tillinghast.

Q. Do you remember how long the body was lying there in Bailey & Smith's at the undertaker's there, before it was buried? A. No.

Q. About how long?

A. O, I think it was there perhaps a couple of days before I commenced work on it; I don't know; I can't remember about that; and it was there probably sometime after I stopped word.

Q. Do you know of the body being embalmed? A. No.

Q. Didn't see that operation performed?

A. Well, you can't perfectly embalm a body shot and bleeding in that way, the way that body was; can't perfectly embalm it; might partially do it.

Q. I asked you if you knew anything about the embalming of that body? A. Not a particle.

Q. Don't know anything about that then? A. No, sir.

Q. Do you know of people going out and in there?

A. No; there was no one going out and in at all when I was there. There had been; I understood people had been down there to see him and identify him.

Q. While you were there though you didn't have any one in there? A. No, sir; the door was kept locked.

Q. The larger amount of your work was done at your office, was it not?

A. Yes, I took the heater over there to melt the bee's wax—warm the bee's wax.

Q. But the bulk of your time in making this cast was spent at your office? A. O yes.

Q. You didn't spend but little time over there?

353 A. No, sir, not at a time.

Q. I understand you to say you went out to the cemetery? A. Yes, sir.

Q. You went out to the cemetery at the time these photographs were taken? A. (No answer audible.)

Q. Do you remember who was there?

A. I remember a portion of them; there must have been fifteen or twenty-five people there.

Q. Just give us a few names of those you remember being there?

A. I listened to Mr. Rahskopf's testimony, and he called up one name I had forgotten, Mr. Van Hausen, the undertaker's assistant.

Q. Who was the undertaker who was out there; Mr. Smith himself or his assistant?

A. I think it was Mr. Smith; he had his assistants with him.

Q. Do you remember who they were?

A. No, sir. Mr. Layman, the photographer was there. I went out with Dr. Stewart, Dr. Miller was there, and Dr. Sam Walker was there; that is about as far—and Joe Farnham was there; that is about as far as my recollection goes.

Q. I understood you to say you made or saw an examination of the hands made there? A. Yes.

Q. Then of course you had an opportunity to observe and did observe the character of the hands of this cadaver?

A. Quite good.

Q. What did you say in regard to the character of his hands, whether they were large or small or long and bony?

A. Unusually long.

Q. Unusually long? A. The man was a large man.

Q. The man was a large man and had an unusually long hand? A. Well, yes.

Q. What would you say in regard to its being a broad and wide hand?

A. Well, that is hard to tell after the flesh has—

Q. You couldn't say in regard to that?

A. I noticed that out there more than I did in the undertaker's room, because they were examining for marks
354 out there, and nobody did that when I was working on it.

Q. I will inquire particularly in regard to the joints of the fingers, whether they were large or not?

A. When the flesh, the soft tissue is shriveled, of course the joints always stand out in a cadaver.

Q. Were what would [—] called large joints?

A. Large enough for a man of that size; no more or no less.

Q. You spoke about the doctor pulling out a lock of his hair. A. Dr. Stewart.

Q. The body was out of the grave of course?

A. Yes, sir.

Q. And they attempted to rub the hair the right way did they not. A. Yes.

Q. Did you see the body reinterred?

A. No, I came away about that time, when they commenced that.

Q. You knew it was about to be done.

Q. Of course if the doctor had not taken this hair, he would have gone into the grave without any of his hair being saved so far as anybody else there was concerned.

A. (No answer audible.)

Q. Nobody else took a lock of his hair?

A. Not that I saw.

Q. That is the only lock of his hair that you know of being preserved?

A. O yes. There was no other lock of hair taken out when I was there, and I was there all the time.

Q. You think that was done before the body was photographed. A. I know it was.

Q. And after that, the body was photographed in two positions?

A. Yes, that is—no; it was photographed from two positions. He wasn't moved; he was photographed looking out that way.

Q. I accept your correction. It was photographed from two positions. Did you see the photographs?

A. I have seen them at all the trials. I saw them at this. I saw them before any of the trials, I guess.

Q. You saw them before the trials?

A. Yes, down at Lawrence—the beginning of the case.

Q. Who went out there to the cemetery with you?

355 A. I went out with Dr. Stewart in his buggy.

Q. Perhaps I asked you before, but I will stand a repetition—did you examine the hands yourself?

A. No, I didn't touch it. I was within two or three feet of it. I think Dr.—I don't know who was handling it and looking all around and at the feet and legs too.

Q. I am asking you now in regard to the hands.

A. I didn't handle the hands myself, but I saw them.

Q. How close did you stand to the body?

A. I was within two feet of the foot of the coffin—right close up.

Q. Right close up? A. Yes, sir.

Q. And there is the time when you say you first discovered what you called a ring mark? A. Yes.

Q. Are you sure that is the first time you discovered that?

A. I didn't—

Q. You hadn't noticed that before?

A. No, I hadn't noticed it before.

Q. You had been working over that body, you stated, for two or three days? A. Quite right; and worked hard.

Q. Worked hard and the hands of course were uncovered while you were in there?

A. No question as to identity had been raised with me then, but out there at the cemetery they were looking for marks, and so was I.

Q. If you will answer my question we will get along faster? I say you didn't discover any marks until you went out there?

A. No, sir; not on the hand—not that ring mark.

Q. And you had seen his hands repeatedly before that?

A. Unquestionably.

Q. You couldn't tell how many times you had seen his before that.

A. No, sir; I couldn't; my attention was given of course to the teeth when I was working over the cadaver.

Q. I understood you to say that you didn't know of any question of identity being raised until you were down at the cemetery.

356 A. Well, I wasn't looking for any marks—

[—] No, but I understood you to say that; am I right about that?

A. No; I think the question had been raised. They went out there and took the body up in order to look for identity marks.

Q. The question of identity had been raised, hadn't it, immediately [—] arriving at Lawrence. That was really the question that was raised? A. Yes, I think that was so.

Q. I am correct about that? A. Yes.

Q. The question of identity was raised immediately upon the arrival of the body there, and even before that.

A. Yes, that is right.

Q. You understood that was why the cast of the teeth was being taken, why the hair was being preserved and why this examination was being made; it was on the question of identity for the purpose of determining the identity of the body.

A. That is the reason I made the casts.

Q. You understood that was why these other things were done, did you not?

A. You asked in regard to the hair. It is possible the hair might have been taken from some other portion of the head so as not to spoil the picture as I considered it helped to spoil it.

Q. You understood these things were preserved for the purpose of determining the question of identity? A. Yes.

Q. Now in regard to a photograph—you have been asked in regard to that. You say somebody showed you a photograph? A. Yes.

Q. Can you state when that was?

A. That was after I had done that work; I think it was after the body was interred.

Q. Where was it?

A. In the store in Frazer's Hall. There used to be a drug store in which Dr. Morris, the coroner, at that time was interested. He was with others, and he—I am quite sure it was he—showed me the picture.

Q. You think Dr. Morris showed you the picture.

A. Dr. Morris, yes.

357 Q. Dr. Morris showed you the pictures. A. Yes.

Q. The coroner at that time?

A. Yes; that is, I think he was.

Q. That is the only time you saw that picture?

A. O, I saw that picture more than once.

Q. Where did you see it after that?

A. I saw it in Dr. Morris's office.

Q. When? A. Within a few days.

Q. Who was present when you saw that?

A. Nobody but Dr. Morris and I.

Q. Nobody but you and the doctor. A. No, sir.

Q Now I will ask you in regard to a ring. You said you had a ring here at the trial of this case in 1895?

A. Well in one or two or three trials I saw the ring; I don't remember—but I saw it more than once.

Q. You saw a ring? A. Yes.

Q. You never applied that ring to that hand? A. No.

Q. Don't know whether it would fit the little finger or any other finger on the hand?

A. It certainly wouldn't after I saw the corpse.

Q. How is that?

A. It wouldn't fit, after I saw the corpse, because the soft tissue had—

Q. (Interrupting.) I know, but I am simply asking you whether you know anything about that, whether it would fit or not? A. No.

Q. You stated, I understood you, in your direct examination that that mark might have been made by that ring.

A. So it might.

Q. And might have been made by any other ring.

A. Any other ring? No.

Q. That would go upon the finger?

A. Why, the same mark might have been made by rings of various sizes or widths undoubtedly.

Q. Do you remember in regard to the size of this ring that you saw there? A. The size of the ring—

Q. Do you remember, I ask you first.

A. It was rather a large ring for a little finger; that

358 is my recollection.

Q. Was it a broad ring or a narrow ring?

A. O it was about 1-8—from 1-8 or 1-16 to 1-4 of an inch.
Q. Was it oval or a flat ring?
A. It was oval—flattish oval.
Q. The last time you saw that ring you had it in your possession, didn't you?
A. Yes at the trial, is the last time I saw it.

By Mr. Hutchings:
Q. At the cemetery when you noticed the ring mark as you have stated, you may state to the jury how you were situated with reference to the hand. Were you in a position where you could see them?

Mr. Barker: The witness has already answered that question and told just where he stood.
The Court: Yes I think so.

Q. I will get you to state whether or not upon the hands of this corpse there was any crooked little finger?
A. I don't know.
Q. You spoke of this corpse being of a large man and having a long hand; I think you used the word unusually long.
A. Well it looked so when they were examining it. Of course when the flesh shrivels the hand of course looks—it would add to the lengthy look rather than to the contrary; because the adipose tissue has shriveled up, and it looks skinny; but it was a long hand—unusually long—unusually long; no question about that at all.
Q. You have stated that you saw pictures or photographs [of] that were taken of the cadaver while you were there. I exhibit to you exhibits Nos. 12 and 13, and will get you to state to the jury whether or not you recognize those as the pictures that were taken at that time? A. Yes I do.

Witness excused.

359 Mr. Barker: I desire on behalf of the defendants to submit the following motion: The defendants, the Mutual Life Insurance Company of New York and the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, request the court to withdraw from the jury all the testimony of the witness, J. D. Patterson, concerning the photograph or picture which he testified to having seen in the possession of one Dr. Morris in Lawrence, and all that was said to said witness concerning the same, because said witness had no acquaintance with John W. Hillmon and no knowledge of what person or persons, if any, said picture was a representation, except what was told him by others than the defendants, and no knowledge whatever as to the correctness or genuineness of said picture; because all of said testimony of

said witness on said matter and subject is wholly incompetent, irrelevant and hearsay.

The Court: It has been stated by counsel for the plaintiff that they propose to show that the picture with which Dr. Patterson made his comparison was a good photograph of John W. Hillmon. If they should not do so during the progress of the trial, and the attention of the court is called to such failure, this motion, or one similar to it, will be sustained. At the present it is overruled.

To which ruling and action of the court the defendants and each of them duly excepted.

360 Ed. Canovan, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Hutchings, and testified as follows:

Q. What is your name? A. Ed. Canovan.
Q. Where do you reside? A. Douglas county.
Q. Did you ever reside in Jefferson county? A. Yes, sir.
Q. When? A. About thirty-five years, I think.
Q. What is your business? A. Farming.
Q. How long have you been engaged in the business of farming? A. About forty years.
Q. Were you acquainted with John W. Hillmon?
A. Yes, sir.
Q. What was the extent of your acquaintance with him?
A. Well, I met him on the street, and other places where we happened to meet.
Q. I will exhibit to you a picture which has been introduced in evidence and marked exhibit number 10, and get you to state if you know whose picture it is?
A. I would say that was John Hillmon's.
Q. In your opinion how tall a man was John W. Hillmon?
A. Well, I have no way of knowing exactly. I think he was about five feet and eleven inches.
Q. When did you see Hillmon last?
A. When did I see him last?
Q. Yes; that is, alive? A. In Lawrence.
Q. About what time? A. I don't know; 1888 or '89.
Q. Do you mean '88 or '78? A. 1878.
Q. Do you remember the circumstance of a body having been brought to Lawrence in April, 1879, that was said to be Hillmon—claimed by some to be Hillmon?
A. I seen it; yes.
Q. I will get you to state in your opinion whose body that was. A. Well, I don't know how to come at that hardly.
Q. Well, in your opinion, whose body was it?
A. I thought it was Hillmon's.

Cross-examination

By Mr. Barker:

Q. You were living out in Jefferson county on your
361 farm in 1878 and '79, were you not? A. Yes, sir.

Q. You didn't remove to Douglas county until within a few years—a year or two, did you? A. Couple of years.

Q. Been living in Douglas county a couple of years?

A. (No answer audible).

Q. Your acquaintance with Mr. Hillmon was quite slight, was it not? It was a very limited acquaintance you had with him?

A. Well, no; I was acquainted with him only about seven or eight months, but we met frequently.

Q. You met several times, did you? A. Yes, sir.

Q. Now in regard to his height,—you have already stated that was a mere matter of opinion? A. Yes, sir.

Q. Never thought anything about his height until this case arose, did you? A. I don't know that I did.

Q. And you have no means of telling what his height was, have you? It is just an impression which you have from having seen him? A. That is all.

Q. Now do you know about when you first saw this man Hillmon? Along in '78 some time, was it?

A. I think it was along in the latter part of 1878.

Q. Along the latter part of 1878? A. Probably in March.

Q. In March, 1878?

A. Might have been February; I can't say as to that.

Q. February or March, 1878? A. (No answer).

Q. You think you made his acquaintance along in February or March, 1878, do you? A. I think so.

Q. It might have been much later than that, might it not? Might have been August or September, 1878?

A. No; I think not.

Q. You think it was in February or March, 1878?

A. (No answer.)

Q. Well, wherever you saw him was in the city of Lawrence, was it? A. In the city of Lawrence; yes, sir.

Q. Didn't make his acquaintance in any other state or anything of that sort? A. No.

Q. In Colorado? A. No.

362 Q. So that if he was in Colorado or outside of the state in February and March, 1878, you would be mistaken in regard to having met him then?

A. Well, I — (answer not finished).

Q. Now in regard to seeing that body there,—you were in Lawrence on that day, were you? A. Yes, sir.

Q. And the body was down at Bailey & Smith's, the undertakers? A. Yes, sir.

Q. And there were a good many people going out and in there?

A. Well, there wasn't very many, but there was some moving.

Q. Do you remember who was in there while you were?

A. No, sir; I don't remember.

Q. Do you remember how you happened to go down there, Mr. Canovan? A. Yes; Mr. Baldwin asked me to go.

Q. Mr. Baldwin found you on the street and asked you to go down with him? A. Yes, sir.

Q. That was Mr. Levi Baldwin? A. Yes, sir.

Q. You had been acquainted with him for some time?

A. Acquainted with who?

Q. Mr. Baldwin? A. Yes, sir.

Q. And he asked you to go down there? He told you that Mr. Hillmon's body was down there at the undertaker's?

A. Yes.

Q. Bailey & Smith's, the undertakers?

A. (No answer.)

Q. Asked you to go down and see him?

A. (No answer audible.)

Q. And you went down there, of course expecting to see the body of Mr. Hillmon? A. I presume I did.

Q. And I understood you to say you wouldn't be positive in regard to it, but it was your impression it was the body of John W. Hillmon? Am I correct about that? A. Yes.

Redirect Examination

By Mr. Hutchings:

Q. State a little more definitely to the jury where you lived in 1878 and '79, or at the time you knew Mr. Hillmon?

A. I lived in Jefferson county.

363 Q. Where did he live at that time?

A. What part of the county?

Q. Yes. A. South part.

Q. Did you have business transactions with him?

A. With Mr. Hillmon?

Q. Yes.

A. No, sir; he was at my house two or three times—he and Mr. Baldwin.

Q. At your house in Jefferson county? A. Yes, sir.

Q. In cross-examination you stated that when you saw him you saw him in Lawrence?

A. Well, I did see him in Lawrence too.

Q. Saw him in Lawrence also? A. Yes.

Q. Did you ever notice Mr. Hillmon's teeth?

Mr. Barker: We think that is not re-examination.

The Court: Counsel wouldn't wish that line drawn strictly throughout this trial.

Mr. Barker: No, not so far as that is concerned; but I think a reasonable enforcement of the rule would probably be beneficial to both sides.

The Court: I suppose counsel forgot to ask him that when he was examining him in chief. I will not enforce that rule very strictly excepting when it may be abused.

Q. Did you ever notice Mr. Hillmon's teeth?
A. No; I can't say that I did.
Q. Did you ever notice any defect in his teeth?
A. No, sir.

By Mr. Barker:

Q. As a matter of fact you never noticed his teeth, did you?

A. I can't say now; it has been a good while ago; whether I did or not.

Witness excused.

364 Phillip Olmstead, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Hutchings, and testified as follows:

Q. What is your name? A. Phillip Olmstead.
Q. Where do you reside, Mr. Olmstead?
A. In Lawrence.
Q. How long have you resided there?
A. Well, about twenty-one years.
Q. You were residing there in 1878 and '79?
A. Yes, sir.
Q. What business are you engaged in?

A. I was engaged in the tanning business—tanning buffalo hides into robes.

Q. Were you acquainted with John W. Hillmon?
A. I was.
Q. What was the extent of your acquaintance with him?
A. It didn't run over only a small length of time.

Q. Well, state about the extent of it—about the number of times you saw him and under what circumstances, and how you came to meet him?

A. I couldn't tell the number of times I saw him; I met him probably a number of times on the street, but he came to my tannery, if I remember correctly, three times. Mr. Brown came with him the first time. The other two times he came alone.

Q. On these occasions that he came to your tannery, did you have business transactions with him? A. I did.

Q. (Showing witness photograph). I will get you to examine this photograph which has been introduced in evidence as

exhibit 10, and state if you know whose photograph it is—who it represents?

A. I should say that was John W. Hillmon.

Q. Do you remember the circumstance, in the spring of 1879, of a body having been brought to Lawrence that was claimed to be the dead body of John W. Hillmon? A. I do.

Q. Did you see that body? A. I did.

Q. I will get you to state, in your opinion, whose body that was? A. The body of John W. Hillmon.

365 Cross-examination

By Mr. Barker:

Q. You stated that you were living in Lawrence now and have been living there for some time? A. Yes, sir.

Q. [A. Q.] Are you engaged in business now?

A. No sir, not in any particular business.

Q. Were you engaged in the tanning business in 1878?

A. Yes, sir.

Q. Whereabouts was your place of business?

A. It was in the old Smith & Bailey building. Everybody knew where that was in Lawrence on account of its peculiar construction.

Q. I am not asking you that? State where it was?

A. You asked me where it was?

Q. You didn't give the street.

A. You wouldn't have known it by the street. I believe though it was on Peyton street, between Vermont (?) and Kentucky.

Q. How long were you engaged in the tanning business there? A. Well I should think three or four years.

Q. Three or four years? A. Yes, sir.

Q. You say you saw Hillmon at your place of business?

A. Yes, sir.

Q. Can you state when it was—what year it was?

A. You ask me can I?

Q. Yes? A. Yes, sir.

Q. What year did you see him there, if you can state?

A. It was in the fall of the year in 1878.

Q. In the fall of the year? A. Yes, sir.

Q. About what time in the fall?

A. Well probably late in the fall.

Q. Late in the fall of 1878? A. Yes.

Q. And you think there was somebody with him, do you?

A. Mr. Brown was with him the first time.

Q. That was the first time you had seen this party, was it?

[Q.] The first time I saw him in the tannery; yes, sir.

Q. In 1896, before Judge Williams, was the first

366 time you testified in this case, was it not?

A. Yes, sir.

Q. I will ask you if at that time you were able to tell what year you saw him, and you said you saw him in 1877, 1878, or 1879?

A. Well, I couldn't remember definitely what year; I couldn't fix it just at that time.

Q. You can fix it now?

A. Since that time I have been able to fix the date accurately.

Q. Now you fix the date, do you? A. Yes.

Q. And you fix it as 1878 that you saw the man?

A. Yes, sir.

Q. Now, you have testified in regard to exhibit number 10. Have you seen that picture before? A. Not that I know of.

Q. Have you [since] it since you have been here in town?

A. No, sir, only from—as I sat back yonder. I couldn't see whose picture it was. I presume it was that. They said it was number 10.

Q. You said you never saw that picture before?

A. No, sir, I didn't see it closely.

Q. Didn't you see that picture in 1896? A. No, sir.

[Q.] (Counsel hands witness picture and witness examines same.) A. No, sir.

Q. Now, those are the only occasions when you remember of seeing this man Hillmon, was it? A. No, sir.

Q. The three times? A. No, sir.

Q. Who introduced you to Mr. Hillmon?

A. He introduced himself, he and Mr. Brown.

Q. Then the way you know it was Mr. Hillmon at that time was that he told you himself that his name was Hillmon?

A. (No answer.)

Q. That is a fact, isn't it? A. Yes, sir.

Q. I will ask you if on your examination in chief, before Judge Williams in 1896, you didn't testify as follows: "Q. Were you at Bailey & Smith's undertaking establishment at any time in April, 1897? and did you not answer: I couldn't tell as to that date; I don't remember the date but I was there and saw a body purporting to be the body of Hillmon, and to the best of my knowledge and belief it was the body of John W. Hillmon. I wouldn't swear to the identity of the body
367 unless it came positively under my observation." That was your statement on that occasion, was it not?

A. That is my statement.

Q. That was your statement then and it is your statement now? A. Yes, sir.

The Court: Mr. Barker, do you mean '97 or '79?

Mr. Barker: I mean in 1896; that was a mistake in calling it '97.

Q. That was your testimony in 1896, was it?

The Court: I know; but you read the question, were you present in Bailey & Smith's undertaking establishment in 1897.

Mr. Barker: It should be '79. The witness understood it. I want to correct that by making it 1879.

Mr. Hutchings: That shows how easy it is to be mistaken as to dates.

Redirect Examination

By Mr. Hutchings:

Q. You were asked about your testimony on a previous trial of the case, and your inability to state the year. I will get you to state whether, in your testimony before Judge Williams, you didn't say in connection with the same matter that was read here, that it was about three months before you saw him dead that he came to your tannery but that you wouldn't fix the year?

Objected to as leading and not re-examination.

The Court: It is leading; objection sustained.

Q. In your testimony before Judge Williams, you may state how you fixed the time in which you saw him at your tannery in relation to the time when you saw him dead?

A. Why, I knew the time of the year that he was there; but I couldn't fix at that time just the absolute year that it was; that was all. I think, on a little reflection, I might have done so at that time.

368 Q. You may state now how long it was after you saw Mr. Hillmon at your tannery that you saw this body that you think was Hillmon's?

A. Somewhere about three months; I couldn't tell exactly.

Q. In your cross-examination you were asked whether you had seen this Hillmon at any place except your tannery. I wish you would state a little more definitely to the jury how frequently you saw Hillmon and where you saw him?

A. I couldn't state how frequently I saw him.

Q. Approximately?

A. I met him a number of times on the street I know, and I spoke to him sometimes, and sometimes I saw him passing when I didn't speak to him. Now, I can fix the number of times at all.

Q. Well, was it very few times, or was it many times? Can't you approximate it?

A. Quite a number of times; yes, sir.

Q. Now, one question I omitted to ask before, I will

get you to state what, in your opinion, was the height of John W. Hillmon? A. Well, he was very near my height.

Q. How tall are you? A. I am six feet.

Recross-Examination

By Mr. Barker:

Q. Of course you never measured; never thought anything about the question of height until since this case arose and since you have been called as a witness? Isn't that a fact?

A. I don't know that I did, more than this—

Q. (Interrupting). I know, but you can answer whether that is a fact or not. A. Well that is all. Could I explain?

The Court: He desires an answer, yes or no.

Q. What do you say in regard to that, whether you ever thought anything about the question of his height until after this case arose and until after you were called as a witness in this case, did you?

A. Well, I couldn't answer that yes or no; because I saw the man there; made a contract with him, and I took pretty good notice of him so as to remember him, that he would fill the contract. He was a comparative stranger to me
369 when I first saw him.

Q. And you had a contract with him there?

A. Yes, sir, and I took some notice of his height.

Q. You looked at his height, did you?

A. I took some notice of it.

Q. That is, you observed the man, but did you think anything about the question of his height? Can you answer that, that twenty years ago you thought anything about the question of his height?

A. No, not his measurement; I wasn't thinking anything about that.

Q. And your estimate of his height is from an impression which you formed of the man when you saw him nineteen or twenty years ago was it? A. Yes, sir.

Q. What was that contract you entered into with him about?

A. He was to furnish me a quantity of buffalo hides, either buy them, or kill them, or both.

Q. That was in the fall of 1878, about three months before you say you saw this body?

A. Well, that is the first time I saw him; yes, sir. I saw him after that, and when he completed the contract after that.

Witness excused.

John Osborne, called as a witness on behalf of the plaintiff, being first duly sworn, was examined in chief by Mr. Hutchings, and testified as follows:

Q. State your name to the jury?
A. My name is John Osborne.
Q. Where do you reside?
A. One mile west of Reno in the southern part of Leavenworth County.
Q. What is your business? A. Farmer.
Q. How long have you been engaged in farming?
A. All my life. I was raised on a farm, and have worked at nothing else all my life.
Q. How long have you lived near Reno?
A. Well, at the place where I now live, this is the third season, but I have been close about Reno for about eleven years.
370 Q. Were you ever acquainted with John W. Hillmon? A. Yes, sir.
Q. State to the jury the extent of your acquaintance with him?
A. Well, I got acquainted with Mr. Hillmon I think in about 1871, but I ain't positive about that, calling the dates back, but I think it was about that. He was at work at Mr. Levi Baldwin's herding cattle and I had an uncle that lived about a quarter of a mile from there, and I used to meet Mr. Hillmon quite a number of times there and see him go backwards and forwards and so forth to his work. He was herding cattle on the prairie out there, and I would see him pass backwards and forwards quite a good many times. I don't know as I can enumerate any nearer than twenty times—twenty-five—more or less. I couldn't give the certain times, because that is something I thought nothing about.
Q. I will get you to examine the picture introduced in evidence and marked exhibit number 10, and state in your opinion whose picture that is?
A. Well, sir, I would take that to be the picture of John W. Hillmon.
Q. In your opinion how tall a man was John W. Hillmon?
A. Well, sir, he must have been—well, I could only go by my own height. He was probably three inches taller than I am, or more, and I am five feet seven; and in talking with him and being with him I had to look up and look him in the face right smart.
Q. Do you remember of the circumstance of a dead body having been brought to Lawrence that was claimed to be the body of Hillmon? A. Yes sir.
Q. Did you that body? A. Yes, sir.
Q. In your opinion whose body was it?
A. It was my opinion that it was John W. Hillmon.

Cross-Examination

By Mr. Barker:

Q. You are living in Leavenworth county, now, are you?

A. Yes, sir.

Q. You formerly lived in Douglas county?

A. I never lived in Douglas county except two
371 months I lived in Lawrence two months once.

Q. You lived in Jefferson county?

A. Yes, many years.

Q. You lived there for a long time?

A. Nineteen years, I think.

Q. And you think that you formed the acquaintance of Mr. Hillmon in 1871?

A. I think—I won't be positive about the date, but I think it was about 1871.

Q. Of course it was while you were living in Jefferson county?

A. Yes, sir; I was living in Jefferson county.

Q. Now do you remember of his being absent a long time; that is gone for three or four years? A. After this?

Q. Yes.

A. Yes; he was gone for awhile. I don't know how long, but he was gone for quite awhile that I didn't see or hear him mentioned that I know of.

Q. Now wasn't he gone from that time until 1878? Wasn't he out of the state or out of the neighborhood anyway, so that you didn't see him a good share of the time—most of the time? A. Well, I rather think not.

Q. I will ask you if the only times you would see him would be in the interims when he would come back; if you didn't understand and know that he was out in the western part of the country—out on the plains and in Colorado a good deal of the time from 1871 or '2 to 1878,—not all the time, Mr. Osborne, but a good many years during that time?

A. Well, he was gone a considerable time, but I couldn't state exactly how much of the time, for he and Mr. Baldwin was in business together once after this before 1878, I think.

Q. But what portion of the time he was absent you wouldn't undertake to state? A. No, no; I wouldn't.

Q. But you do know that he was absent a good deal of the time?

A. Yes; he was absent quite a little bit of the time; I don't know how much time, but quite a while.

Q. Now in regard to his height; so far as that is concerned that is a mere matter of opinion from having seen him, and the fact you had to look up to him?

A. Certainly; he was a man considerably taller than I was.

372 Q. And you are five feet seven inches? A. Yes, sir.
Q. With your boots on?
A. Well, I don't remember whether I was measured in my stocking feet or in my boots.
Q. You couldn't say in regard to that?
A. No, I declare I don't know. It has been several years since I have been measured.
Q. That is as definite as you could be in regard to your own measurement? You are about five feet seven inches?
A. I rather think I measured five feet seven without any boots on, but I wouldn't be right positive as to that now.
Q. You have probably been growing a little the last few years?
A. If it is, it is down-hill. It is downhill in weight, and whether in size or not I don't know.
Q. Do you remember how Hillmon was dressed in regard to his feet when you saw him? A. I don't remember.
Q. If he didn't wear boots and high-heeled boots at that time? A. I couldn't answer that.
Q. I want to call attention particularly to that, if that wasn't one of his peculiarities, that he wore high-heeled boots, and he rode a good deal, didn't he?
A. O, yes; he rode a great deal, but I don't remember of noticing whether his boots had any heels or high heels or what.
Q. You don't remember in regard to that?
A. I don't think I do.
Q. You won't say in regard to that? A. I think not.
Q. Now in regard to seeing the body in Lawrence; you were there in 1879, were you?
A. I was at Lawrence; yes, sir.
Q. Yes, at the time that body was there, whatever body it was? A. Yes, sir.
Q. There was a good deal of discussion in regard to whose body it was, was there not? You heard the matter debated and talked about didn't you?
A. Not very much at the time I saw him. This was the first day he had arrived there.
Q. The first day it had arrived?
A. Yes, sir; noon about that day when I got to Lawrence.
Q. Did you see the body more than once?
A. I did not. I saw it but once.
373 Q. Do you remember with whom you went in?
A. Yes; I remember with whom I went in?
Q. Whom did you go in with?
A. I went in with Mr. George Yates, and Mr. James Gilluly and Charles Smith, the undertaker.
Q. Whereabouts were the undertaking rooms at that time where these remains were?

A. It was across the alley in a little house east of his furniture store there. We went back through the furniture store and crossed the alley, and the first thing when we got in the room there was this body.

Q. You three people went in together?

A. There was four really—myself and Mr. Yates and Mr. Gilluly, and Mr. Charles Smith.

Q. Was there anybody else in there when you went in?

A. No, sir; there was no one there. Mr. Smith unlocked the door.

Q. Did anybody go in while you were there?

A. I think not.

Q. You remained in there only a few minutes, of course?

A. Not very long; just a few minutes.

Q. What was the condition of the body so far as to being clothed preparatory to burial or not?

A. Yes; he was clothed; it seemed to be the clothes he had been wearing where he was killed, I think.

Q. It had on a suit of clothes? A. Yes.

Q. Had the body been—face been washed and shaved?

A. It looked as though it had been washed and shaved after death to look at the face I think. It was poorly shaved.

Q. Poorly shaved? A. I think so.

Q. How did you come to go down there?

A. I was in Mr. George Yates' drugstore when the question came up—next door to this undertaker's office.

Q. Had some one told you Mr. Hillmon's remains were down there? A. (No answer audible).

Q. Do you remember who it was?

A. I think that Mr. Gates spoke about it, I think, and Mr. Gilluly spoke and says, "This gentleman was acquainted with Mr. Hillmon." He had reference to me, and then they made a proposition that we go in and see.

374 Q. Well, in that conversation, did either Mr. Gilluly or Mr. Yates tell you that Mr. Hillmon's remains were only a little ways from there?

A. Well, sir, I don't think they did tell me that Mr. Hillmon's body was there. I don't think either one claimed to know whose body it was. I know Mr. Gilluly didn't.

Q. I know, but so far as that is concerned, I understood you to say that they said Mr. Hillmon was there and you were the gentleman that knew him, Mr. Hillmon? At all events they said they all knew Mr. Hillmon, did they not?

A. Yes, sir.

Q. Then the subject of whose body it was must have been discussed, must it not?

A. Well, I can't say that it was, Mr. Barker,—that it was discussed whose body it was; though I believe that the other two parties didn't claim to know whether it was Hillmon's

body or not. I know Mr. Gilluly didn't, for I talked with him since and he always claimed ignorance.

Q. I know; but how did they happen to say that you knew Mr. Hillmon if the subject of his body being down there was not discussed—if that matter wasn't talked about? How did they come to say that "this gentleman"—meaning you, Mr. Osborne,—"knew Mr. Hillmon"?

A. Well, I don't know as I can exactly tell you why they —The subject in Mr. Yates' drug store there was about Mr. Hillmon being dead and being at the undertaker's office.

Q. Wait a moment. The subject of Mr. Hillmon's death was spoken about there in Yates' store? A. Yes, sir.

Q. And in addition to that wasn't the fact talked about of his body being down at the undertakers' only a few steps from there, and then didn't somebody suggest that you, Mr. Osborne, knew Mr. Hillmon, and propose that you should go down there? A. Well, that might be; very likely.

Q. Then you and various parties went down there?

A. Yes, sir.

Q. And you thought that was the body of John W. Hillmon? A. I did, sir.

Q. That was the impression which you received—which you had at that time, was it?

A. Which? That it was Hillmon's body?

375 Q. Yes. A. Yes, sir.

Q. It was only an impression, was it not? It was only an impression; that was all?

A. Well, I tell you, it was impressed upon my mind pretty deeply.

Q. I will ask you if you didn't testify on the last trial of this case in 1896, in answer to this question: "I understand you to state from what acquaintance you had, that those were the remains of John W. Hillmon? Answer: Yes, sir; that was my impression." Did you so testify?

Mr. Hutchings: How does that contradict the witness? I object to it as not proper cross-examination.

The Court: I think the jury will look at that in a reasonable way. One man may say his "impression"; another may say his "judgment" and another may say his "belief" and another may say his "opinion"; and unless attention is called to the degree of the strength of the belief or opinion or impression, the jury may consider those expressions as synonomous. I don't mean to say that they are synonomous, but it frequently happens that men use them in the same way as being synonomous.

Q. Now you never thought anything about the height of Hillmon until after this case arose, did you, Mr. Osborne?

A. No; I don't know as I ever thought about how many inches high he was.

Q. Then your impression or opinion in regard to his height is from your recollection of him twenty years ago or more?

A. Certainly. I haven't saw him for more than twenty years.

Q. And you state your recollection of a fact that length of time. A. He was a taller man than I am; I am sure of that.

Redirect-examination

By Mr. Hutchings:

Q. You have been a witness at each trial of this case, have you?

A. I have been a witness the third time—'95, '96 and this trial. Earlier than that I was not.

376 Q. To refresh your recollection,—at the time your attention was first called to the fact that there was a body there, I will get you to state whether George Yates didn't claim that it was not the body of Hillmon?

A. Well, I don't know as I can answer that positively. There was a man, a doctor, that claimed it was not; but whether Mr. Yates did or did not, I don't believe I can say positively.

Q. When you examined the body there, did you know there was a claim or that it was claimed that it was not the body of Hillmon? A. I did, sir.

Witness excused.

377 Plaintiff next offers to read in evidence the testimony of Hezekiah Covey given upon the trial of [these] case in 1895.

It is admitted by the parties that Mr. Covey is not within the jurisdiction of the court.

Said testimony was thereupon read to the court and jury and is in words and figures as follows, to wit:

Hezekiah Covey, of lawful age, being sworn testified as follows:

Direct examination

By Mr. Hutchings:

Q. State your name and place of residence.

A. Covey is my name and I live in Lawrence.

Q. How long have you lived in Lawrence?

A. Well I have lived in Lawrence and about Lawrence since 1865.

Q. What occupation do you follow?

A. Well I have been driving team, driving for the city, driving the fire team, hose team and such work as that.

Q. Where did you reside before coming to Lawrence?
A. In Illinois.
Q. Were you acquainted with John W. Hillmon?
A. Yes, sir.
Q. I wish you would state to the jury the extent and length of your acquaintance with him?
A. Well the first acquaintance I had with him he came out to my place with some cattle.
Q. Where was your place?
A. My father was living on Governor Robinson's place.
Q. How far was Governor Robinson's place from Lawrence? A. About four miles.
Q. Well go on.
A. Well the first acquaintance was on Governor Robinson's place he came out with some cattle and the same man that hired him hired me.
Q. Where did Hillmon board? A. On the farm.
378 Q. State the acquaintance between you and Hillmon while there.
A. Well we roomed together and boarded together and herded cattle together.
Q. Can you state to the jury what year this was in?
A. Why I think it was in 1871 or '2.
Q. State to the jury whether you saw Mr. Hillmon from that time up to 1879?
A. I have, yes, sir, at different times.
Q. Do you remember of a body having been brought to Lawrence in the month of March or April, 1879? A. Yes, sir.
Q. Did you examine that body?
A. Well, yes, sir, there were two brothers of us, at that time we was driving teams for a man by the name of Anderson (???) there and it happened we drove into the alley right next to the undertaker's establishment with a load of nails and I spoke to him.

By the Court:
Q. Just answer the question.

By Mr. Hutchings:
Q. What did you do?
A. I got off and went into the undertakers'.
Q. Do you remember who was there at the time?
A. Well, there was several, I do not remember, me and my brother went in there, Mr. Monroe we met coming out of there and, —
Q. State whose body you saw there.
A. John Hillmon's.
Q. State to the jury if from your acquaintance with him you recognized him?

A. Yes, sir, I recognized him the first time I put my eyes on him.

Q. Now Mr. Covey did you examine the body more than once?

A. I think I was taken in there a day or two after, they found out I was acquainted with him, but I cannot say whether it was Clark or the undertaker requested me to go.

Q. You examined the body a second time?

379 A. Yes, sir.

Q. You may state if you know anything about the marks or moles on the body of John W. Hillmon?

A. Why there was one on the left shoulder, I remember putting court plaster on it many a time.

Q. What was the object of putting court plaster on it?

A. He said his suspenders rubbed it.

The defendants moved to strike out the answer as hearsay, motion overruled, the defendants and each of them duly except.

Q. State what examination you made, if any, with reference to this mole?

A. Well they asked me to go in and look at him and examine him and I went and looked thoroughly, the second time I went in and I looked pretty well, convinced myself and I took hold of his shoulder and turned him over and it was there, I was satisfied.

Q. What was there?

A. That little mole. It was very small, and I was satisfied it was Hillmon.

Q. Now Mr. Covey you say you have slept and roomed and worked with John W. Hillmon,—I will get you to state to the jury in your opinion what was his height?

A. Well I should judge he was about my height or a little taller.

Q. How high are you?

A. I am six eleven,—or five eleven.

Q. Five feet, eleven inches?

A. Yes, sir, that is what I measure.

Q. I will get you to examine this photograph that is marked Exhibit "18" and state to the jury whether you recognize that person and if so who it is,—whose picture it is?

A. Well sir, that is Hillmon.

380 Q. I will get you to examine this photograph marked Exhibit "19" and state to the jury whose picture that is, if you know? A. That is Hillmon.

Q. That is all, take the witness.

Cross-examination

By Mr. Green:

Q. How long did you say you lived at Lawrence?

A. Since 1865.at Lawrence and about Lawrence.
Q. And you came from Illinois to Lawrence?
A. Yes, sir.
Q. Came with your father and family?
A. No, sir, I did not, I came alone.
Q. You came alone?—when did your father come?
A. Came in 1866.
Q. The next year? A. Yes, sir.
Q. Where did he stop when he came?
A. Well he rented a house in Lawrence and lived there probably a couple or three months and from there we went on to Governor Robinson's farm?
Q. And you remember how long he lived on Governor Robinson's farm?
A. Well no not exactly, he lived there a great deal longer than I was, we lived there probably six, seven or eight years.
Q. You lived there off and on with your family?
A. Yes, sir.
Q. Where did you say you herded cattle?
A. There on Governor Robinson's farm.
Q. On the bottom farm or on the hill farm?
A. On the hills there, we kept them in the corral, in Mr. Robinson's corral in the bottom.
Q. In that land back of Governor Robinson's house?
A. He has two,—one we lived in in the bottom down there and the one he lived in himself. Yes, sir, the one down there on the creek,— yes, sir, that corral.
381 Q. What I am speaking of is the land lying west of Governor Robinson's house opened at that time?
A. Lying east was, yes, sir.
Q. And the cattle you herded ranged east did they?
A. Yes, sir, east and north.
Q. And what year did you say this was?
A. This was in 1872 or 3, "1" or "2," along there, seventy one and two.
Q. Seventy-one and two? A. Yes, sir.
Q. And what time in the year was it?
A. Well now I just could not say exactly what time of th. year it was.
Q. Well give your best recollection?
A. Well I could not say, it was after grass got up so as the cattle could live good.
Q. Well was it the early part of the season?
A. Well, when they brought them there, yes, sir.
Q. And how long did you say you were there?
A. Well it was in the neighborhood of two or three months, maybe not quite three, pretty close to it.
Q. Then that would take it to what part of the summer?

A. Well I think we moved the cattle away along the latter part of July.

Q. And do you know where they took them, what place?

A. Took them up on the creek above Eldridge's, took them four or five miles above our place.

Q. And whose cattle were they?

A. They belonged to Uncle Tommy White when I went to work for him.

Q. Uncle Tommy White of Lawrence? A. Yes, sir.

Q. And you went to work for Mr. White?

A. He employed me, yes, sir, Mr. White.

382 Q. And when did you next see Hillmon after 1871 or 2 when you were herding cattle?

A. Well, I would see him frequently in town at John Eldridge's he was buying cattle and hogs.

Q. When? A. Well, I cannot state when.

Q. Well, canot you give any idea?

A. Well, no, when I went to town after I went to work driving team why I would see him different times.

Q. And did he live in town that time?

A. Part of the time.

Q. And part of the time he was-

A. He was away part of the time.

Q. And you do not know where he lived in town?

A. Well, one time, yes, I did, he lived at North Lawrence one time.

Q. And when was that? A. Well now I could not state.

Q. Could not state the time? A. No, sir.

Q. Well, could you give us any idea?

A. No, I could not, it is between 1872 and 1879.

Q. Between 1872 and 1879?

A. John Eldridge was a brother-in-law of mine and I would frequently go there and hire horses to ride and Hillmon would come there to get a horse. Eldridge had one horse he used to ride a good deal.

Q. Well, can't you state a little more definitely than from 1872 to 1879?

A. Well, I know he did live there, but I do not know when. I know it was between 1872 and 1879, he lived in one of Petty's houses.

Q. And where was that house located?

A. Located in North Lawrence.

Q. What part of North Lawrence?

A. Well, the north part of North Lawrence, out on Bridge street.

383 Q. That is Massachusetts street extended?

A. No, sir, it ain't. Massachusetts street goes straight across the river and this is Bridge street.

Q. Then this is the street going directly north from the bridge?

A. Yes, sir, I think he lived in Lyon, the second house from the corner.

Q. And who was living with him?

A. I think Mrs. Hillmon's folks was living there at that time, I think she was there and her mother was living there.

Q. Now can you tell the year they were living there?

A. No, sir, I cannot.

Q. Can you give us about the year?

A. No, sir, I ain't abouting anything about it only it was between 1872 and 1879, I was in town and I used to see him frequently and he told me he lived over there.

Q. But you saw him frequently?

A. I saw him once after that and he said he was running a restaurant again after that.

Q. I wish you would answer my question. Now will you attempt to fix the next time you saw him after you were herding cattle with him?

A. No, sir, I would not attempt to fix it at all.

Q. Well, would you say it was a year?

A. I would not say how long it was, I seen him frequently in town around and talked to him, I would not state the time I talked to him—just before he started away I saw him and Mr. Baldwin sitting on the bridge, I was crossing the bridge going north and I saw them sitting on the south end.

Q. You saw him there in 1872?

A. Yes, sir, on our place in 1872.

384 Q. And did you see him again in 1873?

A. I would not say.

Q. Would you say you saw him in 1874?

A. I would not.

Q. May you have seen him in 1874?

A. I would not say whether I did or did not, I have seen him frequently after he quit and went away from there.

Q. Would you say you saw him in 1875?

A. I would not.

Q. Or 1876? A. No, I would not.

Q. Or 1877? A. No, sir.

Q. Or 1878?

A. No I would not, I saw him between those times, but I would not state the times.

Q. And what year did you live in Atchison, Mr. Covey?

Q. Well, that was in, along in seventy, let's see, I forget just now when I did go to Atchison.

Q. And now were you in Atchison several years?

A. I was in Atchison a little over a year, yes, sir.

Q. And driving team for?

A. I think it was 1880 or 1881 I went to Atchison.

Q. 1880 or '81? A. I would not state just which.

Q. Now don't you know, Mr. Covey, that it was along in the seventies? A. No, sir, I think it was in 1881.

Q. Well, was it before or after you saw the body you speak of? A. It was after.

Q. After that? A. Yes, sir.

Q. Then you say that from 1871 or '2 up to 1879 you were continuously at Lawrence?

A. I was there at Lawrence, of course, yes, sir.

Q. About how many months would elapse between the times you would see Hillmon?

A. I could not tell you how many months would elapse.

Q. Would you see him every month or two?

385 A. Well sometimes it would be quite a while, I would not be willing to say anything about it, that is about the times.

Q. Now how long would you say that it was the longest time at any one time that you did not see Hillmon in Lawrence? A. I could not state that.

Q. Will you state when you last saw him prior to the time you saw that dead body?

A. No, I could not do that either.

Q. Could not do that?

A. As I state the last time I saw him was sitting on the bridge, him and Levi Baldwin together.

Q. Would you say that you had seen him within a year prior to that time? A. No, I would not.

Q. And it would be your best judgment you had not seen him within a year?

A. I would not say whether I had or had not, I would see him at lots of times and speak to him.

Q. But you saw him at your brother-in-law's, John Eldridge's? A. Yes, sir, I would see him there frequently.

Q. I think you stated John Eldridge was a brother-in-law of yours? A. Yes, sir.

Q. And he was keeping a livery stable there north of the bridge in North Lawrence? A. Yes, sir.

Q. How many times would you say you saw him there at John Eldridge's? A. Well, I saw him frequently.

Q. All during those years?

A. No, sir, not all during those years, there was quite awhile he was away.

Q. Well, would you say what years he was gone?

A. No, sir.

Q. Have you any recollection of the years he was gone?

386 A. No, sir, but it was between those years that we worked together and he was killed that he was gone. I could not say where he was gone only he was gone.

Q. How many times did you see him from the time you worked there together? A. I could not tell.

Q. Now do you remember when it was that you saw that dead body? A. Well not just the exact time, no sir, I do not.

Q. Do you remember what year you saw it?

A. Well, yes, sir.

Q. Well now will you state what year you saw it?

A. 1879.

Q. What is there that fixes your mind as to that date?

A. Well I was in there, and the death of him, and I was called in there.

Q. Well would that fix the time as to the date you saw him? A. Yes sir.

Q. That would fix the time?—and is that the only thing that you have by which you fix the date at which you saw him?

A. Yes sir, I have heard it often enough, I have heard it repeated often enough I come pretty near knowing the year it was in.

Q. Then it was from having heard it repeated often you know the date? A. Yes sir, and knowing it too.

Q. And where were you when you drove up, you say?

A. I was right at Ridenour and Baker's warehouse in the alley.

Q. And how far is that?

A. That is a little over fifty feet from the undertaker's.

Q. And you jumped off and went in? A. Yes sir.

Q. And no one requested you at that time, you just went in?

A. No, sir, I called my brother's attention to it, I said, "Let's go and see if it is Hillmon."

Q. Do you remember what time in the day it was?

A. No sir, I do not.

387 Q. Would you say it was in the forenoon or afternoon?

A. I would not state. We just drove in there with nails and I spoke to him.

Q. Well you have told that often enough.

A. I would not state as to the exact hour.

Q. I am not asking you the exact hour, but whether it was before you had dinner or not? A. I do not remember.

Q. You do not remember that? A. No, sir.

Q. Now whom did you say was in there at that time?

A. Well I could not state who was in there exactly.

Q. Well, anyone?

A. Well I think I met Ed Monroe, and I think Smith was in there at the time, I know he was, and Monroe had just come out and people were walking in and out.

Q. Quite a number were walking in and out?

A. There was not so many, no sir.
Q. But there were people walking in and out?
A. Yes, sir.
Q. You do not recollect who you saw there?
A. I saw Ed Monroe.
Q. And that is the only one you remember?
A. The only one I spoke to.
Q. How long did you remain there that time?
A. I presume I was there 15 minutes.
Q. And the body was lying on boards?
A. I think it was laying on trestles.
Q. Do you remember what day of the week it was?
A. No, sir.
Q. Do you know how long the body had been there?
A. I think it had been put in there that same day just before we drove up a little while.
Q. And you say you think the body was lying on a board?
A. Yes, sir, I think it was lying on trestles and on a board.
388 Q. Well now Mr. Covey isn't it a fact that the body was in a coffin and the coffin was on the trestles?
A. No sir, I do not think at that time. I think at that time, it laid on a plank I know the second time I was in there.
Q. We are not asking you about the second time, I am asking you about the first time now.
A. I should judge it was laying on a plank the first time.
Q. Well do you know he was? A. No, sir.
Q. You would not swear then whether this body at the time you first saw it was in the coffin or lying on a board?
A. No sir, I would not.
Q. Now was the body dressed at his time?
A. Yes, sir, he had on clothes.
Q. And you examined the face?
A. The first time I just walked around him and looked at him, and I was convinced it was him and I walked out.
Q. Well did you say it was that took fifteen minutes?
A. Yes sir, I walked in and looked at him.
Q. I understood you to say you walked in and just turned around and walked out? A. Yes, sir.
Q. Well I will ask you again, did it take you all of fifteen minutes?
A. Yes sir, but I was not walking all the time.
Q. When did you next see the body again after that?
A. I think it was the next day, I am not positive whether it was the second or third day.
Q. How did you come to go there at that time?
A. I was requested to go there by Sheriff Clark, I think it was.

Q. Did you inform him that you had seen the body?
A. No, sir; I did not. Somebody informed Sheriff Clark that we was acquainted with him.
389 Q. And you did not inform Sheriff Clark that you had already seen the body fifteen minutes and knew who it was? A. No, sir.
Q. Where was you when he came to you?
A. I was right up there about where Poehler's building was near Pendleton's building.
Q. That is north of Bailey & Smith's? A. Yes, sir.
Q. And about how many yards distant?
A. About three hundred feet it would be.
Q. And what were you doing? A. I was hauling freight.
Q. Well were you loading or unloading?
A. I was either loading or unloading, I was right there at Mr. Poehler's store.
Q. And who was keeping store there at that time.
A. I do not remember.
Q. Whose freight were you unloading?
A. I was unloading freight at that time, I do not recollect whether it was Resting's (???) or Poehler's.
Q. And who went with you this second time?
A. Well I ain't positive, I do not remember whether Clark asked me to go or not.
Q. I am asking you who went with you?
A. There was no one.
Q. Who was there? A. I think Smith was there.
Q. Were there other people there?
A. There was not any in there hardly when I went in.
Q. Do you remember anyone that was in there?
A. No, I think Smith was in there, I do not know that positively, he was there at the door I think; he asked me to go and look and I went and looked.
Q. You were not thoroughly convinced the first time?
A. Yes, sir, I was.
390 Q. You were thoroughly convinced the first time?
A. I was convinced the first time I laid my eyes on him.
Q. You could not be mistaken?
A. No more than if it was my brother.
Q. Why did you go there a second time?
A. Because they requested me.
Q. And no one went with you?
A. No, I think not, I do not think anyone went down with me.
Q. In what state of preservation was this body in there when you were in there the second time?

A. Well, it was in pretty good shape to be buried as long as it had been.

Q. Well, I was not asking you for your opinion as to how long it had been buried. I asked if it was in a good state of preservation.

A. Yes, sir, I think it was; it looked natural to me.

Q. Well, did you know the time you went there the first time that there was a question as to whose body it was?

A. No, sir. Not when I went in.

Q. You did after you got in you say? A. Yes, sir.

Q. And so you took a good look at the body? A. Yes, sir.

Q. Now, you have lived in Lawrence since 1879?

A. I have lived in Lawrence and about it since 1865.

Q. I was fixing it since 1879,—have you lived there since 1879?

A. Not all the time, I have been in Atchison part of the time since, I think I was in Atchison a little over a year.

Q. Now do you remember of testifying in this case before?

A. Yes, sir.

Q. How many times have you testified?

A. I think twice.

Q. Twice,—at the first and second trial or the second and third trial?

391 A. I was at Leavenworth once and here once.

Q. Do you remember what year this case was tried at Leavenworth? A. No, sir.

Q. Do you remember what year it was tried here?

A. No, sir.

Q. You were not sworn on the first trial? A. No, sir.

Q. When did you first tell anyone,—

A. The first trial I was not there.

Q. I am not asking you where you were, I am asking you who you first told?

A. I never told anybody, I think some of the witnesses here told it first and I was subpoenaed, I think it was Eldridge first stated about our acquaintance.

Q. You never stated it to anyone? A. No, sir.

Q. Did you ever state it to anyone before you were put on the stand?

A. No, sir, there were lots of witnesses knew it.

Q. I will ask you if you talked to anyone in regard to this case before you were placed on the stand? A. No.

By Mr. Hutchings:

Q. When?

By Mr. Green:

Q. The second trial?

A. No, only there was a talk there, they came around,—

Q. I am not asking you about the time. I am asking you for a fact.

By Mr. Hutchings:

Q. You do not give the witness a chance to explain.

A. Well, yes, I talked, they came to me before I was subpoenaed.

Q. I am not asking you whether they came to you or anything of the kind, I am simply asking you if you talked to anyone about what you would testify to, before you were put on the stand? A. Yes, sir.

Q. And do you remember who you first talked with?

A. Well, I think the first one I ever talked with was H. S. Clark in regard to it.

392 Q. I am speaking now about the time you were called as a witness in this case.

A. Now I forget who it was came to me and they asked me all about it, I could not say positively who it was now.

Q. You do not remember?

A. Well, I do, too, I think Mr. Riggs was the first one that came around to me and asked me all about it and I made a statement to him.

Q. Do you remember how long that was before the trial?

A. I do not.

Q. Now, do you remember where you said you had driven that team or where you stopped your team when you got off the wagon and went in to see that body the first time,—now do you remember what you testified in regard to that the first time you testified in this case?

A. I was on a load of nails in the alley, yes, sir.

Q. I asked you if you remember what you testified to?

A. I think I testified to that same thing exactly.

By the Court: If you would pay a little more attention to the question and simply answer that question we would get along better. Answer that and nothing more.

A. Yes, sir.

By Mr. Green:

Q. Now, did you state at that time that you were driving along Massachusetts Street when you first found he was there and that you got off and went in? A. I did not.

Q. You did not? A. No, sir.

Q. Now did you testify at that time that you examined the body twice?

A. I think I did not, I do not think I was asked the question.

Q. You do not think you were asked the question and do not think you testified you examined the body twice?

A. do not think I testified to it.

393 Q. Did you testify on the last trial of this case that you examined this body twice? A. I did not.

Q. Did you ever testify before that there was a mole on Hillmon's back? A. No, sir, it never was asked before.

Q. I was not asking you whether it was asked or not,—did you ever testify to it? A. No, sir.

Q. When did you first disclose the fact to the plaintiff or any of her attorneys as to his having a mole on his back?

A. Well, they was asking me if there was any marks on him.

Q. When was it they first asked you?

A. Well, I do not recollect the first time, it was since I was here as a witness before.

Q. They did not ask you if there was any marks then?

A. They did not ask the question.

Q. And you did not tell them what you knew there was marks on the body? A. They did not ask me.

Q. When did you first tell them you examined that body more than once? A. I cannot remember that, not when.

Q. Well, about when?

A. Oh, I can't about it at all, I told you I could not tell only it is since I was here before.

Q. Did you disclose to them after these other trials that you examined that body twice? A. Yes, sir, I did.

Q. Well, before the last two trials you did not tell them that? A. No, sir.

Q. And you did not tell them about this mole before that?

A. No, sir.

Q. And don't you know that would be a mark of identification?

A. I do not know anything about that, I suppose it would be if they knew it.

394 Q. But you knew it and did not tell them?

A. They was asking me if there was any marks.—

Q. When was that? A. I cannot state.

Q. Can you state about when? A. No sir.

Q. Well was it within the last year?

A. I think it was within a year, yes sir, we was talking about it.

Q. Within a year,—now on this second occasion you do not remember who was present?

A. No I do not. I think Smith was.

Q. Do you remember whether the body was lying in the coffin at that time or not? A. It was not.

Q. It was not? A. No sir.

Q. And you think it was on the second or third day?

A. I think so, yes sir, not longer than that I do not think.

Q. It was not on the day you got off the wagon and went in?

A. No sir, I saw the body three times really, I was in there when Dr. Mottram was in there once.

Q. You say that it was lying, how was it lying at that time? A. Lying, I think, on a board of the same tressels.

Q. Now sir how was this body dressed the second time you was there?

A. Well I think it had no coat on it the second time, just kind of something throwed over him, pants on, I did not notice particularly about the pants.

Q. Do you remember whether or not he had a coat on?

A. I think he had none on.

Q. Well do you say he had not?

A. I think he had none on at that time, I am pretty positive he did not.

Q. Well do you say he did not?

A. I think he had no coat on at that time.

Q. Did he have any other clothes?

A. Yes sir I think he had a pair of pants on and a shirt on.

395 Q. He was not lying in the coffin at that time?

A. I am pretty sure he was lying on the boards.

Q. Did you ever see that body in the coffin?

A. Not that I know of. I think the first time I was here he was lying on a plank taken out of the box.

Q. Well when was it you saw it the third time?

A. Well I could not state the time.

Q. Was it the same day you saw it the second time?

A. No, I think it was after that, Doctor Mottram was there I think that trip.

Q. When you saw the body at that time was it in the coffin or on the plank?

A. Well I think it was still on the plank.

Q. Well this at least would be the third day the body was there?

A. I would not state whether that would be the third day or whether it was the third day I went there the second time.

Q. You did not go there twice on the same day?

A. I would not say whether I did or did not.

Q. I understood you to say you did not?

A. I said I would not say whether it was the second or third day I went there the second time.

Q. Then you went there three times? A. Yes sir.

Q. Well was that the second or third day?

A. I do not know whether it was the same day or the day after.

Q. Was it the same day you say you went in and examined and saw the mole? A. No sir, it was after that.

Q. The day after that, some day after that?

A. It was after that.

Q. And was the body in the coffin at that time?

A. No sir.

Q. Now how did you come to go there that day?

A. Well I just walked around there, I worked there right close.

396 Q. How did you come to just walk around there?

A. Well I was in there at the alley after freight again and seen a crowd there and I walked down there.

Q. Crowd going in and out?

A. Well they was not walking in and out much that day. I just walked down there and Mottram was making an examination and there was quite a stench there and I did not notice many go in there.

Q. Could you state who was there the second time?

A. Well I would not say positively, but I think Smith was there and I think that cabinetmaker he had there, I would not say positively.

Q. Well were there any other people there?

A. I think they were around there, I would not say whether they was or not.

Q. Now on this second trial you say you testified at Leavenworth?

A. Well I would not say whether it was the second or third time.

Q. Do you remember how many times this case has been tried? A. No, sir.

Q. Do you know who presided at the trial at Leavenworth?

A. Judge Brewer, I think.

Q. Well at that trial were you not asked this question, "Now by what particular feature, if any, did you recognize the remains as being Hillmon?" and didn't you answer that question, "Nothing any more than I would you?"

A. Well that is it, at that time, what I meant by that was,—

Q. And were you not asked at that time, "Didn't recognize him by any particular feature or mark?" and didn't you answer to that, "No sir"?

A. I do not think I answered that way, no, sir.

397 Q. Do you say you did or did not?

A. Well, I say I do not think I did because,—

Q. Well I am not asking you if they were. A. Because,—

Q. No, I am not asking for any reasons either. Did you or did you not?

A. Well I do not know, I do not recollect.

By Mr. Green:

Q. Were you not also asked on that examination, "Was there any peculiarity about Hillmon by which you could recognize him" and did you not answer to that question, "Not particularly, no marks that I knowed of?" Was that question asked you and did you answer in that way?

A. Well if I did I answered it wrong because there was marks.

By the Court: Answer the question. Did you or did you not.

A. Well I do not recollect whether I did or did not answer it in that way. If I did I did not understand it.

Q. And again another question, were you not asked, "Do not remember of any marks?" and did you not say, "No sir." What do you say to that?

A. I said if I did I did not understand the question.

Q. I did not ask you that, I asked you whether you so testified? A. I do not know.

398 Q. Will you say you did not?

A. No, I would not say whether I did or did not.

Q. How long ago was that, Mr. Covey, that you gave your first evidence in this case?

A. I do not recollect exactly.

Q. Give the best of your recollection.

A. I should judge six or seven years.

Q. Now at the trial at Leavenworth over which Justice Brewer presided were you not asked this further question, "Did they look natural, well preserved, in good order?" answer, "They looked natural to me." Question, "Perfectly natural?"—Was that question asked you and that answer given?

A. I think it was.

Q. Then the next question, "Perfectly natural?" and did you not answer, "Not perfectly natural,"—was that your answer.

A. Well I do not think I did, he looked natural to me.

Q. I am asking you whether you said that or not?

A. I do not remember whether I did or did not.

Q. Will you say you did not or that you did?

A. I do not think I said it.

Q. Were you not then asked, "The remains were sufficiently well preserved so that you had no trouble in recognizing Hillmon" and did you not answer that, "I got it down in my head that that was Hillmon." A. Yes, sir, I have yet.

Q. Well I asked if you were asked that question and did you not answer that?

A. I answered that I was positive that was Hillmon I said.

Q. Pay attention to the question,—I asked now if he was asked this question, "The remains were sufficiently well pre-

served so that you had no trouble in recognizing Hillmon," and did you not answer that question as follows, "I got
399 it down in my head that that ws Hillmon"?

A. Yes that is right.

Q. Do you remember of that question being asked and you answering it?

A. I do not remember just how I answered it, I do not remember just how it was put to me.

Q. Do you remember of that question being asked?

A. I do not.

Q. Do you remember the question being answered?

A. No sir, I do not.

Q. Do you remember whether the question was asked or not? A. I say I do not recollect.

Q. Now your recollections of any marks would be quite as good in 1885 as they are now, would they not?

A. I do not know whether they would or not.

Q. Don't know whether they would or not,—Mr. Covey where did you first see that mole that you speak of?

A. Why it was when we was at work when we was herding cattle together on the prairies the first time I ever saw it.

Q. Where were you when you first saw it?

A. I was up on the prairie back of Governor Robinson's.

Q. And what was the occasion?

A. He asked me to put a court plaster over it.

Q. And you put a court plaster over it? A. Yes sir, I did.

Q. Were you carrying court plaster along with you for the occasion? A. No sir, I did not, he did.

Q. He had court plaster with him? A. Yes sir.

Q. . Now what season of the year was this?

A. Along in hot weather, I do not recollect just what season of the year.

Q. Well about what month would you say it was?

A. I could not say.

Q. Well could you give us your best impression?

A. I could not, we was out there herding cattle and he asked me to put it on and he said the suspender rubbed it and asked me to put it on.

400 Q. Isn't it a fact that Hillmon did not wear suspenders? A. He did at that time.

Q. Where did you locate that mole?

A. It was a small one on the left shoulder.

Q. How large?

A. I could not say how large, but it was small.

Q. Was it as large as a walnut?

A. No sir, It was very small.

Q. About how large was it?

A. It wasn't as large as a pea, nothing like it.

Q. What was the shape of that mole?

A. It was a little bit of a black spot.
Q. What shoulder was it on, did you say?
A. It was the left shoulder blade.
Q. How do you remember it was the left shoulder blade?
A. Well the time I examined him there and I put it on him enough to know.
Q. About how many times do you remember you put it on?
A. Four or five times while we worked together.
Q. You are positive, you say, it was on the left instead of right? A. I did not say it was the right.
Q. You said it was the left shoulder?
A. The left shoulder.
Q. Was it near the center of the back or toward the side?
A. It was just right down there where the suspender came, right there on the shoulder, his suspender used to rub it.
Q. Yes, but I am trying to locate it?
A. Yes sir, I come pretty near telling you where it was.
Q. Was it on the spine? A. No sir.
Q. How far was it from the spine?
A. Well it was between his back and shoulder.
401 Q. About how far?
A. Well I could not tell about how far.
Q. Give us your best impression, was it an inch or two inches? A. I do not know.
Q. Or three inches?
A. I could not say, I never measured.
Q. Well can you give us your best judgment?
A. Well it was just down by the left shoulder, I said between the back and shoulder, I do not know how wide he is between his back and shoulder.
Q. Please give your best judgment as to the distance that mole is located from the spine?
A. Well I could not say, it was not very far.
Q. Well in inches how far was it? A. I could not tell.
Q. You would not pretend to say?
A. Not the distance, no sir.
Q. Where abouts on the prairie was it?
A. Right east of Governor Robinson's and north.
Q. Right east and north?
A. Yes, sir, right east where we herded together, from Governor Robinson's house.
Q. Now what condition did you find that mole in?
A. What condition I found the mole in?
Q. Well I know, but what condition was the mole?
A. Well it looked natural enough.
Q. Looked natural?
A. Yes, sir, I did not stop to examine it very long, I just located it and that was all there was of it, to see that it was there.

Q. Now how did you get at this mole?

A. Well I just put my hand on the shoulder and raised it up a little.

Q. You do not understand. A. What do you mean?

Q. When you saw the mole on the prairie.

A. Well he would raise his shirt up a little and I would get down and put the court plaster on it.

402 Q. Do you remember of his unbuttoning his suspenders?

A. No, sir, he generally would take them down without unbuttoning them.

Q. Then you would raise the shirt and put this plaster on?

A. Put a little court-plaster on.

Q. What was the effect of this court-plaster?

A. Well it just kept his shoulder and suspenders from rubbing, that is what he told me.

Q. Now after the first time you discovered it when was the next time you saw it?

A. Well whenever it would get to hurting him a little he would ask me to put court-plaster on it.

Q. Now I asked you when was the next time?

A. Well I could not say.

Q. Well how long did it go?

A. Well sometimes it would go three or four days and sometimes I would put it on the next morning.

Q. Now what was the effect of that court-plaster?

A. Why he put it on to keep from rubbing the shoulder I understood.

Q. You did not examine him to see how it affected him?

A. He told me it was to keep his suspenders from rubbing.

Q. Now do you think it was the next morning after your attention was first called to it you saw it again?

A. No, sir, I would not say, sometimes I put two on,—I would not say it was the next morning or a week after.

Q. You would not say at all as to that?

A. Oh, yes, I remember putting it on.

Q. Now do you remember whether this plaster stuck or not?

A. Sometimes it would and sometimes it would not.

Q. How long? A. I do not remember.

Q. Were you riding hard at that time?

A. Not very hard.

403 Q. And the cattle were not troubling you a great deal? A. Not much, no.

Q. Now after you put this mole on did he say anything about the effect at all? A. I did not put the mole on.

Q. The plaster on?

A. Well he never said anything to me only he had it there to keep his suspenders from rubbing as I told you.

Q. Now did this plaster draw or irritate the mole?
A. I could not tell you.
Q. You did not hear him say whether it drew or irritated the mole or whether it soothed the mole?
A. He did not say any thing about that.
Q. And then after you put it on then you would hear nothing further from it?
A. Yes, it would come off sometimes and I would put another one on.
Q. Then the intention was to keep plaster on there all the time, wasn't it?
A. No, sir, not all the time, sometimes he would say his suspenders would rub it or his shirt and I would put it on.
Q. Well when it came off and you would put it on again you had an opportunity of seeing the effect that plaster had on there?
A. Well it would stay on there, I could not say what effect it had on there, I could if it was on me.
Q. When the plaster would come off and you were called upon to put another one on you could then observe what effect this had upon the mole? A. No, sir.
Q. You did not observe that at all? A. No, sir.
Q. How much was the mole irritated?
A. Not any hardly, not to notice, very little.
Q. You could hardly notice the irritation,—do you remember what wages he was getting then?
A. I do not.
404 Q. How much did you get?
A. I got sixty dollars at that time.
Q. And board yourself? A. Yes, sir.
Q. A month? A. Yes, sir.
Q. Hillmon was doing the same service I presume?
A. Well he was doing a little bit more. He was in charge of the cattle, selling cattle.
Q. You say he was selling cattle? A. Yes, sir.
Q. Didn't White live in Lawrence?
A. Yes, sir, but he let Mr. Hillmon sell the cattle. Purchasers would come out there to see the cattle and would not see Mr. White, I suppose,—

By Mr. Smith:
Never mind what you suppose now.

By Mr. Green:
Q. Now you said that H. S. Clarke asked you to go down there the second time you saw this mole?
A. I would not be positive whether it was Clark or Smith.
Q. Did you state anything to the persons there about what you found? A. Well there was several times,—

Q. No I asked you if you said anything to the person who requested you to go down there as to what you found on that body? A. No, sir.

Q. Then I understand you went immediately from the place they requested you down to where the body was?

A. They requested me.

Q. I say you immediately went after they requested you down to the place where the body was? A. Yes, sir.

Q. I understand you to say you immediately went to where the body was? A. Yes, sir.

Q. And immediately you examined to find this mole?

A. No sir, not immediately, I looked around, I examined and I was satisfied it was Hillmon and they did not ask me.

Q. No, I did not ask you that, now what did you do?

405 A. Well they asked me to go down and see if it was Hillmon.

Q. No I am asking you what you did when you went in there? A. I went in and looked at it.

Q. How long did you look at him before you made this examination for this mole? A. I could not say how long.

Q. Well about how long?

A. I only looked at it a few minutes.

Q. Well I want your best judgment?

A. Well you can say ten or twenty.

Q. Well would you say which it was, ten or twenty?

A. I would not.

Q. Now how was the body lying at this time?

A. Lying on his back.

Q. Lying on the back, and as I understand on a board, and this board was resting on?

A. I think it was on tressels.

Q. By tressels you mean saw-horses?

A. Yes, saw-horses.

Q. Such as carpenters use when they put boards on to saw?

A. Yes, sir.

Q. Now will you state how that body was clothed at that time?

A. Well I think the second time I went in he had just a pair of pants on and a shirt.

Q. Now this is the time you examined for the mole?

A. Yes, I think the shirt had been on him since the first time.

Q. I mean how was he dressed at the time you examined for the mole?

A. I think just the pants and shirt, I think the shirt had been off.

Q. Now this shirt was open in the front?

A. I think it was opened in the back, I would not say positively whether it was or was not, I think it was not opened in front.

Q. It was not a shirt that was opened in the front?

A. I would not say positive it was or was not, I think it was,—

Q. Well do you know? A. No, sir.

406 Q. You saw it?

A. Yes sir,—I wasn't there to examine it for that purpose.

Q. And who did you say was there at that time?

A. Well I could not say positively who they was because I did not know them, that is a fact.

Q. Well will you try and recollect who was there?

A. No sir.

Q. You won't,—do you know whether there was more than one person there?

A. There was several looking in the windows.

Q. Several looking in the windows?

A. At the time, yes sir.

Q. And you were the only person in there? A. Yes sir.

Q. Do you remember who they were? A. No sir.

Q. Did you see Clark or Smith?

A. Well, I do not remember which one of those two, if they was in there.

Q. Well then did Clark come in there?

A. Well I think he went in there. I think it was either him or Smith.

Q. Well did you find Clark there when you got there?

A. Well I ain't sure whether he went out and came down the alley, or Smith, it was either him or Smith opened the door for me.

Q. You do not remember which one it was opened the door for you? A. No sir, when I went in.

Q. Will you swear whether it was either one of them?

A. No sir, I would not swear positively.

Q. Will you say it was one of them?

A. Well I think that it was one of them.

Q. You would not swear positively whether it was Smith or Clark?

A. Yes sir, or Mr. Cole, I think Mr. Cole was there, a gentleman that worked for him.

Q. Well if it wasn't Clark or Smith that went with you who went with you?

A. There was not anyone, you asked me who I met

407 there and I said Smith came out of the door.

Q. I am asking who went down with you, Clark or Smith?

By Mr. Hutchings:

He has gone over and over that and we object to it.

A. I do not recollect which one did open the door or whether it was Mr. Cole, he worked there for them at that time, I could not say positively it was not him.

By Mr. Green:

Q. Do you recollect whether it was one of those two men or not? A. No, I do not.

Q. Then if it was not one of those two men who was it?

A. Well I could not say, I say Mr. Cole worked there.

Q. Well would you say it was Mr. Cole? A. No sir.

Q. Well would you swear it was one of those two men?

A. No sir.

Q. Well if it wasn't them who was it?

A. I would not swear which one it was opened the door, I went in and there was several came in afterwards but I do not recollect who they was.

Q. If the door was unlocked there wasn't any necessity of either Mr. Clark or Mr. Smith unlocking it?

A. I did not say the door was locked, there was several looked in the windows, I ain't positive but a brother of mine, Dan, came right down.

Q. Well now Mr. Covey will you swear positively that you did not go there alone? A. That I did not go alone?

Q. That is go into the room alone? A. No, I would not.

Q. Someone did go? A. I do not understand.

By Mr. Hutchings:

It seems to me the frequency with which they go over that tends to confuse. The witness stated that he went there alone and that someone opened the door.

408 A. And several looked into the windows.

By Mr. Green:

Q. But he did not say whether it was Clark or Smith or Cole or anybody else.

By Mr. Hutchings:

I do not think anybody else would after sixteen years.

By Mr. Green:

Q. Now what did you do in order that you might see this mole? A. What did I do?

Q. Yes. A. Just merely raised him up.

By the Court:

Q. Merely what?

A. Raised him up, raised his head up.

By Mr. Green:

Q. You just raised the head up?

A. I raised the body a little, yes sir, I had taken him by the head, I raised him up a little and kind of twisted him over, I did not raise him up straight.

Q. Did you twist the whole body over?

A. No sir, I did not, I did not stay long enough.

Q. Is that the reason you did not turn him over?

A. There was quite a stench there and I just raised him and satisfied myself and left.

Q. How did you get at the mole after you raised the body up?

A. Well I just stripped the shirt up a little and looked at it, I would not be positive whether that shirt was opened, whether it was open at the back or whether it was open at the front, there was an opening, I got in there.

Q. Then you pulled the shirt up after you raised the body and looked? A. Yes sir.

Q. Did you replace the shirt?

A. Well I would not say. I did not replace it very good.

Q. Did you call the attention of any person there to
409 the fact that there was a mole on the body? Did you call the attention of any person there that you had discovered this mole? A. No, I did not.

Q. You were requested to go down there and identify this body, were you not?

A. Yes, sir, they said they had heard I was acquainted with him and wanted me to go and see.

By Mr. Green:

Q. Answer my question,—and being so requested you went down there and discovered this mole on the body and did not call the attention of any person present to the fact that you had so discovered it? A. No sir, I did not.

Q. You did not tell anyone there that Hillmon did have such a mole and that you had found such a mole on the body?

A. No sir.

Q. You did know that it was questioned at that time whether the body was Hillmon?

A. At that time I guess I did, that is why they requested me to go.

Q. Well why did you not tell a person there what you had discovered?

A. I was not asked the question, they just asked me to go down and convince myself whether that was Hillmon or not.

Q. They asked you to go down and identify the body, did they not? A. Yes sir.

Q. And after you went down there and found this identifying mark you did not report it to anybody at all?

410 By Mr. Green:

Q. I have asked this question before,—when did you say you first informed anyone of the fact that you found this mark on the body?

A. Why, I do not recollect just when it was.

Q. Well about how long?

A. I could not say, I have been asked that since this last trial.

Q. Was it within a year, will you fix the time as near as you can?

A. Well, I do not know whether it is one year or a year and a half.

Q. Now you knew at the former trials of this case that the question at issue between the plaintiffs and defendants was whether this was the body of John W. Hillmon, did you not?

A. Yes, sir.

Q. And you never disclosed the fact to the plaintiff or her attorneys that you had found this mole was on this body until after the last trial? A. Yes, sir, it was not asked me.

Q. But you were requested to go down and identify the body?

A. Yes, sir, I did—and I did identify him the first time I saw him.

Q. Mr. Covey, to refer again to the body, how high were those supports? A. I could not tell you.

Q. But I will ask you what was the distance from the body to the floor? A. Oh I never measured the distance.

Q. You did not take a measure along with you to ascertain that fact? A. How far it was down,—no, I did not.

Q. Well, can you give us your best judgment?

411 A. Well, I would say about that high (indicating) not quite as high as that table.

Q. Well, so as you can get it in the record, about how many feet? A. I would not say how many feet.

Q. You say not quite so high as this table, give us your best judgment of the distance between the body and the floor.

A. Well, it might have been three feet, it might have been two feet, I would not say.

Q. Would you say between two and three feet?

A. It was two feet up anyway, I would say, it might have been a little more than that up off the floor.

Q. Now which hand did you raise the body with?

A. Which hand?

Q. Yes.

A. I stood on the south side, head this way and I turned him over this way (indicating), and stuffed something, I forget what it was, some old clothes I guess, and went around the other side and took the head up.

Q. Which direction was the body lying?

A. Well, his feet was lying to the west and his head to the east and I went around to this side and pulled him over.

Q. Now, which is the side,—the south side?

A. No, I went on the south first and went around and twisted him over and got to the left shoulder and looked at him.

Q. Now which side were you on and where were you standing when you twisted the body?

A. Well, I went on both sides.

Q. Well no.

A. Well, I was on the north side of him at the time I turned him.

Q. How did you take hold of the head?

A. I just took hold of him this way and I could not raise him this way (indicating) and I put my hand under him this way and raised him a little and walked around to the other side.

412 Q. Now were you standing now at the head of the body or on the side of the body?

A. Oh, I was standing on the side.

Q. And you took hold of the head and twisted it over?

A. Yes, sir, head and shoulder.

Q. The head and shoulder? A. Yes, sir.

Q. And then you say you propped him up with old clothes?

A. Then I went around to the other side and pushed some things under and looked.

Q. Now, did the body move while you were walking around there?

A. Didn't move but very little because I kept one hand on it.

Q. Which hand?

A. I do not recollect. I walked around his head I know. went around from the north side, went around his head and came on the south side.

Q. Walked around then from the north side to the south side? A. Yes, sir, first stood to the east.

Q. And I think you say you propped it up with some old clothes?

A. I do not recollect what it was, whether it was an old coat or what it was.

Q. Do you recollect where you got it?

A. Well, it was laying right there.

Q. You say "Laying right there,"—right where?

A. Well, it was laying right there by the side of him, there was several things there.

Q. Right by the side of him?
A. Well, it was right there.
Q. Do you recollect what color it was? A. No, sir.
Q. Do you recollect whether it was of one color or different colors? A. I do not.
Q. Do you recollect whether it was a plaid or whether it was not? A. I do not.
Q. And you cannot tell any more about it but that it was an old coat?
A. I said I could not tell about it, may be it was
413 an old coat.
Q. What made you think it was an old coat?
A. Well, I do not know, I wasn't thinking of the coat.
Q. You know a coat when you see it?
A. Yes, sir, I do not know what it was, it was old clothes of some kind I stuffed under it.
Q. Why do you not know?
A. Why I did not stop to examine it, I did not go there to examine that.
Q. You did not take those clothes with you, you found them there? A. Yes, sir.
Q. What portion did you prop up?
A. I just turned them under,—after I got over on that side I stuffed the clothes right kind of under his hips, kind of pushed him over.
Q. Well, you twisted him over instead of turning him over?
A. Well, have it the way you please, I pushed him over.
Q. Well, did you pull him or push him?
A. I both pushed and pulled, I guess.
Q. And I understand you twisted the body so that you could get at it to see? A. Twisted and lifted it together.
Q. Did you keep your hands on the body during all this time? A. Part of the time.
Q. All the time you were making this examination did you keep your hands on the body? A. Not all the time.
Q. After you had twisted it and put these clothes under it then it laid quiet, did it? A. Yes, sir.
Q. And these clothes were under about the hip?
A. Yes, sir.
Q. And did you have to keep your hand on it to keep the body in that position?
A. No, sir, I did not have to, no sir, after I pushed him over he stayed there pretty well.
Q. Now, which hand did you use in raising the shirt?
A. Well, I do not know which hand I used, I used both of them.
Q. You did raise the shirt?

A. I think I pulled the shirt down from the top, I think I opened it, I think it was open at the top and I think
414 I pushed it down the back, I think the shirt was split down the back.

Q. Well, do you remember? A. I do not, no, sir.

Q. But you think you examined it by removing the shirt from the front? A. Yes, sir.

Q. Did you have any difficulty? A. No, sir, I did not.

Q. Did the persons in there ask you what you were doing?

A. No, sir. Nobody asked me.

Q. If the persons there did not ask you why you were twisting the body over?—

A. No, sir, there was not anybody.

Q. Did the persons there give you permission to do it?

A. Yes, sir, they told me to go in and look at it.

Q. Well, did they give you permission to push it this way?

A. I did not ask them, I took permission.

Q. They did not ask you what your object was in doing this way? A. No, sir, I done that to convince myself.

Q. And having taken the liberty of examining this body in this way for the purpose of discovering this mole you then kept it to yourself for fifteen years before letting anyone know you knew of it?

A. I did not say I kept it for fifteen years.

Q. Well, how long did you keep it?

A. I could not tell you.

Q. Have you any idea? A. No, sir.

Q. You kept it from that time until about a year ago, didn't you?

A. Yes, sir, I think about that time we was talking about it, yes, sir.

Q. Well, why did you go to this trouble if you did not state it to anyone?

A. Why we was talking about this Hillmon case,—

Q. Well, I am asking you why you did that?

A. Well, I cannot answer you, I do not understand.

Q. Well, I will ask you why you went through all this examination, turning that dead body which you say was
415 offensive on account of the odor, and then you did not disclose the fact that you found a mole there until fifteen years afterwards?

A. I wanted to convince myself that it was Hillmon.

Q. Well, I understood you to say you knew it was Hillmon the first time you saw it?

A. I did know it. A little more would not hurt any.

Q. Well, what object did you have in convincing yourself it was Hillmon?

A. They were talking about it and I wanted to make sure.

Q. Well, why didn't you disclose it?
A. Well, I did not, I did not even want to go on the witness stand.
Q. You are not answering my question, I say why did you not disclose it?
A. Well, the fact of it is I never was asked whether there was marks on him or not.
Q. You were asked to go there and identify the body?
A. Yes, I did identify I said again.
Q. Well, you were asked about identifying marks on the body at the last trial, the trial before Judge Brewer, were you not? A. I think so, yes.
Q. And you did not give this mole?
A. No, sir, I did not.
Q. Now, when did you first learn that this body had a mole on the back?
A. I learned that when I was at work that time there on Governor Robinson's place.
Q. No, this body I am speaking of, when did you first learn that the physicians had discovered it?
A. I do not know whether they did or did not discover it.
Q. You never heard of that? A. No, sir.
416 Q. Were you here at two trials?
A. I have been here at one,—

By Mr. Riggs: Q. That is all.

By Mr. Green:
Q. You have been at two trials? A. Yes, sir.
Q. Had not heard this matter of moles mentioned?
A. I have not.
Q. Had not heard that even mentioned? A. No, sir.
Q. Never heard that mentioned before? A. No, sir.
Q. Do you remember to whom you first disclosed this fact?
A. Well, I do not recollect whether it was Mr. Riggs or not. I am not positive.
Q. Do you remember how you came to do it?
A. No, I do not. I was talking to him in a conversation.
Q. You do not remember that?
A. Well, I do not know how it came around, no sir.
Q. And you do not remember when it was?
A. No, I do not.
Q. You do not remember the occasion?
A. Why, I do not remember, no, I forget where it was now we had that talk, me and him.
Q. Do you remember whether there was more than one present? A. Well, I do not recollect that.
Q. Do not recollect that now?—How long have you known the plaintiff?

A. Well, I could not say exactly how long.

417 Q. What, you remember led up to the conversation between you and Mr. Riggs, if it was Riggs, to your disclosing in regard to this?

A. No, sir, I do not, only think he said that he guessed he would have to have me up as a witness again and that is about all. I think that is the way it started.

Q. Well, how did you come to disclose to him at that time about this mole?

A. Well, I think I just spoke to him about it, told him there was something they had never asked me any questions about it, I think that is the way it came around.

Q. That is your recollection about it, how you came to disclose this fact, that they had never asked you in regard to it?

A. Yes, sir.

Q. How long had you known plaintiff?

A. I do not know how long.

Q. Well, about how long?

A. Well, I could not tell how long.

Q. Have you any idea? A. No.

Q. Can you tell that it was as early as 1879?

A. Well, I could not say positively how long I have known her.

Q. Well give us your best recollection?

A. Well I could not say.

Q. Can you give us any idea? A. No, not positively.

Q. Well, did you know her five years?

A. Known her five years?

Q. Yes? A. Oh, yes.

Q. Have you known her ten years? A. Yes, sir.

Q. Did you know her at the time this body was brought back to Lawrence? A. Never had spoken to her.

Q. Never had spoken to her then? A. No, sir.

Q. Became acquainted with her afterwards? A. Yes, sir.

Q. Didn't you know her when she was living in Petty's house?

A. I had seen her but had not become acquainted with her.

418 Q. About how long after the body was brought back there before you became acquainted with her?

A. Well I could not state, I ain't positive that some body didn't send her to me.

Q. Well can you give us any idea?

A. Well it was before she had that trial at Leavenworth I know, and I ain't sure then whether it was her came to me, or Mr. Riggs, about it.

Q. Well you have known her since that time, have you not?

A. I have known her by sight ever since I heard Mr. Hillmon was married.

Q. You have been acquainted with her a number of years?

A. Yes, sir, I suppose.

Q. You have had frequent conversations with her?

A. No, sir, I have not.

Q. Haven't you frequently conversed with her during these trials? A. I do not think I have conversed with the lady.

Q. I mean at these trials?

A. I have conversed with her I think about once at each trial, I think at Leavenworth was the first time I had an introduction to her.

Q. You think the first time you met her was at Leavenworth?

A. I think the first time I had an introduction to her was at Leavenworth.

Q. You saw her there at the trial?

A. I saw her just as I have seen her here.

Q. You had a conversation with her in regard to the case?

A. Well I think the first time was just before I got on the stand.

Q. Have you had any conversation with her in regard to the case? A. Yes, sir.

Q. You have conversed with the attorneys between that trial and the third trial?

A. Not often, I have conversed with them but not often.

Q. Now you may state then whether it was either
419 Mrs. Hillmon or Mr. Riggs who came to you and asked you about what you knew?

A. Why I think it was Mr. Riggs.

Q. Well now he wanted to know, I presume, if you were acquainted with Hillmon? A. Yes, sir.

Q. And he further wanted to know if you saw that body?

A. Yes, sir.

Q. And if you identified that body? A. Yes, sir.

Q. And how you identified that body?

A. Well I don't know as he done that, I do not know as he asked all those questions.

Q. Don't think he asked that?

A. No, sir, he merely came down to me and asked me if I was acquainted with Hillmon and I told him the straight thing of it and he had me subpoenaed to go to Leavenworth.

Q. Your recollection is he did not ask you how you identified the body?

A. I do not think he asked me how, I think it was some of the witnesses and they told about me being acquainted when on the stand.

Q. Well I am asking you about Mr. Riggs.

A. I think I told him I was acquainted.

Q. And you told him you saw that body?
A. Yes, sir.
420 Q. And you said it was Hillmon? A. Yes, sir.
Q. And you did not tell him how you knew it,— did he ask you how you could say that was Hillmon?
A. No, he did not.
Q. He did not ask you anything of that kind?
A. He did not.
Q. Now if Mrs. Hillmon came to you did she say who sent her?
A. No she did not, and I do not know whether she came to me or not, I am not positive.
Q. Now are you acquainted with Levi Baldwin?
A. Yes, sir.
Q. How long have you known Levi Baldwin?
A. Oh, I have known him since 1865 I guess, pretty near ever since I came here; in 1865 or 6.
Q. Have you been intimately acquainted with him?
A. No, not intimately, no sir.
Q. How well have you been acquainted with him?
A. Well I have been acquainted just enough to know who he was and talk to him, he lived on a farm just north of where my father lived.
Q. You lived in the same vicinity? A. Yes, sir.
Q. You would see him frequently? A. Yes, sir.
Q. You would see him frequently since the question of whether that was the body of Hillmon came up?
A. I have not seen Mr. Baldwin since the trial at Leavenworth until the other day.
Q. I asked you if you had not seen him frequently since the question of the identity of that body which was at Lawrence was raised?
A. No, sir, I have not seen him very often.
Q. Haven't seen him very often?
A. No, sir, not at that time, he left here about that time.
Q. You saw him at the trial at Leavenworth?
A. Yes, sir.
Q. How many times do you think you saw him between those two times?
421 A. I could not state how many times.
Q. You saw him at the trial, however, at Leavenworth? A. Yes, sir.
Q. Did you disclose to him this fact that you found this mole?

By the Court:
Q. What is the question?

By Mr. Green:

Q. Now have you ever conversed about this case with John Eldridge? A. Mightly little sir.

Q. The question was whether you ever had?

A. I have, yes sir.

By Mr. Green:

Q. Did you say, Mr. Covey, that you saw Hillmon and Baldwin at one time at the bridge? A. I did, yes, sir.

Q. What bridge did you refer to?

A. Lawrence, south end of the bridge at Lawrence.

422 Q. North end of the bridge at Lawrence?

A. South end.

Q. South end of the bridge at Lawrence? A. Yes sir.

Q. Can you tell me when that was?

A. Well that was in about 1879 I think.

Q. About 1879? A. I think so, yes.

Q. What time of the year 1879?

A. I could not tell you, it was not long before he went south I know. It was the last time I ever saw him alive. Levi Baldwin and him was sitting together up on the rail of the bridge.

Q. That was when?

A. It was not long before he was starting away I think.

Q. Mr. Covey where do your father and mother reside now?

A. Live in North Lawrence.

Q. Do they still reside there? A. Yes sir.

Q. And where did this brother reside who may have gone down there with you? A. Dan, he lives in North Lawrence.

Q. How many brothers and sisters have you?

A. I have one sister and seven brothers.

Q. John Eldridge, I understand, married your sister?

A. Yes sir.

Q. And you have seven brothers? A. Yes sir.

Q. Where are they?

A. Well there are some of them at home and some at Lawrence.

Q. How many of them were there? A. All of them.

Q. And were they living there in 1879?

A. Was they there in 1879,—I think not, I think father was in Illinois at the time. Dan and me I think was the only two of us boys that was here at the time, I think the rest was in Illinois.

Q. Was your sister living at that time?

A. My sister was dead at that time.

Q. It is not Mr. Eldridge's present wife? A. No sir.

Q. Now I will ask you this Exhibit "H" (handing

423 defendants' Exhibit "H" to the witness)—do you identify that picture? A. Yes sir.

Q. Look at the picture marked Exhibit "F" (handing the witness defendants' Exhibit "F") and see if you identify that?

A. Well I would not say positively, I think that is Hillmon,—for I do not know, I would not say positively about that one.

Redirect Examination

By Mr. Hutchings:

Q. Mr. Covey, I wish you would state where it was that you first say the dead body in Lawrence, at what place?

A. Bailey & Smith's.

Q. Where is that, in what part of the city of Lawrence?

A. Well it is in the alley in the rear of Massachusetts Street, it is in Block eight.

Q. Which side of Massachusetts Street?

A. It is on the east side. Really the [low] would front on New Hampshire Street, but the little undertaking establishment fronted on the alley at that time, right in the rear of their furniture place is the undertaking establishment.

Q. I will change the question,—at the time that you testified before in this case you may state whether it was in reference to this first visit that you testified?

424 A. Well I testified in regard to the first visit as there was no question asked me in regard to the—

Q. That answers the question,—now I will get you to state whether at the time of that examination, that is upon the trial of this case where you testified as a witness, you answered all the questions that were put to you and which the court permitted you to answer? A. Yes sir. (???)

Q. You may state whether upon that trial, the previous trial of this case you were asked any question relating to any visit or examination of this body except only,—except the first one.

A. No sir.

Q. You may state whether upon that trial at which you testified you were asked any question with reference to any mole upon the person of r. iHllmon.

425 A. I was not.

Q. You may state, Mr. Covey, whether or not you recognized this body as being Mr. Hillmon, before you saw that mole at all? A. Yes sir.

Q. You may state to the jury where it was that you saw the body the second time?

Counsel for defendants object as it is re-examination of something that has been gone over.

By the Court: Yes it has been gone over,—you may answer the question.

By the Court: I understand he examined it at each time at the same place?

By Mr. Hutchings:

Q. Is this correct? A. Yes, sir.

Q. Were you examined as a witness at the Coroner's inquest at Lawrence? A. No, sir.

Q. That is all.

426 Recross examination

By Mr. Green, continuation:

Q. I was about to ask you, Mr. Covey, before adjournment last night some questions in regard to your examination the first time you testified I believe, before Judge Brewer, presiding, do you remember what year that was?

A. I do not know, not exactly.

Q. About 1885? A. I do not know exactly.

Q. You do not know,—now I will ask you, in your direct examination at that time if you remember who conducted your direct-examination?

A. I think it was Mr. Hutchings.

Q. That is Mr. Hutchings, John Hutchings?

A. I think so, yes.

Q. Now I[was]to ask you if on your direct examination he did not ask you this question, "About when did you last see him alive," and did you not answer, "It was in 1879 some time. I seen him and Mr. Baldwin sitting on the bridge the last time I saw them, right at the end of the bridge, and I was coming over with a team. They were sitting there talking. I spoke to them." Do you remember that question and answer? A. Yes sir, I do.

Q. Then the next question, "The bridge at Lawrence," and you answered, "Yes sir." A. Yes sir.

Q. Now the next question, you will remember this being asked, "In what condition did you next see him", and you answer, "I saw the remains of him there at Bailey & Smith's the undertakers." Do you remember that question and answer? A. Yes sir.

Q. And were you further asked this question,

427 "About how long after that", and did you not answer, "I could not say exactly how long it was after that."

A. Yes sir.

Q. Do you remember the further question, "Can you tell about what time of the year it was," and did you not answer, "It was in 1879 some time, but I could not tell the exact time"?

A. Yes sir.

Q. And you were asked then, "Tell whether it was in the spring or fall", and you answer, "It was in March or April, along there some time in the spring I think." Did you make that reply? A. I don't recollect whether I did or not,—

Q. Were you then asked the further question, "Who was present when you saw the dead body", and did you not an-

swer, "Well there was a good many." "I could not name them all. I did not look to see who was present. I just walked in to see the corpse. Ed Monroe was present. He is the only one I remember who was there."

By Mr. Hutchings:
Q. Answer. A. How was that question?

By Mr. Green:
Q. He asked you, "Who was present when you saw the dead body", and did you not answer, "Well there was a good many, I could not name them all, I did not look to see who was present. I just walked in to see the corpse. Ed Monroe was present. He is the only one I remember who was there."
A. I think I answered that question in this way, that my brother and me went in there together and we met Ed Monroe coming out of the building. I think I answered that
428 question that way. It is probable there was a good many in there. I do not recollect who was present, but I think I met Ed Monroe coming out when we went in.
Q. Did you ever testify that your brother Lee went in with you at either of the trials?

By Mr. Green:
Q. Now you may state,—will you read that question to the witness? (Question read). "Did you testify in either of the former trials that your brother Lee

By Mr. Green:
Change that to "Dan".

(Continuation)—Dan went in with you?"
A. I did not to "Lee". I think that I testified that Dan went with me and I think he went with me and I think I testified to it.
A. I do not know whether I did it.
Q. Were you not asked this question on the cross-examination, "Do you remember seeing",—at the same time and place,—"Do you remember seeing Levi Baldwin there at Lawrence at the same time the remains were there", and your answer, "No sir, I do not."

429 By Mr. Green:
Q. You were asked, "Do you remember seeing Levi Baldwin there at Lawrence at the same time the remains were there", and did you answer, "No, I do not."
A. I do not recollect of seeing him.

By the Court: He is not asking you as to the fact, the question is simply, did you testify as he read on the former trial.
A. I do not think I did.

By the Court: Your answer would be you did or did not or do not remember.

A. Well I do not think I saw him.

By Mr. Green:

Q. The question is did you so testify on the former trial?

A. I do not think I did.

Q. I do not think he understands it exactly.

A. Well I say I have no recollection of testifying that I saw Mr. Baldwin.

Q. Then were you asked this question, "Didn't you see him around there?" and to that did you not answer, "No sir, I just happened in with a load of nails, I saw them taking the remains in. I jumped off to see the remains. That is how I came to be there."

By Mr. Green:

Q. Now I will ask the question,—were you asked
430 the question, "Didn't you see him around there?" and did you not answer, "No sir, I just happened in with a load of nails. I saw them taking the remains in. I jumped off to see the remains. That is how I came to be there."

A. I do not recollect saying that I saw Mr. Baldwin there. I got off the wagon and went in to see the remains.

By the Court: Did you testify or not?

A. Well, I do not recollect.

Q. Did you further testify, "Now you identified these remains, did you," and did you not answer, "In my own mind I did." And the further question, "Who was the first person you told in regard to it," and did you not answer, "Ed Monroe."

A. Yes, sir, I think I did.

Q. Were you then asked, "Did they look natural, well preserved, in good order," and did you not answer, "They looked natural to me." A. Yes, sir, I did.

Q. Were you then asked, "Perfectly natural?" and did you answer, "Not perfectly natural."

A. Natural as any dead man.

By the Court: Do not forget what I said to you, state whether you so testified or not. A. I think I did.

Q. Were you not then asked, "The remains were well preserved so that you had no trouble in recognizing Hillmon?" and did you not answer, "I got it down in my head that that was Hillmon," and then were you then asked the question,
"Now by what particular feature, if any, did you recog-
431 nize the remains as being Hillmon," and did you answer, "Nothing any more than I would you?" What do you say? A. What is it?

Q. Were you asked "Now by what particular feature, if any, did you recognize the remains as being Hillmon?" and did you answer, "Nothing any more than I would you?"

A. Yes, sir, I think I would—

Q. And were you then asked, "Did not recognize him by any particular mark?" and did you not answer, "No, sir," and were you asked this question, "It was just an impression you had that these were the remains of Hillmon?" and did you answer, "Yes, I had seen him a good many times."

A. I do not recollect how I answered that question.

Q. And were you then asked, "It was talked over these were the remains of John W. Hillmon," and did you answer, "some said it was and some said it wasn't?" A. Yes, sir.

Q. And were you then asked, "Was there any peculiarity about Hillmon by which you could recognize him," and did you answer, "Not particularly, no marks that I knowed of."

A. I do not recollect how I answered that question.

Q. Will you say that you did not answer it that way?

A. I say that I do not know, I have no recollection how I answered that question.

Q. And were you then asked, "Don't remember of any marks," and did you answer to that, "No, sir."

A. I do not think I made that answer.

Q. Will you say you did not answer that?

A. I would not say I did not, I do not think I answered in that way.

Q. Now, I would like to ask one or two questions which I neglected to ask yesterday, proper examination, you stated, Mr. Covey, that this body had a shirt on,—will you tell the jury what cloth or character of the cloth that shirt was?

432 A. No, sir.

Q. Do you remember whether it was a woolen shirt or a linen shirt?

A. Well, I think it was linen, I think it was a light shirt, but I would not be positive about that.

Q. You would not be positive, but you think it was a light shirt? A. It was a light shirt, yes sir.

Q. Was it linen or cotton? A. I could not say.

Q. Was it what we call a cheviot shirt?

A. I could not tell you. I am no judge of cloth.

Q. Now was the shirt which this man had on a cheviot shirt,—you say you are not a judge of that? A. No, sir.

Q. Was it plain white or was it colored?

A. Well, I should judge it had been a white shirt. It was a light shirt, it was a little soiled, it looked to me as if it had been a light shirt, but I do not remember.

Q. Now, don't you remember that it was what is called a checked shirt?

A. No sir, I do not remember, it was a light shirt, I do not remember what it was.

Q. You are pretty certain that it was not a woolen shirt?

A. I say I do not know. It was a light shirt, I do not remember whether it was cotton or not.
Q. What do you mean by light,—in heft?
A. In color.
Q. Was it a light or heavy shirt?
A. It was not very heavy.
Q. While you were examining there you noticed it?
A. I noticed he had a shirt on, it was a light shirt, soiled.
Q. Well as to the heft?
A. Well, I could not say anything about the heft of it at all, I did not weigh the shirt or anything of the kind. I could not say anything about the heft of the shirt, any shirt.
Q. I do not understand you to say whether this shirt opened in the back or in the front?
433 A. I do not,—I think it was open in the back, but I do not remember positive about it now at present.
Q. That is all.

By Mr. Hutchings: Q. That is all Mr. Covey.

The picture of John W. Hillmon, marked Exhibit "18," shown to the witness, is the same picture as Exhibit "10" of the trial of 1899.

434 Plaintiff next reads in evidence the testimony of John Eldridge, given upon the trial of 1895. It is admitted by the parties that Mr. Eldridge is not within the jurisdiction of the court. The said testimony is in words and figures as follows, to wit:

Direct Examination

By Mr. Wheat:
Q. What is your name? A. John Eldridge.
Q. Where do you reside at the present time?
Q. What did you say was your name?
A. John Eldridge.
Q. Where do you reside? A. Pond Creek, Oklahoma.
Q. How many years have you resided there?
A. A little over a year.
Q. Where did you reside before that?
A. At Lawrence, Kansas.
Q. How long did you reside at Lawrence, Kansas?
A. Between 25 and 30 years.
Q. State whether you were acquainted with the gentleman referred to here as John W. Hillmon in his lifetime?
A. Yes, sir, I was.
Q. How long were you acquainted with him?
A. Well, I suppose between 8 and 10 years.
Q. State when you last saw him alive?
A. I saw him at Lawrence, Kansas.
Q. When last alive?

A. Couldn't remember what month. Just a short time before he was killed.

Q. State whether you saw the corpse; have you been present here during the trial? A. Yes, sir, first time.

Ques. State whether you saw the corpse at Bailey & Smith's undertaking establishment in Lawrence, Kan-
435 sas, April, 1879? A. I did.

Q. State whether you know of whom that was the corpse or not, state whether you knew who it was, or think you know? A. I call it John Hillmon.

By Mr. Barker:

He said he called it John Hillman.

Ques. State whether that was John or John W. Hillmon?

A. I called it Hillmon's.

Q. What was his given name?

A. I always supposed it was John Hillmon.

Q. State whether you know the plaintiff in this case?

A. Yes sir.

Q. State whether this man you call John Hillmon, you said you knew him so many years? A. Yes sir.

Q. State if you can of whom that is a picture (handing witness picture) or if it is a picture of anyone else you knew or not?

(Pictures are marked, large one exhibit 18, small one exhibit 19, and another marked exhibit 20, and another marked exhibit 21 by the plaintiff's stenographer and returned to Mr. Wheat.)

Q. Look at this picture marked exhibit 18 (handing witness the exhibit 18), and state whether you recognize that as the picture of any person or not.

436 A. John Hillmon.

Q. The Hillmon you alluded to before?

A. Yes sir.

By Mr. Wheat: We offer that in evidence (indicating exhibit 18) is there any objection?

437 Q. Look at this picture marked exhibit 19 (handing witness exhibit 19) and state whether you recognize that as being the picture of any person, and if so whom.

A. I do. John Hillmon.

Q. The same Hillmon before alluded to? A. Yes sir.

By Mr. Wheat: We offer this (indicating Exhibit 19) in evidence.

Q. Look at this cadaver, or corpse, this picture marked Exhibit 20, I ask you (handing witness Ex. 20) whether you recognize that as being a picture, the part shown there, of any

person, of any corpse, if you identify the individual from that, and can you tell who it is, and if so who?

A. Well, I should call that the same picture of the same person.

By Mr. Wheat: Offered in evidence this exhibit, No. 20.

Q. State whether,—what that is with reference to the corpse you saw at Bailey & Smith's, whether this is a picture of the same corpse at Bailey & Smith's. A. I think it is.

Q. The same that you alluded to? A. Yes sir.

Q. Look at this picture, Exhibit 21 (handing witness Exhibit 21), and state whether you recognize that as being the picture of the corpse of any person, and if so whom?

By the Court: Which are they?

By Mr Wheat: Why, 21 is front view, 18 in the large and 19 small picture of the living person, and 20 is the small one of the corpse.

438 Q. (Question repeated.) State whether you recognize that as being the corpse of any person, and if so whom? A. I should say it was the same.

Q. Who? A. John Hillmon.

Q. The same man you before alluded to? A. Yes sir

Q Is it the picture of the corpse you saw at Bailey & Smith's? A. I think it is.

By Mr. Wheat: We offer that in evidence. (Hands it to defendant's attorneys.)

(Picture is handed around to the jury.)

Q. State how frequently you saw this Hillmon, the man of whom you speak, John W. Hillmon, state how frequently you saw him within the last few months before March, 1879, with reference to the fall of 1878, state how frequently you saw him in the fall of 1878?

A. I saw him, I should judge, probably on an average of once a month, that he was there to my place buying hogs, he was there probably—

By the Court: Where did you say you saw him?

A. I say I saw him on an average of once every month.

Q. What time?

A. During that year that he was at my place buying hogs, probably two months, maybe longer.

Q. How much of that time was he there buying hogs during those two months? A. There pretty near all the time.

Q. Which two months was that?

A. I declare I can't say.

Q. What place do you allude to when you say your place?

A. At my livery stable in North Lawrence.
Q. Were you keeping a livery stable there then?
A. Yes sir.
Q. On what street? A. Bridge street.
Q. You say he was buying hogs? A. Yes sir.

439 Q. State whether you saw him and this Mr. Wiseman talking there together at your place of business at the time he was there dealing in hogs that you speak of.
A. I did.
Q. State whether this signature on this paper marked Exhibit 9 (handing witness paper) is yours?
A. Yes, sir, that is my handwrite.
Q. Did you write that? A. I did.
Q. Where were you when you wrote that?
A. In my livery stable North Lawrence.
Q. Who was there present when you wrote that?
A. John Hillmon and Wiseman.
Q. The Wiseman spoken of here?
A. The Wiseman spoken of here, the insurance man.

By Mr. Hutchings: I call the court's attention to the fact that it is a "friend's" statement attached to the application for the policy, application dated 31st of October, 1878.

By Mr. Barker: Is that offered in evidence?
By Mr. Wheat: If it is not offered in evidence before, I offer it in evidence now.

440 Q. How did Hillmon and Wiseman become acquainted?
A. Well, Wiseman came over there to see me, and called me in the office.
Q. What business did you have with him?

By Mr. Wheat: I want to show who introduced Wiseman to Hillmon?

By the Court: All right, did you introduce Wiseman to Hillmon?

441 Q. State who asked you to introduce him?
A. Well, Mr. Wiseman said he wanted to know if I carried any insurance. I told him I did not now, and he commenced to tell me. Well, he wanted to know if I carried any insurance, and I told him I did not, and then he went ahead and gave me a nice little game talk. He is a nice talker.

The defendants objected and moved to strike out the answer of the witness as hearsay. Motion overruled. The defendants and each of them then and there duly except.

Q. State if he asked you to take insurance? A. He did.
Q. What did you say as to yourself?
A. I told him I was not able to.
442 Q. State who introduced Wisemen to Hillmon?
A. I did.
Q. State what took place between them in the way of talk?
A. Wiseman took him in the office, and they talked there awhile.
Q. On what subject?
A. On insurance, and Hillmon told him he would see him again, that for him to come in a few days, four or five days, something like that, and in a few days Wiseman came and asked if Hillmon was around, and I says he was, and I went in the back yard and holloed to Hillmon Wiseman was there and we went in, and they called me in and I signed something, I don't know what it was.
Q. Did you sign it?
A. I signed it, don't know what it was.
Q. Did you sign anything else?
A. Not that I know of.
Q. In your office in North Lawrence?
A. North Lawrence, north side of the Kansas River.
Q. Where was Hillmon's office, on which side of the river?
A. He made his office in mine.
Q. Where was Wiseman's office? A. Don't know.
Q. State if you remember about the height of John W. Hillmon, his size?
Q. Well, if you know what his height was?
A. We measured that day, and I recollect, I think, that he was a little bit higher than me, but I would not say. I am five feet and 11 inches.
Q. How high are you? A. Five feet and 11 inches.
Q. State what kind of hair Hillmon had, what was the color first? A. Well it was not black it was dark brown.
Q. State whether it was straight, wavy or curly, with reference to that?
A. When it was out long, it was inclined to be a little wavy.
443 Q. State whether it was fine or coarse?
A. It was fine hair.
Q. State whether he wore a mustache or not during the time you knew him? A. He always did wear a little mustache.
Q. State whether he wore, during that time, what is called a goatee?
A. I seen him with a goatee or chin whiskers, last time I seen him he had a mustache, but had not been shaved on the face I should judge for a week or two.
Q. Did the hair of the goatee seem to have been shaven?
A. Yes, sir, I made the remark, I says, "John"—

Q. Just what you saw? A. That was what I saw.
Q. Still had goatee or chin whiskers?
A. Yes sir, not real heavy.

By the Court: He had a goatee and chin whiskers, but the side of the face had not been shaven for about a month as I understand? A. Yes sir.

Q. State with reference to the formation of the man, general carriage, of his carriage, whether stooping or erect, stumbling or awkward?
A. He was broad shouldered, straight, quick mover, and rather active quick kind of a man.
Q. If you recollect, state whether there was anything unusual, comparatively speaking, with reference to the length of his foot, as he was round in ordinary appearance
444 whether they was extra short or long, or whether they were ordinary size?
A. Well, if they had been more than ordinarily small, I think I should have taken notice of it, and if they had been very large I would have noticed it; the feet was proportioned with the general makeup of the man, not overly large or very small.
[—] That's all.
445 Cross-examination

By Mr. Barker:

Q. Mr. Eldridge, you are not much of an artist, are you; do not know much about pictures or claim to? No, sir.
Q. You are a liveryman and have been for twenty or twenty-five years in Lawrence; that was your business, was it not?
A. Yes, sir.
Q. How long did you say you had been acquainted with this man Hillmon?
A. Well, between eight or nine years.
Q. That is, you had been slightly acquainted with him?
A. Why yes you might say slightly acquainted with him.
Q. He was absent a good portion of the time for several years, was he not—I will put it in a little different form. Mr. Eldridge, don't you know that he was absent in New Mexico or Colorado or some place for several years after the time you first met him?
A. No, sir, I did not say for several years; but I think about four years.
Q. Well of course, in that time you did not see him?
A. No.
Q. When did you state you first became acquainted with him?
A. I could not say what year it was, he was herding cattle out on Governor Robinson's farm.

Q. Do you know who he was herding cattle for?
A. No, sir.
Q. At that time he was working as a cattle herder?
A. I judge he was.
Q. Do you think you would remember the names of who he was herding cattle for, Major Huston or Mr. Keeler?
A. I think it was Mr. Keeler.
Q. Then he went away and was gone in the neighborhood of four or five years? A. Yes, sir.
Q. Four years you say? A. Yes, sir.
Q. And during that time you did not see him?
A. No, sir.
Q. Now, could you tell what year he returned?
A. I could not tell what year it was.
Q. You could not tell whether he came back before 1879 or not—wouldn't be your best recollection that he only returned from Colorado sometime in 1879—I beg your pardon, I mean in 1878; or have you any knowledge on that subject?
A. I could not tell.
Q. You knew he was back there? A. Yes, sir.
Q. And that is about all you know about that?
A. No, I think he was back there a couple of years before he was married.
Q. Well, he was married in 1878?
A. I do not know what year he was married.
Q. You do not know what year he was married?
A. No, sir.
Q. Now, isn't it a fact, to refresh your mind that he was married in October and he came back in August that year?
A. Well, I do not know. I knew that he was back. I don't know only I was out on the farm and he used to come out there.
Q. What year did he used to come out on the farm?
A. I could not tell.
446 Q. Well, assuming, he was married in 1878 in October, did you see him along in that summer?
A. The summer he was married?
Q. The summer of 1878?
A. I saw him the summer he was married.
Q. Where did you see him, there in Lawrence?
A. Yes, sir.
Q. Well, do you know what he was doing then?
A. No, I do not.
Q. Well have you any recollection of seeing him, or having anything to do with him, from the time he went to Colorado until you saw him in 1878? A. Yes, sir.
Q. Well when was it, tell us the year?

A. I could not tell what year but he always used to come to me to hire his rigs.

Q. Didn't he hire his rigs of Colonel Walker?

A. Well he used to come to hire his rigs of me, he and Colonel Walker had a little racket about something, and he come over to hire his rigs of me.

Q. And you think you saw him after he left for Colorado and prior to his marriage in 1878?

A. I cannot remember the dates.

Q. Well you had no intimate acquaintance with him?

A. I had no intimate acquaintance with him only he used to come over and hire rigs of me and I was acquainted with him just as I would be with anybody else.

Q. Well you are acquainted with Levi Baldwin?

A. Yes, sir.

Q. And you had known him for a long time? A. Yes, sir.

Q. He was living out from North Lawrence? A. Yes, sir.

Q. How far? A. About thirteen miles.

Q. That was in Leavenworth or Jefferson county, do you know?

A. I think Leavenworth county, I do not know.

Q. Well, how long had Levi Baldwin been living there?

A. I could not say.

Q. Now you say you remember of the fact of this body being brought there to Lawrence? A. Yes, sir.

Q. That is of its being there? A. Yes, sir.

Q. And you remember of going down there? A. Yes, sir.

Q. And you remember of Levi Baldwin coming over to get you to go down? A. Yes, sir.

Q. And you lived on the north side of the river and the body was at Bailey & Smith's on the south side?

A. Yes, sir.

Q. And about how far was it, did you say, from your place of business to where this body was lying at the undertakers, half a mile or a mile?

A. Well a short quarter of a mile, well a quarter of a mile.

Q. Do you remember who came with him when Levi Baldwin came over to ask you to view the remains? A. With who?

Q. With Levi Baldwin when he came after you?

A. I do not remember anybody.

Q. And you went over there with him?

A. I went over with him as far as Colonel Walker's and Levi Baldwin stopped there.

447 Q. Prior to that Levi Baldwin told you the remains were down at Bailey & Smith's? A. Yes, sir.

Q. And he told you where to find them, told you to go in the front and go back?

A. No, I do not think he did.

Q. And you went in there expecting to find the remains of John W. Hillmon? A. Yes, sir.

Q. Well do you know who went in with you when you went in?

A. I do not remember who went in with me but there was quite a number going in there.

Q. There was quite a crowd passing in and out?

A. Yes, sir.

Q. There was no appearance of any restriction about people going in there? A. I do not think there was.

Q. Mr. Eldridge, would you undertake to testify to the coarseness or fineness of a man's hair?

A. I would think you had pretty fine hair.

Q. Did you undertake to examine Mr. Hillmon's hair?

A. I would say he had— I never observed anything that was unusually coarse.

Q. You never observed anything peculiar about his hair, that it was unusually fine or unusually coarse?

A. I do not think that there was anything unusual. I simply always admired his hair when he wore it about a certain length and combed it back.

Q. You admired his hair—he wore it kind of long, didn't he? A. Not at all times.

Q. And because you admired it did you say it was of a peculiar character, fine or coarse?

A. I told you that he had a nice head of hair.

Q. He had a nice head of hair, you said that when it was long it—

Q. You do not know your height exactly now, do you?

A. No, sir.

Q. Well, I asked you at that time, the time you testified but you did not know your height?

A. I do not know that I did.

Q. And I understood you to say you do not know your height now? A. No, sir.

Q. Have you been measured here for the purpose of testifying or anything of that sort. A. No, sir.

Q. So you do not know anything more in regard to your height than you did before when you testified that you did not know your height---you know as much now as you knew then?

A. Well I testified about my height.

Q. I asked you if you did not know just as much about your height when you testified before as you do now?

A. I do not know it just to the quarter of an inch.

Q. Now in regard to the length of his foot or anything of that sort—did you say you had any special knowledge of that?

A. I would have had if [had] had an extra small foot or an extra large foot.

Q. But there being nothing peculiar about his feet you never noticed them in the world? A. Oh, yes I would.
Q. But you said you would not have noticed them?
A. I said if they had been unusually small I would have noticed them, or if he had had a very large foot.
448 Q. But because they were neither unusually small or unusually large feet you do not know as to the size of them? A. No, sir.
Q. Well what would you call a very large foot?
A. Well a man of his size?
Q. Well not as to his size, I am asking you what you would call a very large foot, large foot, what number boot?
A. Well, I would call a ten or eleven.
Q. And what would you call a very small one?
A. I do not know.
Q. You only know what you would call a large one and you cannot tell what you would call a small foot and I understood you to say if it had been a small foot you would have noticed it? A. Yes, sir.
Q. Now this is the first time you have ever testified to anything in regard to his feet?
A. I do not remember, I think it is.
Q. You would have remembered any particular peculiarity of his in regard to his feet in 1882 just as well as you do now?
A. I think I would.
Q. And you never testified to anything before in regard to his feet as you said?
A. I said I did not think I ever did.
Q. Now I am speaking about you going down there to view these remains now you were down there and you do not remember who went with you?
A. No, I do not think anybody went in there with me.
Q. Now state the names of any persons whom you saw in there while you were there?
A. Well my goodness I don't know, there was so many.
Q. Well I know but I want you—
A. Why I remember Doctor Fugate being in there and I remember of Smith and Bailey being in there.
Q. There was so many in there it would trouble you to remember all the names, wouldn't it?
A. Well I could not tell you; there were persons going in and out all the time and I didn't think anything about it.
Q. And of that crowd you have testified all the names that you can remember?
A. Well the transfer teams they stopped there I don't know, Dan Covey, he was in there and a lot of his drivers, I don't remember their names.
Q. Was there anybody else?

A. Well I told you there was a continuous stream going in and out there.

Q. Do you remember what day of the week or what day of the month that was that you went in there?

A. I could not tell.

Q. Could you say anything in regard to that?

A. No, sir, I could not.

Q. Do you know anything about how long it was after the body had arrived before you went down there to see it?

A. I do not.

Q. Do you know whether Mr. Baldwin told you when the body had arrived?

A. Why I didn't know the body was in town until they told me that morning.

Q. You mean until Mr. Baldwin told you? A. Yes, sir.

Q. And you do not know anything from what he said how long it had been in town? A. No, sir.

449 Q. It laid there for a day or two?

A. I do not think it did.

Q. State whether it was the first or second day when you went down there? A. I judge it was the first day.

Q. State why you think it was the first day?

A. Why, Levi stopped there with a carriage to go up and bring Mrs. Hillmon down to see the corpse, they stopped there with the carriage just as I came out.

Q. These exhibits twenty and twenty-one are photographs of the cadaver of the dead body that you saw there on that occasion, are they? A. Yes, sir.

Q. Now, Mr. Eldridge, you say that you called that body the body of John W. Hillmon, didn't you? A. Yes, sir.

Q. That is what you called it, ain't it? A. Yes, sir.

Q. Do you mean that was the impression that you had in regard to it? A. Yes, sir.

Q. Going in there under those circumstances—I want to ask you, Mr. Eldridge, if there was any particular mark by which you claim to have identified that body?

A. Nothing more than the general feature of his face.

Q. There was no special mark by which you called that Hillmon? A. No.

Q. I will ask you if you did not say, if you have not stated that these remains didn't look like Hillmon?

A. No, sir, it is not, I said that it did not look like John W. Hillmon the last time I seen him.

Q. Well, it didn't look like John W. Hillmon the last time you saw him, that is a fact?

A. It looked like his nose and cheek bones.

Q. You give those as the reasons why you called him Hillmon—on account of his nose and cheek bones?

A. I could not state but I took that to be Hillmon just as any other man I would see dead.

Q. Well, when you went down there you expected to see Hillmon? A. Yes, sir, I certainly did.

Q. And you had no special marks or means by which you identified it as Hillmon? A. I had no special mark.

Q. This Exhibit "19," you say that is the picture of John W. Hillmon, do you? A. Yes, sir, I do.

Q. And you say that that is the picture of the dead body which you saw down there? A. I do, yes, sir.

Q. And it is your impression that they are the same person, it is? A. It is.

Q. That is your impression in regard to that?

Q. I want this marked, or rather these two, as Exhibit "F" and "G."

By the Court: Are not they those that have been marked?

By Mr. Barker: Have those marked "F" and "G."

Q. Look at Exhibit "G" and state if that is also a picture of John W. Hillmon? A. I should say it is.

Q. Exhibit "G" is a picture of John W. Hillmon?

A. Yes, sir.

Q. And Exhibit "F," look at that? A. Yes, sir.

450 Q. That is also a picture of John W. Hillmon?

A. Yes, sir. Let me look at that.

Q. Yes, sir, look at it all you want? A. Yes, sir.

Q. You should say that was a picture of John W. Hillmon —you have spoken in regard to Mr. Wiseman being over at your place of business? A. Yes, sir.

Q. When was that? A. That was—

Q. Have you any means of fixing it definitely?

A. That was when he became acquainted with Mr. Hillmon.

Q. I wanted to fix the date as definitely as you can when it was? A. I told you I could not fix the date.

Q. Could you fix the month when it was? A. No, sir.

Q. Do you know how long it was before Mr. Hillmon was married, about how long it was before that time?

A. Well, I should say, I should not think it was over a couple of months, I should think it was not over three months.

Q. You should think it was not over three months before Mr. Hillmon was married that Wiseman was over there and had this talk with him? A. Yes, sir.

Q. I will ask you to state, Mr. Eldridge, if heretofore you have not stated simply that it was an impression that you had that was Hillmon, that the remains did not look like Hillmon? A. No, sir.

Q. And that you had no means by which you could identify Mr. Hillmon?

Q. Yes, sir, I have stated that I had no means, no scar or nothing of that kind to identify him.

Q. You never observed anything of that sort upon him?

A. No, sir.

Q. No scars or anything of that kind upon him by which you could identify him? A. No, sir.

Q. Did you make a pretty thorough investigation of that body you saw there? A. No, sir, I did not.

Q. You stood and looked at it?

A. I just stood and looked at it.

Q. Did you examine the hands?

A. I saw the hands there, I looked at them.

Q. But you did not make any examination of the hands besides that did you? A. No, sir.

Q. There are a great many people in North Lawrence you know better than you did Mr. Hillmon and whom you have known a good deal longer? A. Yes, sir.

Q. Do you know Mr. John Westfall in North Lawrence?

A. Yes, sir.

Q. How long have you known him?

A. Ten or twelve years.

Q. What business is he in? A. Farmer,

Q. Do you know Mr. William Skinner? A. Yes, sir.

Q. How long have you known him?

A. Well, twelve or fifteen years.

Q. Were you acquainted with Mr. Charles King who lived in North Lawrence?

A. I guess I remember him, but I don't know that I know him any—

Q. How long have you known Westfall?

451 A. I have known him ten or twelve years.

Q. How close has he lived to you?

A. About a mile.

Q. Lived there during all that time has he not? A. Yes, sir.

Q. What kind of hair has Mr. Westfall so far as the texture? A. The color do you mean?

A. No, by texture I don't mean color, I mean whether it is fine or coarse? A. Well, it is finer than it is coarse.

Q. Well, what do you mean by that, that it is more fine than coarse? A. Yes, sir.

Q. How does it compare with Mr. Hillmon's hair?

A. It is not as fine as Mr. Hillmon's hair.

Q. Do you remember in regard to Mr. Westfall's hair?

A. Yes, sir.

Q. How does it compare in color with Mr. Hillmon's?

A. Mr. Westfall's was not as dark.

Q. How was it in regard to Mr. King's?

A. I said I did not remember Mr. King's.

Q. You have already stated that this is your signature?

A. Yes, sir.

Q. "How long have you known the above named person, and the above named person is John W. Hillmon?

A. Yes, sir.

Q. Will you read your answer there? A. Yes, sir.

Q. What does it say?

A. About two years. He asked me about how long I had been personally acquainted with him.

Q. And you said two years?

Q. Well, that was as long as you had been personally acquainted with him wasn't it? A. I guess it was.

Q. And when you state that you have known him for eight or ten years you mean you had seen him?

A. I said I had been personally acquainted with him, but the time I had intimate acquaintance with him was when he was herding cattle, not before.

Q. You had not had any intimate acquaintance with him until up to a year or two—? A. Yes, sir.

Q. There is another matter I want to call your attention to and that is your testimony on the former trial of this case. Did I understand you to say that Mr. Wiseman was present when you and Hillmon were measured? A. Yes, sir.

Q. When was that?

A. That was the day that I signed that paper.

Q. Who did the measuring on that occasion?

A. If I remember right, Mr. Wiseman did.

Q. You say that on that occasion Mr. Wiseman measured you and Mr. Hillmon?

A. Yes, sir, we stood right back against the [—] in the office.

Q. That was the same date you signed this certificate as to the length of time among other things which you had known him? A. Yes, sir.

Q. I will ask you if you did not testify on a former trial of this case to wit, on the second trial of this case in Leav-
452 enworth, in answer to the question that you had no difficulty in recognizing these remains as the remains of John W. Hillmon, did you not answer: "It looked to me I thought it was Hillmon."

Q. The question was, "But you had no difficulty in recognizing these remains as the remains of John W. Hillmon," and the answer is, "It looked to me, I thought it was Hillmon."

By Mr. Barker:

Q. Did not you testify in that manner on the second trial of this case in Leavenworth? A. I do not remember now.

Q. You do not remember in regard to that; did you not in answer to the question, "Now, if the remains did not look as John W. Hillmon did when you last saw him how are you able to identify these as being the remains of John W. Hillmon,"

did you not answer, "Because his mouth was open wide when I saw him there in the corpse. He had been shaved with an old razor and hacked up."

By Mr. Barker:

Q. Did you so answer that question? A. How is that?

[A.] Didn't you make this answer to the question, "Now if the remains did not look as John Hillmon did when you last saw him how are you able to identify these as being the remains of John W. Hillmon?" did you not answer, "Because his mouth was open wide when I saw him there in the corpse. He had been shaved with an old razor and hacked up?" Did you not answer that question in that manner?

A. I remember saying about his being shaved but I do not remember of saying his mouth was open.

Q. Well didn't you say it didn't look like Hillmon?

A. I have answered all the time that it didn't look like Hillmon when I last saw him?

Q. Well, in answer to the question, "Well, if the remains did not look as John W. Millmon did when you last saw him how are you able to identify these as being the remains
453 of John W. Hillmon's did you not answer "Because his mouth was open wide when I saw him there in the corpse, he had been shaved with an old razor and hacked up?"

A. I do not remember of ever having answered it in that way.

Q. Cannot say whether you answered it in that way?

A. I have all the time myself said that it did not look as Hillmon did when I last saw him.

Q. Well, didn't you give that as one of the means of identifying him, "because the corpse had been shaved with an old razor? A. That that would be a means?

Q. Yes, sir? A. No, sir.

Q. That is your answer, "that you do not know how you answered the question on that occasion?" Now in regard to this measurement that took place there. I understood you to say you did not make any measurment, it was the agent Major Wiseman that made the measurement of you and Hillmon?

A. I said if I remembered right we were measured that day and I think Mr. Wiseman measured us. I would not say positive. Hillmon might have done it, but Mr. Wiseman was there, and it was done on that day.

Q. That is the only measurement you have any recollection in regard to?

A. That is the only measurement in regard to Mr. Hillmon.

Q. What day was that?

A. I could not tell you. That was the same day I signed that paper.

Q. Where do you live now, did you not say in Oklahoma?
A. Yes, sir.
Q. Where are you living now, Mr. Eldridge?
A. Oklahoma.
Q. You have lived down there about a year?
A. I have been there off and on about a year.
Q. What place? A. Pond Creek.
Q. You are engaged in the saloon business there?
A. Yes, sir.
Q. That is your sole business?
A. Well, handling horses.
Q. Handling horses and keeping a saloon?
A. I think that is all.

By Mr. Hutchings: Q. That is all.

* * * * * * * * *

It is admitted by the parties that exhibits 18 20 and 21, referred to in the evidence of H. Covey, John Eldridge, Levi Baldwin, Sallie E. Smith, and any other witness given upon the trial of 1895, are the same exhibits as exhibits 10, 12 and 13, at this trial respectively.

454 A. J. Phillips, called as a witness on part of the plaintiff, and being duly sworn, was examnied in chief by Mr. Hutchings, and testified as follows:

Q. What is your name? A. A. J. Philips.
Q. Where do you reside? A. Lawrence, Kas.
Q. How long have you resided there?
A. Something over thirty years.
Q. Were you acquainted with John W. Hillmon?
A. I was not personally acquainted with him.
Q. Were you ever introduced to him? A. I was; yes sir.
Q. How often did you see him?
A. Well, I don' remember of seeing him but just the one time.
Q. Just state the circumstances briefly?
A. I met him on the street in Lawrence with his wife. I was well acquainted with her and she introduced me to her husband, and we stood and talked for some little time. I don't remember whether I seen him after that or not.
Q. Now from your recollection of John W. Hillmon, what in your opinion was his height?

Mr. Barker: To that we object on the ground that he hasn't shown sufficient knowledge of the man to form any opinion in regard to his height. It seems to me that it is incompetent.

The Court: The testimony is competent. The jury is the ultimate of judge of what credence to give it.

To which ruling of the court the defendants and each of them at the time duly excepted and still excepts.

A. Well, I should think he was something like five feet eleven inches high—something like that.
Q. How tall are you? A. Five feet, ten.
Q. You may state whether he was a taller or shorter man than you? A. I should say he was taller.

455 Mr. Barker: To that question we object as incompetent, unless there was some measurement taken or some way of ascertaining that fact.

The Court. He may answer if he knows.
Witness: What is the question.

(Previous question read by the stenographer.)
A. He was taller, in my judgment.

Cross-examination

By Mr. Barker:
Q. You made no measurement of him? A. No, sir.
Q. Or anything of that sort? A. No, sir.
Q. You don't know anything about that so far as any measurement was concerned?
A. Only by my eyes—looking him in the face.
Witness excused

456 By Mr. Hutchings: We next offer in evidence the diary found upon the body in the camp at Crooked Creek.

By Mr. Ware: Do you offer the book or the book and its contents?

By Mr. Hutchings: We offer the book and its contents, as evidence of the identity of the body.

Admitted without objection.

Said diary is set forth at length with the defendants' evidence in this bill of exceptions.

It is admitted by the parties that there was an agreement made before any deposition was taken in either case, that any deposition taken on due notice in either case, could be read in evidence in each case, the same as though duly taken and filed therein.

The plaintiff next offered in evidence the deposition
457 of William Riggins, taken at Medicine Lodge, Kansas,

which is in words and figures as follows, to wit:

William Riggins, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth,

whole truth and nothing but the truth, deposeth and saith that:

Q. 1. State your name, age and residence.

A. 1. My name is William Riggins; my age is 29; reside in Barbour County, Kansas.

Q. 2. Do you remember the circumstance of a man being killed in the year 1879 in this County near the residence of P. B. Briley? A. 2. Yes, sir.

Q. 3. State when and under what circumstances you first saw the body?

A. 3. It was a dead body the first time I saw it.

Q. 4. State specifically all the circumstances connected therewith.

A. 4. I should guess it was about 8 or 9 o'clock in the evening.

Q. 5. Where was the body lying when you first saw it?

A. 5. It was lying up above P. B. Brileys.

Q. 6. How long did you remain with the body.

A. 6. I remained with the body over night.

Q. 7. State whether any other person or persons staid there with you during the night, and if so, who they were?

A. 7. Mr. John Chadwick, Mr. Frazer Hesland, the young man who worked for Mr. Dray, and Mr. Brown staid with me during the night.

Q. 8. State whether the body was in any wise disturbed, handled or interfered with during the night.

A. 8. It was not.

Q. 9. State if you know whether any person came and took charge of the body during the day.

A. 9. Yes, sir, Mr. G. W. Paddock.

Q. 10. What then occurred, if anything?

A. 10. They searched the body. They held a coroner's inquest.

Q. 11. State if you know what afterwards became of the body?

A. 11. The last I saw of it they started to Medicine Lodge, Kas.

Q. 12. State who had it in charge?

A. 12. Mr. William Walt.

Q. 13. Who, if any one started from there in company with William Walt with the body?

A. 13. There was several of us came down. I live about 1¼ miles south of there. I came down as far as home.

Q. 14. State who, if any person accompanied William Walt with the body to Medicine Lodge, Kas.

458 A. 14. Mr. Brown was in the seat with William Walt, and then I don't know who accompanied him to the Lodge after I left them.

Q. 15. State whether you saw any blood on or near the body when you first saw it? A. 15. Yes sir.

Q. 16. Where was the blood?

A. 16. By the side of his head next to the camp fire.

Cross-examination

By Defendants' Counsel Geo. J. Barker:

Q. 17. Where do you reside now?

A. 17. About 12 miles north of west of Medicine Lodge, Kas.

Q. 18. How long have you resided there?

A. 18. Three years the 3rd day of April last.

Q. 19. How far do you live from where this dead body was found? A. 19. I should judge about 1¼ miles.

Q. 20. In which direction?

A. 20. South, I should think, very near.

Q. 21. Do you remember what kind of a day it was this body was found?

A. 21. Can't say that I do remember what kind of a day it was.

Q. 22. Do you remember in reference to being a still or windy day? A. 22. No sir, I don't.

Q. 23. How did you happen to go there on that occasion?

A. 23. By P. B. Briley letting me know.

Q. 24. Did you and P. B. Briley go together?

A. 24. No sir.

Q. 25. Which went first, you or Mr. Briley? A. 25. I did.

Q. 26. When you arrived at the camp where this dead body was who of your neighbors was there?

A. 26. Mr. Dray, Mr. Frazer Harland the young man who worked for Mr. Dray, Mr. John Castine. That is all that I remember.

Q. 27. Where did Mr. Dray live with reference to this spot?

A. 27. A mile or over south from camp I should think. Mr. Frazer Harland lived with Mr. Dray at the time.

Q. 28. In what position was the body lying when you first saw it?

A. 28. Lying on his back. I think his head was laying mostly to the east. Head not resting on anything that I can recollect of. I don't think I can tell the position of his hands.

Q. 29. Did you make an examination of the body when you got there? A. 29. No sir.

Q. 30. It was quite dark when you arrived on the spot was it? A. 30. Yes sir.

Q. 31. Did you observe any blood upon the face of the body?

459 A. 31. No sir not that I recollect of.

Q. 32. Was his head lying higher than the rest of his body? A. 32. I don't remember.

Q. 33. Was the feet or head of the body lying furtherest from the camp fire?

[—]. 33. To the best of my recollection his feet were furtherest from the camp fire.

Q. 34. Can you tell how many persons remained there during the night? A. 34. Yes sir.

Q. 35. How many? A. 35. Four (4) of us.

Q. 36. Who were they?

A. 36. John Chadwick, Frazer Harland, myself, Mr. Brown.

Q. 37. Did you all sit up during all the night, or did you take turn in watching?

A. 37. We all sit up during the night but Frazer Harland.

Q. 38. Do you remember who came in the morning?

A. 37. I don't know as I remember all of them. I do some of them.

Q. 39. State as many as you remember who they were?

A. 39. Charles Chadwick, Jeff Logan, Joseph Dray, William Walt, Jacob Frazer, G. W. Paddock.

Q. 40. Have you now stated the names of all the persons you saw at the camp that night and the next morning?

A. 40. As far as I remember. Have just thought of P. B. Briley. I have now stated as far as I can remember the names of all the parties.

Q. 41. This camp consisted of one wagon and one team did it not? A. 41. Was all that I seen.

Q. 42. What time next morning did you leave there?

A. 42. I should guess 9 or 10 o'clock.

Q. 43. Did all the persons who were [—] leave the camp at the same time? A. 43. We all left together.

Q. 44. Did you observe any appearances or traces of blood upon the face of this body the next morning?

A. 44. I don't recollect of seeing any.

Q. 45. Did you assist in putting the body into the wagon or see it while it was being put in?

A. 45. I didn't assist but I seen it put in.

Re-examination

By Plaintiffs' Counsel:

Q. 46. You state that you were notified by Philip B. Briley of the death of this man, what time during the day was this? A. 46. A little after dark—not a great while.

Q. 47. State if you know in what direction Mr. P. B.
460 Briley went from you immediately after notifying you of the above fact?

A. 47. He started in a westerly course toward Mr. Castines.

Q. 48. How long after he left you was it before you went up to the body?

A. 48. I should guess it was 1 hour and a half any way.

Q. 49. State whether Mr. P. B. Briley came up to where the body was that night after you arrived there?

A. 49. As well as I recollect he did.

Q. 50. How long had you been there before Mr. P. B. Briley came? A. 50. But a very short time.

Q. 51. State if you know whether Mr. P. B. Briley had been there before or not? A. 51. I don't know.

Q. 52. State whether there was a camp fire burning when you arrived there? A. 52. There was some fire there.

Q. 53. State whether the fire was kept up during the night while you was there? A. 53. Yes sir it was.

Q. 54. State whether the position of the body was changed after you arrived there until taken charge of by G. W. Paddock, and whether it had been interfered with at all during the night? A. 54. No, sir, it was not.

Recross-examination

By Defendants' Counsel Geo. J. Barker:

Q. 55. Who went with you to this camp the first time you went there?

A. 55. Mr. Charles Chadwick, Mr. John Chadwick, Mr. Jacob Frazer.

Q. 56. How did you go, walk or ride?

A. 56. All rode except Mr. Jacob Frazer and we changed horses with him.

Q. 57. How many horses did you have among you?

A. 57. (2) two horses and one mule.

Q. 58. What means have you of knowing what time you arrived at camp that night?

A. 58. I had to guess at it.

WILLIAM (his mark) RIGGINS.

Attest:

C. T. HICKMAN.

* * * * * * * * *

461 The plaintiff next read in evidence the deposition of George W. Paddock, which is in words and figures as follows, to wit:

G. W. Paddock, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth,

the whole truth and nothing but the truth, deposeth and said that:

Q. 1. State your name, age and residence.

A. 1. My name is G. W. Paddock; my age is 54 years and I reside in Barbour County, Kansas, between 8 and 9 miles northwest of Medicine Lodge.

Q. 2. State where you resided in the month of March, 1879? A. 2. Resided same place as now.

Q. 3. Do you remember the circumstances of a man being killed in the neighborhood where Phillip B. Briley resided in March, 1879? A. 3. I do.

Q. 4. Please state if you know the exact date on which the body was found. A. 4. I cannot personally.

Q. 5. State where, when and under what circumstances you first saw the man who was killed, state fully and specifically?

A. 5. Well the date when I first saw the man was the 19th day of March, A. D. 1879, about probably possibly between 9 and 10 o'clock in the morning.

Q. 6. State what official position if any you were holding in Barbour county at that time?

A. 6. It was Justice of the Peace.

Q. 7. State who was there at the body when you arrived?

A. 7. John Chadwick, a man J. H. Brown and a young man I do not know his name who worked for Mr. Dray.

Q. 8. Now state what was done while you were there in reference to this dead body?

A. 8. I empaneled a jury, held an inquest. I deputised Mr. William Walt as constable. I appointed Mr. Frazer to examine the body and ascertain what effects there were upon it. After examining the body the jury deliberated upon the matter and rendered a verdict.

Q. 9. What effects if any were found upon the body?

A. 9. There was a pocket-book containing $25.00 in currency found in the side pocket of pants. The pocket-book contained 2 or 3 letters and I believe a couple of bills of lading of some stock that had been shipped on a railroad and some other papers of miner importance that didn't amount to anything. I think that all that was in the pocket-book. There was a valise found in the wagon represented to belong to him containing wearing apparel.

Q. 10. State whether that valise was open when you found it or not?

462 A. 10. I think not.

Q. 11. How did you get into it?

A. 11. Found a key among some of the effects and opened it. I think the key was in the man's pocket.

Q. 12. State if you know how the body was clothed?

A. 12. As to the material I can't state. He had on a common dress coat and vest, pants and a pair of shoes. Whether he had socks on or not I won't say.

Q. 13. State what was done with the body after the verdict of the jury was rendered.

A. 13. The body was placed in the wagon found in camp and brought to Medicine Lodge, Kas.

Q. 14. Who came with the body to Medicine Lodge, Kas?

A. 14. William Walt, J. H. Brown and myself. The three named came to my house. After that S. A. Ferguson came on down to Medicine Lodge, Kas. with us.

Q. 15. What was done with the effects and the team and wagon found in camp after leaving camp?

A. 15. I took charge of everything and placed them in the wagon and brought them to Medicine Lodge.

Q. 16. State what was done with the effects in Medicine Lodge, Kas.?

A. 16. They were left in the wagon until after the man was buried, then I still retained charge of them, wrote a letter to Mrs. Sallie E. Hillmon at Lawrence, Kansas, I just kept possession of the effects until I got word from her. Then I delivered them up to J. H. Brown, wagon and team and everything that was in it.

Q. 17. State what was done with the body after it was brought to Medicine Lodge, Kansas?

A. 17. Body was placed in a coffin and buried in the cemetery near Medicine Lodge, Kas.

Q. 18. State what was done if anything with reference to holding an inquest after the body arrived at Medicine Lodge, Kansas?

A. 18. I set aside the verdict of the jury that was held up there at the camp ground, and summoned another jury, held another inquest.

Q. 19. State if you know why the coroner did not hold the inquest? A. 19. Not notified.

Q. 20. State where the coroner lived and how far from where the body was found and how far from Medicine Lodge, Kansas?

A. 20. The coroner lived at Sun City, about 18 miles from where the body was found, and about 25 miles from Medicine Lodge, Kansas.

Q. 21. State whether the clothing was taken from the body after it arrived at Medicine Lodge, Kansas, and whether
463 the body was washed and face shaved?

A. 21. The clothing was taken off the next morning, the body washed and face shaved, clean clothes put on and placed in the coffin, as before stated.

Q. 22. State if you know who accompanied the body to the cemetery?

A. 22. S. A. Ferguson, William Walt, John Upperman, and possibly Clark Gilmore; I saw these men leave with the coffin, and didn't go myself; hadn't time.

Q. 23. State whether any of the clothing found on the body at the camp was buried with him? A. 23. I think not.

Q. 24. Where did you get the coat in which the body was buried?

A. 24. Got it in a trunk that was in the wagon; I omitted to state in giving the effects before, that there was a trunk with some clothing and I think a comforter or two in it.

Q. 25. State who washed the body and shaved its face?

A. 25. William Walt, John Upperman and S. A. Ferguson.

Q. 26 Please describe as minutely as possible, the place where the camp was located, and the body was found?

A. 26. The camp was located on a little stream; I believe it has been denominated here to-day Crooked Creek; which empties into Elm Creek, and about 12 miles from Medicine Lodge in a northwesterly direction; the camp was located in a kinder of a pocket of a hill, about 50 yards from the stream, in Barbour county, state of Kansas. The country east of the camp in the vicinity is composed of a ridge sloping down to the south; west of it there is a small bottom with a gradual ascent, perhaps for a mile or two; the camp might have been seen from the west and northwest from one to two miles; on the east and southeast a person might have come within 100 yards of it without seeing it. Northeast was also some low hills; a person might come close without seeing it, say 100 or 150 yards; on the north it was more open and could have been seen for probably a half a mile. The ground around the camp fire and wagon was a very good camping place; I see nothing whatever to find fault with about the camping place; the fire was west of the wagon, probably 15 feet from it, and a little below on the lower side of the slope. The body was lying close to the fire; from appearances it might have fallen on the fire, and been pulled off on the south side of the fire, with head to the west, I think.

Q. 27. State whether there was a wagon road or trail near the camp?

A. 27. There was a trail close to the camp, going right up to the creek, the wagon road coming from Hutchinson to Medicine Lodge comes down the ridge, I think not over a half a mile east from the camp.

Q. 28. State whether that portion of Barber county was thickly settled or otherwise?

A. 28. It is about the same there as any other place on the creek. You might take an area of 4 or 5 miles up and down the creek and it is about the same.

464 Q. 29. At the time you delivered the personal effects of the dead man to Brown, who else was present?

A. 29. S. A. Ferguson; that is all except Ferguson's family.

Q. 30. Where was Brown stopping at that time?

A. 30. He stopped at my house during the time he stopped in the county after the man was killed, which was about ten days.

Q. 31. When Brown left your house with the personal effects aforesaid, who if any person or persons, went with him?

A. 31. No person to my knowledge.

Q. 32. State whether you saw him afterwards in Medicine Lodge, with the personal effects aforesaid?

A. 32. I believe I did.

Q. 33. State who was with him at the time you saw him, if any one.

A. 33. There were two men by the name of Baldwin, who went to the graveyard with him.

Q. 34. State whether the dead man had any beard on his face at the time you first saw him? A. 34. I think he did.

Q. 35. Describe it.

A. 35. It was light beard in body, rather inclined to be thin; also mustache was thin; beard (seemed) to be from two to 4 weeks old.

Q. 36. What was the color of his hair?

A. 36. It was what I would call dark, rather inclined to be black.

Q. 37. State whether his hair was straight or otherwise?

A. 37. His hair was inclined to be wavy.

Cross-examination

By Defendant's Counsel Geo. J. Barker:

Q. 38. How long have you lived in this county, Esquire?

A. 38. Four years last December.

Q. 39. Where did you reside before coming here?

A. 39. State of Indiana, Vigo county.

Q. 40. Have you always lived at one place in this county?

A. 40. That is all.

Q. 41. How far is that from where this man Brown was camped? A. 41. Between three and four miles somewhere.

Q. 42. In which direction is your house from that camp?

A. 42. A little east of south, almost southeast.

Q. 43. Do you live on (a) public highway or on any stream?

A. 43. I live upon Elm Creek, and the public highway is about 100 yards from my house.

Q. 44. What highway is that; leading from that point to what point?

A. 44. From Medicine Lodge to Luka and Larned.

465 Q. 45. Known as what road?

A. 45. No name that I know of.

Q. 46. Do you remember the character of the weather here in 1879 from the 17th to the 21st of March?

A. 46. I recollect the character of it on the 19th of March.
Q. 47. Do you remember the character on the 18th day of March? A. 47. I do not.
Q. 48. Do you remember the character on the 17th day of March? A. 48. Cannot say that I do.
Q. 49. On the 20th or 21st day of March?
A. 49. I believe I do remember what it was on the 20th, but do not on the 21st of March.
Q. 50. What kind of a day was the 19th of March?
A. 50. It was a windy, cold day.
Q. 51. Do you remember the condition of the season, had spring advanced much?
A. 51. Hadn't advanced very much.
Q. 52. Grass green upon the range? A. 52. No sir.
Q. 53. Had the grass started at all?
A. 53 I don't think it had.
Q. 54. How did you happen to go [—] this camp where Brown was at that time? A. 54. By request of the citizens.
Q. 55. Whom; which one?
A. 55. Mr. Charles Chadwick's son came for me.
Q. 56. On what day?
A. 56. The 18th of March, I don't think I can tell day of week.
Q. 57. What time in the day did he come to your place?
A. 57. Between 8 and 9 o'clock in the morning, I should suppose—in the forenoon.
Q. 58. How did he come? A. 58. He came on foot.
466 Q. 59. Who was with him? A. 59. No one.
Q. 60. Did you return with him to the camp?
A. 60. I think I did.
Q. 61. Do you know whether you did or not?
A. 61. Well, I believe I will say yes.
62. Q. How did you and he return to camp?
62. A. We walked to Mr. Chadwick's house, and got conveyance in a wagon from there.
63. Q. How far is [—] from your house to Mr. Chadwick's house? where you got the wagon?
63. A. About 1, ¼ miles.
64. Q. From Mr. Chadwick's who went with you to the camp?
64. A. Mr. Charles Chadwick, James Chadwick, Jacosok Chadwick and W. J. Logan; I believe that is all I recollect now going in the wagon.
65. Q. Did the young man Chadwick who came after you go with you to the camp?
65. A. He did, I believe also William Walt went with us.
66 Q. Did you find William Walt and Logan and the other persons whom you have mentioned at Mr. Chadwick's house when you got there? 66. A. I did.

67. Q. Where did Mr. Logan live at that time?
67. A. He lived on a little creek called Spring Creek, a little south of east, about 1, ½ miles from Mr. Chadwick's.
68. Q. Where did Mr. Walt live at that time?
68. A. About 80 rods a little south of west of Mr. Chadwick's.
69. Q. How far is Mr. Chadwick's house from that camp?
69. A. About 2, ¾ miles.
70. Q. When you arrived at camp, what time was it?
70. A. To the best of my recollection between 9 and 10 o'clock in the morning.
71. Q. State who was there when you got there?
71. A. J. H. Brown, John Chadwick; and a young man; I believe his name was Harland; he worked for Mr.
467 Dray.
72. Q. Any other of your neighbors?
72. A. They were the only ones there.
73. Q. Are you positive about that? 73. A. I think I am.
74. Q. Well sir, what was the first thing you did when you got there on getting out of the wagon?
74. A. The first thing I did was to impanel a jury.
75. Q. In your direct examination you spoke of deputizing some one to act as constable; was that before or after impaneling the jury?
75. A. I believe it was after; I won't say positive.
76. Q. You think then you impaneled the jury, and then impaneled some one to act as constable?
76. A. I think so.
77. Q. Did you deputize that man in writing?
77. A. I did not.
78. Q. You spoke of appointing some one to examine the body and effects; was that appointment or authorization in writing? 78 A. It was not.
79. Q. Who was the person?
79. A. Jacob Frazer, one of the jury.
80. Q. Now, when you arrived at the camp that morning, where was the wagon standing; in what direction was it facing?
80. A. I believe it was facing to the north; at any rate, it stood to the north and south, end ways.
81. Q. Where was the team?
81. A. Lariated out a little way from the wagon.
82. Q. On which side of the wagon?
82. A. I think they were southeast from the wagon.
83. Q. Was there a camp fire burning? 83. A. Yes, sir.
84. Q. Which direction was that from the wagon?
84. A. West.

468 85 Q. About how far distant 85. A. Fifteen feet.
86. Q. In what direction was the body lying; which way was its head?
86. A. I said a while ago it was to the west; I think it was a little to the southwest.
87. Q. How was the body lying?
87. A. Lying upon its back with one arm extended.
88. Q. Which arm was extended?
88. A. I believe I can't tell that.
89. Q. What was the position of the other arm?
89. A. I think it was folded across the breasts.
90. Q. Do you remember the head resting upon anything?
90. A. I can't say that I do. I believe, though, there was a stick of wood lying under it.
91. Q. Which was lying nearer the camp fire, the feet or the head of the body? 91. A. I think the feet were.
92. Q. What, if anything, did you do towards making a personal examination of the remains there?
92. A. Merely to look on and see that the things were conducted as nearly right as I knew how to do it.
93. Q. You attended to the jury, did you not?
93. A. I did.
94. Q. You directed others what to do, did you not?
94. A. I don't know that I did.
95 Q. Do you remember whether the head of that corpse was covered or uncovered when you got there?
95 A. It was uncovered.
96 Q. Was this man Brown about the camp during all the time that you were there? 96 A. Yes sir.
97 Q. Were you there while the contents of the clothing upon the body were being examined by Mr. Frazer?
469 97 A. I stood by.
98 Q. When did you first see the pocketbook?
98 A. When he first took it out of the pocket.
99 Q. Had you observed it before? 99 A. I had not.
100 Q. Out of the pocket of what garment did he take it?
100 A. I think from the pantaloons pocket.
101 Q. Are you positive as to that?
101 A. Morally I believe I am.
102 Q. Was it delivered to you there then?
102 A. It was.
103 Q. By whom? 103 A. Mr. William Walt.
104 Q. Where was Brown during the time this examination was going on?
104 A. He was there in camp in charge of William Walt.
105 Q. How far were they standing from you, while this examination was going on?
105 A. I couldn't tell you; a short distance; we were all standing close around the body.

106 Q. Was this examination before or after the jury had returned the verdict? 106 A. Before.

107 Q. About what time did you leave that camp that day?

107 A. I should say somewhere between the hours of 12 and 1 p. m.

108 Q. Did you and all the persons who went with you to camp that morning, and all whom you found there, leave at the same time?

108 A. I think not. I think there were two or three,—I forget who they were, started on ahead before the wagon started.

109 Q. Who left that camp at the same time you did?

109 A. William Walt, J. H. Brown, and probably Mr. Charley Chadwick and his two sons, and perhaps two or three others; such points as that my memory does not grasp very readily?

110 Q. In whose wagon was the body carried?

470 110 A. That is a hard question for me to answer; it was the wagon belonging to camp.

111 Q. Who drove the vehicle?

111 A. J. H. Brown drove the team.

112 Q. Did you ride with Brown? 112 A. I did.

113 Q. Will you describe as near as you can the team Brown had?

113 A. They were ponies; one was an iron gray mare, the other was a sorrel horse.

114 Q. What was their condition in flesh?

114 A. Good living condition.

115 Q. Were they thin?

115 A. They were not thin. They were in medium condition.

116 Q. What kind of a wagon was it?

116 A. It was a light spring wagon, rather old.

117 Q. Two springs or three?

117 A. I believe there were only two.

118 Q. A deep or shallow body?

118 A. Deep body, sideboards on it, making it deep.

119 Q. How was it compared in depth with an ordinary farm wagon?

119 A. About the depth of an ordinary farm wagon with the sideboards on.

120 Q. What would be the depth in inches?

120 A. About 22 or 23 inches.

121 Q. Was the wagon covered?

121 A. There were bars on the wagon, but I think the cover was off.

122 Q. It was was called the sheet, or wagon cover with the wagon? 122 A. Yes, sir.

123 Q. When you went to that camp that morning, did you observe any cooking utensils lying around?
123 A. I can't say positively, but I think I did.
124 Q. Do you remember what they were?
124 A. I think there was a camp kettle, coffe-pot and frying pan.
125 Q. Were they near the fire?
471 125 A. I think they were near the wagon.
126 Q. Sitting on the ground?
126 A. Yes, sir.
127 Q. What was done towards preparing that body for the grave, before it was removed from camp?
127 A. Not anything.
128 Q. Was the face of the corpse washed or bathed at the camp? 128 A. No, sir.
129 Q. Did you observe blood upon the face of the corpse at the camp?
129 A. I did upon the sides of the head; I do not know that I did upon the face.
139 Q. What examination did you make of the wound upon the body?
130 A. Nothing more than looking at it.
131 Q. Was the body lying on the ground when you looked at it?
131 A. When I first looked at it, it was.
132 Q. Where was it lying the last time you looked at it?
132 A. In the coffin.
133 Q. Where? 133 A. Medicine Lodge, Kansas.
134 Q. Are you able to describe the location and character of the wound?
134 A. The location of it was just above, and a little back of the ear on one side, and just above the ear on the other; I believe the character of it was a prodigious hole through the man's head.
135 Q. How much lower did you say the wound was on one side of the head than it was up on the other?
135 A. I am positive there could not of (have) been more than a half of an inch difference.
136 Q. How much farther back of the ear was the wound on one side of the head than on the other?
136 A. Perhaps a half of an inch; don't think it was more.
137 Q. Are you positive in regard to the location of this wound? 137 A. I am.
138 Q. On which side of the head was the wound the higher, the right or the left?
472 138 A. That I cannot tell you.
139 Q. Why can't I tell you (you tell me)?
139 A. For the best of all reasons, I do not know.
140 Q. Who beside yourself rode in with Brown that day?

140 A. William Walt rode to my house, and from there S. A. Ferguson accompanied us to Medicine Lodge, Kansas.

141 Q. What time did you get into Medicine Lodge that day or night?

141 A. I should say it was somewhere in the neighborhood of five o'clock in the afternoon.

142 Q. Where did you go first?

142 A. I do not know; the first thing I recollect of was going to [to] the clerk's office.

143 Q. Where did you leave the team with the body in Medicine Lodge?

143 A. Somewhere near or about the northwest corner of Mr. Iliff's livery stable.

144 Q. Did you get out of the wagon then?

144 A. I think I did.

145 Q. Do you know whether you did or not?

145 A. I do not.

146 Q. When you got out of the wagon there; who did you leave in charge of it? 146 A. William Walt.

147 Q. Who else was in the wagon besides William Walt at this point?

147 A. I am not positive, but I think S. A. Ferguson was; well I do not think there was anyone else at the time I left the wagon.

148 Q. Was the body in the wagon when you left it?

148 A. It was.

149 Q. Now, how long before you again returned to the wagon? 149 A. Perhaps 5 minutes.

150 Q. Was the wagon standing in the same place when you returned; same persons there?

150 A. The wagon was at the same point when I returned; I do not know whether Ferguson was or not; Walt was, and quite a number of citizens.

473 151 Q. Was this man with the wagon when you got out of it at Iliff's stable? 151 A. He was.

152 Q. Was he there when you returned to the wagon?

152 A. I think he was.

153 Q. Do you remember whether he was or not?

153 A. I do not.

154 Q. Where was the wagon standing when the body was first moved from it in Medicine Lodge?

154 A. I won't say positively, but I think it was in front of a house on the east side of Main street; I think it was the house the Index is now printed on.

155 Q. By whom was this body removed from the wagon?

155 A. William Walt, S. A. Ferguson and John Upperman, possibly J. H. Brown assisting them.

156 Q. Do you remember whom the citizens were present at that time? 156 A. I do not.

157 Q. Do you remember any of the citizens who was present at that time? A. 157 A. I do not.
158 Q. Were any citizens present at that time?
158 A. Do not know.
159 Q. Were you present? 159 A. I was not.
160 Q. Where was you when the body was being removed from the wagon to the house?
160 A. I think I was in the clerk's office.
161 Q. Where was the house into which the body was taken, with reference to the clerk's office?
161 A. Nearly opposite, across the street.
(Adjournment.)
474 162 Q. Did you cross over with the wagon from Iliff's stable to the building you designated as the Index office? 162 A. No sir.
163 Q. Were you at the clerk's office at that time?
163 A. I think like (I) was.
164 Q. When did you next see the body?
164 A. After it was put in the office.
165 Q. Where was it then?
165 A. It was in the building, but I have found by examination since I gave my testimony it was the building just this side of the Index building.
166 Q. How long was it from the last time you saw the body until you saw it in the coffin?
166 A. Perhaps two hours; it was during through the night, and until the next morning; I didn't see the body from probably 8 o'clock at night until 7 or 8 o'clock next morning.
167 Q. Where was the body; what was its condition, and who was present when you last saw the body on the 19th of March?
167 A. The body was in the wagon; condition was just as it was when[he]brought it from camp; Ferguson and William Walt were present; couldn't [—] whether Brown was or not; there were several citizens present also.
168 Q. And you saw them from the clerk's office? where you then were did you not?
168 A. I could not see them from the clerk's office.
169 Q. Could you see from the clerk's office the parties when they were removing the body from the wagon?
169 A. I could see them.
170 Q. Did you see them?
170 A. I cannot say that I did.
171 Q. During the night had the body been prepared for burial? 171 A. I think not.
172 Q. Did you observe that anything had been done to the body from the time you last saw it until you saw it
475 in the office? 172 A. I did.
173 Q. What?

173 A. Been washed, face shaved, and some different clothing put on.

174 Q. Were you present when the body was either washed or shaved? 174 A. I was not.

175 Q. Did you return home the next day, the 20th of March? 175 A. I did.

176 Q. What time in the day did you start for home?

176 A. Perhaps one or two o'clock.

177 Q. What disposition had been made of the body?

177 A. It had been buried in the cemetery north of the town of Medicine Lodge.

178 Q. How far is that cemetery from Medicine Lodge, and in what direction?

178 A. About one mile from the town about north—northeast.

179 Q. About what time in the day did the procession start for the cemetery?

179 A. Probably between 10 and 11 o'clock, somewhere.

180 Q. Did you accompany the procession?

180 A. I did not.

181 Q. Where [—] you when the procession started?

181 A. I believe I was at the building where the body was kept over night.

182 Q. How was the body conveyed; on a wagon or on a bier? 182 A. A wagon.

183 Q. Whose wagon was used on that occasion?

183 A. The wagon that was found at the camp.

184 Q. State who went with the wagon; all the parties?

184 A. To the best of my knowledge, S. A. Ferguson, William Walt, John Upperman; whether there were any others I cannot say.

185 Q. Where was Brown during the time they were going out to bury the body?

185 A. I cannot tell; Brown may of [have] gone out with the wagon.

476 186 Q. Did you remain here until they returned from the burying? 186 A. I did.

187 Q. About what time did they get back?

187 A. I think about twelve o'clock. Very near that time.

188 Q. Were there any religious exercises at the house in Medicine Lodge or any other place, and if so by who conducted? 188 A. Not that I know of.

189 Q. Did you see any person engaged either in washing, shaving or dressing the body?

189 A. I did not to my recollection.

190 Q. Who went home with you on the day of the funeral?

190 [—] S. A. Ferguson, William Walt and J. H. Brown.

191 Q. From that time, how long did Brown continue with you; how many days? 191 A. I think about 8 or 10 days.

192 Q. Have you any means to fix definitely the days, for instance the day he left your house? 192 A. I have not.

193 Q. How was the weather at the time Brown left; was it still cool?

193 A. The weather was pleasant; it was not as cool as it had been.

194 Q. Did you not have quite cold weather after Brown left your house, say after the 30th of March?

194 A. I do not recollect.

195 Q. Did you give directions where to have that body buried?

195 A. I believe I gave instructions to have it buried in the cemetery; did [—] designate any particular location.

196 Q. To whom did you give the directions?

196 A. S. A. Ferguson, William Walt; I believe that is all.

197 Q. Was that on the day the body was buried?

197 A. It was, and in the evening previous also.

198 Q. Did you also direct to have the body prepared for the grave, washed and dressed? 198 A. I think I did.

477 199 Q. To whom were those directions given?

199 A. William Walt and S. A. Ferguson; more especially to William Walt.

200 Q. When did you give those directions for the preparation of the body for the grave?

200 A. On the evening of the 19 of March, 1879, also on the morning of the 21st of the same year.

201 Q. Was the order which you have testified to making setting aside the verdict of the coroner's jury in writing?

201 A. I think not.

202 Q. Prior to the 19th day of March, 1879, had you any acquaintance with this man you called J. H. Brown?

202 A. I had not.

203 Q. When did you first see him?

203 A. Between 9 and 10 o'clock on the morning of the 19th of March 1879.

204 Q. Did you have any knowledge of what the effects of the dead man consisted except what John H. Brown told you?

204 A. I did not.

205 Q. You have testified, I believe, that when you first saw the dead body, it had shoes on its feet? 205 A. I have.

206 Q. Will you describe as well as you can, the shoes, whether they were low or high cut?

206 A. They were not high shoes nor were they low shoes; they were between; that is my impression.

207 Q. Were they laced up, or were they buttoned?

207 A. I do not know.

208 Q. Did you take those shoes into your possession?

208 A. In connection with the other things, I did.
209 Q. What did you do with those shoes finally?
209 A. I delivered them with the other things to J. H. Brown?
210 Q. When and who was present?
478 210 A. I cannot say the date of month. I think about the 28th or 29th of March, 1879, in the presence of S. A. Ferguson and as I said yesterday, perhaps his family. It was at his house.
211 Q. When did you last visit the place where the camp was located, where you first saw Mr. J. H. Brown?
211 A. The 19th of March, 1879.
212 Q. Did you ever see that place more than once?
212 A. I do not know whether I did or not.
213 Q. Did you say that that camp was located upon or near a road?
213 A. I said the road coming from Hutchinson, in my opinion, was not over a half a mile from the camp, and that there was a trail running up the little stream upon which the camp was located, a short distance from the camp.
214 Q. Had this trail near camp that you have testified to the appearance of recent travel?
214 A. Not to any great extent.
215 Q. Had it to any extent; if so, to what extent?
215 A. It had; whether of cattle or horses I cannot tell.
216 Q. Was this trail any more than a cattle path?
216 A. I do not know.
217 Q. Did it have the appearance of having been abandoned, or unused for a long time?
217 A. I stated a moment ago I thought it had been traveled recently by something.
218 Q. From the observations which you made, can you tell by what it had been traveled?
218 A. I cannot; I paid very little attention to it that day.
219 Q. Had it the appearance of having been traveled by wagons? 219 A. Not that I recollect.
220 Q. Do you know from what place to what place this path or trail led?
220 A. It led from Mr. P. B. Briley's place; to what place I know not any more than the range.
479 221 Q. All the country in that vicinity was a range?
221 A. Principal part of it.
222 Q. What direction was the road which you have designated as the Hutchinson and Medicine Lodge road from that camp? 222 A. It is east of it.
223 Q. How far? 223 A. About a half a mile, I think.
224 Q. At this time was there much travel upon that road?
224 A. There was considerable travel upon the road.

225 Q. You had seen the travel upon that road that spring?
225 A. I won't say I had seen any travel that spring upon that road, but I had seen travel upon that road and had been there.
226 Q. Is it not a fact that at that time that road was traveled but very little? 226 A. No, sir.
227 Q. Do you mean to state that the road which you have described as the Hutchinson and Medicine Lodge road was on the 19th day of March, 1879, where it passes nearest to the camp you have mentioned, a much traveled road?
227 A. It was traveled to a considerable extent; I believe the mail from Larned to Medicine Lodge, Kansas, was carried upon that road at that time.
228 Q. Was there any trail or road leading from this Hutchinson road to the place where you saw Brown in camp?
228 A. Not to my knowledge.
229 Q. Is this road of which you speak the main road leading from Hutchinson to Medicine Lodge?
229 A. At that time it was.
230 Q. You are positive in regard to that, are you?
230 A. I think I am; there were other roads, but that received the greater part of the travel.
231 Q. What is the condition of the country between the Hutchinson road and the place where this camp was?
231 A. Principally slope downhill.
480 232 Q. Is there any broken country between the Hutchinson road and where the camp was?
232 A. I presume there were some depressions, but there were no hills rising between the road and the camp. The road was located on a ridge, gradually sloping towards the West, to the valley, about one-half mile from the road; the valley of this branch this camp was located on.
233 Q. In and about where the camp was located, was there gulches, depressions or what we call broken land, or was it level and smooth?
233 A. In the vicinity of the camp there were some depressions; there was one small gulch not a great way from camp, as I best recollect.
234 Q. Which direction was this gulch from where the wagon stood? 234 A. Northeast.
235 Q. How far?
235 A. From 50 to 75 or 100 yards.
236 Q. Was there a knoll between the gulch and the wagon? 236. A. I think there was a small one.
237 Q. How far was the wagon from that knoll?
237 A. Oh, 40 to 50 steps, perhaps.

238 Q. Is your recollection pretty clear regarding distances, or indistinct?

238 A. I think it is tolerably clear. There is a bank on the east of the wagon, that I think was nearer the wagon than the knoll I before mentioned.

239 Q. How close to that bank did the wagon stand?

239 A. Well, perhaps 25 feet; mebby more, mebby less.

240 Q. What is your best judgment regarding the distance? 240 A. 25 or 30 feet.

241 Q. In what direction does the Hutchinson (road) run at that point? 241 A. A little northeast and southwest.

242 Q. Did you notice from the wagon tracks from
481 what direction that wagon came from to that camp?

242 A. I did not.

243 Q. Did you receive a visit from one of the attorneys for the plaintiff in this case at your house last Sunday?

243 A. I believe I did; Mr. Riggs was at my house last Sunday.

244 Q. After the attorneys for the plaintiff on last evening had given notice that your evidence in chief was closed, and a recess was taken until after supper, did you have any conversation with the attorneys for the plaintiff or either of them before you took the witness stand again? 244 A. I did.

245 Q. Was that conversation in relation to that case?

245 A. It was—part of it.

Redirect Examination

By Plaintiff's Counsel, S. A. Riggs, Esq.:

246 Q. In your cross-examination, you spoke of a bank east of the wagon; describe that bank.

246 A. It was a kind of a promontory or point running down from the hill that the soil or ground had been washed away from, leaving it standing higher than the ground on either side.

247 Q. About what was its height and declivity?

247 A. Perhaps from three to five feet high; it could not be very declivitous in that height.

248 Q. You have been asked to state minutely all the personal effects found about the camp; state what other property than that which you have already stated, if any there was, you found in that camp?

248 A. I found a gun there I did not mention before; it was a breach-loading rifle, caliber about 44; I believe other things I have mentioned all of them.

249 Q. What became of that gun; state all and the last you know of it.

249 A. I kept it with the other things, and deliv-
482 ered it up to Brown with them.

250 Q. (This question is ruled out of the deposition and marked "not read.")

[—] Who did you understand to be the owner of the personal effects you say you kept and afterwards delivered to Brown?

250 A. I understood them to belong to J. W. Hillmon.

251 Q. (This question is also ruled out) How did you come to deliver the wagon, team and other personal effects, to John H. Brown?

251 A. By order of Mrs. Sallie Hillmon.

252 Q. In your cross-examination, you stated that when you were at the camp, in the morning, the wagon had bows on it, but no cover; state if you know when the cover was removed?

252 A. In my testimony yesterday, I stated I thought the cover was off, but I now think that it was on when I went there but was taken off in order to have better access to the wagon in putting the dead body in the wagon.

Recross examination

By Defendant's Counsel, Geo. J. Barker:

253 Q. State when, where and under what circumstances you ever saw or conversed with Mrs. Sallie E. Hillmon?

253 A. I never saw her nor conversed with her.

254 Q. (This question and answer are ruled out) The order from her to which you alluded in direct examination was in writing, was it not? 254 A. It was.

G. W. PADDOCK.

483 Plaintiff then offered and read in evidence, the deposition of John H. Brown, taken in Wyandotte County, Kansas, commencing on the 30th day of December, 1881, before Henry McGrew, Notary Public within and for said county and state. During the reading of said deposition, the following exceptions were taken by the defendants and each of them:

Q. 33. Objected to as calling for incompetent and irrelevant testimony. Objection overruled, the defendants and each of them excepting.

Q. 80. Objected to as indefinite, leading and calling for incompetent, irrelevant and immaterial testimony. Objection overruled, the defendants and each of them excepting.

Cross-examination

Q. 401. Objected to because the statement alleged to have been made by the witness Brown is in writing as appears from the opening statement of counsel and from the question

itself; and for the further reason that it is admitted by the defendants, through their attorneys, in open court that they have in their possession the paper writing alluded to in the question, and that it does not appear that the same was shown to the witness, John H. Brown, while he was giving his deposition, and calls for incompetent testimony, oral evidence not being competent, all such statements appearing to be in writing.

Objection sustained with the provision that if the original instrument is produced or its loss accounted for, the objection will be overruled. To which ruling the defendants and each of them excepted.

Q. 402. Same.
Q. 403. Same.
Q. 404. Same.
Q. 410. Same.
Q. 411. Same.
Q. 412. Same.
Q. 413. Same.
Q. 414. Same.
Q. 622. Same.
Q. 763. Same.

And in addition to the foregoing objection, the following: Because the question is improper in form, being put in the alternative, and because it purports to represent the contents of a written statement which was not exhibited to the witness, and because no proper foundation has been
484 laid for the examination. Objection sustained, the defendants and each of them duly excepting.

Q. 773. Same objection, ruling and exception as last above.
Q. 774. Same.
Q. 775. Same.

The following questions and the answers thereto were withdrawn:

1244,
1245,
1246,
1247,
1253,
1254,
1255,
1256,
1257,
1268,
1269,
1270 to 1293 inclusive, withdrawn.

The defendants and each of them offered to withdraw questions numbered 1378 to 1397, both inclusive, to which the plaintiff objected and the court refused to permit; to which ruling the defendants and each of them duly excepted.

By permission of the court, the plaintiff withdrew question numbered 77 on re-examination; to which the defendants and each of them objected, which objection was overruled, the defendants and each of them duly excepting.

During the reading of said deposition, and in connection with question 1377, the defendants and each of them offered in evidence the original of the letter purporting to be set out in question 1378, and also on pages.....of this record. This is the letter referred to in the evidence of J. W. Green, Reuben Brown, Wm. J. Buchan and the plaintiff and commonly known as the "Where is John" letter.

The objections written in the body of, and at the time of the taking of, said deposition are waived except as specifically renewed at the time of the reading of said deposition at this trial of these causes.

485 In the Circuit Court of the United States, District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, Defendant.

The defendant above named, The Mutual Life Insurance Company, of New York, will take notice that on Friday, the 30th day of December, 1881, the above plaintiff will at the office of D. B. Hadley, in the city of Wyandotte, in the county of Wyandotte, and State of Kansas, take depositions of the following witnesses, to wit: John H. Brown, Reuben Brown and ——— Brown, to be used as evidence in this action. That the taking of said depositions will be commenced at 9 o'clock a. m., of said day, and the same will be continued from day to day until completed.

Dated, December 29th, 1881.

S. A. RIGGS,
L. B. WHEAT,
JOHN HUTCHINGS,
R. J. BORGALTHAUS,
Attorneys for Plaintiff.

Personal service of the foregoing notice is admitted this 29th day of Dec., 1881.

J. W. GREEN,
Attorney for Defendant.

In the Circuit Court of the United States.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company, of New York, Defendant.

Depositions of sundry witnesses taken before me, Henry McGrew, Notary Public, within and for the County of Wyandotte, in the State of Kansas, on the 30th day of December, in the year A. D., 1881, between the hours of nine o'clock a. m. and six o'clock p. m., at the office of D. B. Hadley, at the city of Wyandotte, in said county, pursuant to the annexed notice to be read in evidence on behalf of the plaintiff in the said action.

John H. Brown, a witness of lawful age, being, by me, first carefully examined and duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposes and says:

Q. 1. State your name and age.

(The defendant, The Mutual Life Insurance Company, of New York, object to the taking of any evidence at this time, because no notice as required by law has been given it, and because the Notary has no power, authority or jurisdiction to take evidence under the alleged notice in this case.)

2d. Because said defendant has not, since the service of said notice, sufficient time to prepare for the taking of the same.

3d. Because said witnesses proposed to be examined lives within one hundred miles of the place at which place said case is to be tried.

A. 1 Name, John H. Brown; age, about thirty years old.

Q. 2. Where do you reside?

A. 2. In Platt County, Missouri, near Smithville.

Q. 3. Were you acquainted with John W. Hillmon in his lifetime? A. 3. Yes, sir.

486 Q. 4. When did you first become acquainted with him? A. 4. In the year '73 or '74.

Q. 5. Where did you first become acquainted with him?

A. 5. In Quartzville, Colorado.

Q. 6. Were you ever in his employ? A. 6. Yes, sir.

Q. 7. When were you first employed by him?

A. 7. In the spring of '74; am not right positive about it as to the exact time.

Q. 8. What were you employed by him to do?

A. 8. Mining.

Q. 9. How long were you engaged at mining for him?

A. 9. About ten or twelve months.

Q. 10. Where was Hillmon during that time?

A. 10. He was there at the mines all the time I was working for him.

Q. 11. What were you next employed by him to do?

A. 11. Driving team.

Q. 12. How long did you work for him at that time driving team?

A. 12. About twelve months or over, near that length of time.

Q. 13. Where did you preform the service of driving team last mentioned? A. 13. In Kansas, Texas, and Mexico.

Q. 14. In what part of Mexico?

A. 14. In the eastern part, and in north part.

Q. 15. In which Mexico? A. 15. In New Mexico.

Q. 16. Where was Hillmon during the time you were driving team as last stated, and what business was he engaged in?

A. 16. He was with the teams the most of the time, and was engaged in the business of killing buffaloes and freighting hides.

Q. 17. What were you next employed by Hillmon to do?

A. 17. Taking care of and feeding hogs.

Q. 18. Where was this service of taking care of and feeding hogs performed? A. 18. In Wyandotte county, Kansas.

Q. 20. How long were you engaged in this service?

A. 20. About three months.

Q. 21. State if you can, what year and what time of the year this was.

A. 21. In the year of '77 and '78; in the winter.

Q. 22. Where was Hillmon during the time you was taking care of and feeding the hogs?

A. 22. Most of the time at Lawrence, Kansas.

Q. 23. What were you next employed by him to do?

A. 23. To take a trip down to Southern Kansas to open up a cattle ranch.

Q. 24. Did you take that trip, and with whom?

A. 24. I taken that trip with John W. Hillmon.

Q. 25. When and from where did you start?

A. 25. We started from Lawrence, Kansas, in the year of 1878, about a week or ten days before Christmas of that year.

Q. 26. How did you go?

A. 26. Went by railroad to Wichita, Kansas, from Wichita we went in a spring wagon with a pair of horses.

Q. 27. Where did you go to from Wichita?

A. 27. Medicine Lodge, in Barber county, Kansas.

Q. 28. From Medicine Lodge, Barber county, Kansas, where did you go to?

A. 28. To Sun City; northwest I would call it.

Q. 29. From Sun City where did you go?

A. 29. Went from there to a town on the Arkansas river and on the Atchison, Topeka & Santa Fe Railroad. I can't call the name.

Q. 30. From that town on the Atchison, Topeka & Santa Fe Railroad where did you go?

A. 30. To the Great Bend or Big Bend, a town named by that name, from there on to Hutchison and several towns —I don't remember the names—to Wichita.

Q. 31. About what time did you arrive at Wichita?

A. 31. About the 18th or 20th of January.

Q. 32. Who went with you on that trip?

A. 32. John W. Hillmon.

487 Q. 33. What was the purpose of that trip?

Objected to by defendant for the reason that it calls for incompetent and irrelevant testimony. (Overruled 10, '99.)

A. 33. For hunting up and locating a cattle ranch.

Q. 34. How long did you remain at Wichita immediately after you returned from that trip?

A. 34. I remained there myself all the time up to the first of March, or a little after, and he was there part of the time during our stay, up to the first of March.

Q. 35. Where did he go to during that time, if anywhere?

A. 35. He went up home to Lawrence, Kansas.

Q. 36. How many times?

A. 36. Two different times during our stay there.

Q. 37. When did you leave Wichita?

A. 37 About the 4th or 5th of March.

Q. 38. Where did you go and who went with you?

A. 38. Went from there by the way of Kingman, by the way of Harper City, and on to Medicine Lodge. On by the way of Sun City, and from Sun City then on to Elm Creek, and on to Spring Creek or Crooked Creek, and John W. Hillmon was with me.

Q. 39. Did any one else make that trip with you?

A. 39. No, sir.

Q. 40. About what day of the month did you arrive at Crooked Creek or Spring Creek?

A. 40. It was about the 16th or 17th of March. I think it was the 17th.

Q. 41. What did you do when you got to Crooked Creek?

A. 41. Went into camp, built a fire and got supper.

Q. 42. About what time of day was it that you got supper?

A. 42. It was about sunset. It might have been a little before.

Q. 43. Where did you remain that night and the next day?

A. 43. Remained there, in camp.

Q. 44. Did any one else stay with you? A. 44. No, sir.

Q. 45. During the day did any one call at the camp?

A. 45. Yes, sir, there was a man called there in the forenoon. I don't know the exact time of day.

Q. 46. What did you have in your wagon?

A. 46. Had some bedding, a satchel or hand valise, some cooking utensils and a trunk. I believe some of the cooking utensils were in them.

Q. 47. At what time do you refer to?

A. 47. The next morning, after the night of the camp.

Q. 48. Did you stay there through the day?

A. 48. Yes, sir, with the exception of what little running round the camp we did. I don't suppose either one of us were over a half mile from the camp, and I myself was not over 300 yards from the camp.

Q. 49. State what transpired that evening or afternoon in relation to Hillmon?

A. 49. Well, there was nothing more than usual that afternoon. He had the gun out and was a shooting around there towards evening or after the middle of the afternoon. I judge it was not more than an hour by sun. He was shooting from camp at some little bushes. It was in a westerly direction. Shot two or three times at the object he was shooting at. Quit shooting then and put the gun in the wagon loaded, unbeknown to me whether the gun was loaded or not. Set the gun in the wagon from the side of the wagon, with the breach of the gun in the wagon and the muzzle sticking out on some blankets or by the side of some, and left that way; and then we prepared for supper—or I did mostly myself—got supper ready and eat. Sit around camp until bed time. I went then to prepare to get ready to go to bed. I went to the side of the wagon to take out the blankets, or bedding, and the gun was in the way. I catched hold of the gun to take it or pull it out of the wagon, the lock of the gun catched on something as I went to pull it out of the wagon and the gun went off and shot John Hillmon through the head.

Q. 50. What did you do then?

A. 50. I dropped the gun and grabbed Hillmon as he was falling, and I rather moved him as well as I remember from the fire, as I rather thought he was or would be in danger of falling in the fire, and then I got a pony, went down to a house about three-quarters of a mile from the camp and told him what I had done.

Q. 51. Told whom?

A. 51. Told the man that was living there what I had done, and wanted help; and I think he asked me to wait till after supper or wait for him awhile. I told him no I was alone and I wanted help, so he came right along with me back to camp.

Q. 52. What condition was Hillmon in when you got back to camp?

A. 52. He was laying on the ground by the fire dead.

Q. 53. Do you remember the name of the man who went back to camp with you, and if so state what it was?

488 A. 53. I don't remember the name for certain. I think it was Graves.

Q. 54. After you got back to the camp what was done?

A. 54. He told me to stay there until he went and got some neighbors to come.

Q. 55. Was this the same man that was at the camp in the morning?

A. 55. Yes, sir, the same man.

Q. 56. Did any of the neighbors come afterwards?

A. 56. Yes, sir.

Q. 57. How many came, and when did they come?

A. 57. Three or four came afterwards in an hour and one-half; to the best of my memory, it was about that time.

Q. 58. What did they do after they came?

A. 58. Set around the fire and keep up a fire all night, and got up some wood.

Q. 59. Did the first man that came return again that night, I mean the man that you went after?

A. 59. Yes, sir, the same man, that night.

Q. 60. How many of them remained all night?

A. 60. Three or four of them.

Q. 61. Was the body removed or put in any different place that night? A. 61. No, sir.

Q. 62. What was done the next morning?

A. 62. Mr. Paddock held an inquest and examined the corpse; searched his pockets and the things he had on him; then they examined the wagon and clothing and the trunk and the hand valise, and searched me, myself; and then they taken the body and put it in the wagon, and myself, the body and the team, and everything belonging with the outfit was in charge of Mr. Paddock and Mr. Watt, if I remember the name right, and went to Medicine Lodge. And then they had another jury, or inquest, I should say, and they taken the body and put it in a house there and kept it over night. The next morning it was washed, shaved and dressed, and was put in a coffin and taken to the burying ground and buried. Mr. Paddock taken charge of the team and everything belonging with it, and taken it home, and I went with him. I stayed with him for several days, and then Mr. Paddock brought the team to Medicine Lodge, and I rode with him; met two of the Mr. Baldwins there from Lawrence. I went back the same day, home, with Mr. Paddock, and came back to Medicine Lodge the next morning; stayed in Medicine Lodge all day, from the time I got there, and all night. The next day I was getting ready to go out to the grave with the two Mr. Baldwins.

Q. 63. Did you go out to the grave? If so, with whom did you go?

A. 63. I went out to the grave with the two Mr. Baldwins, and one or two other men.

Q. 64. What was done when you got to the grave?

A. 64. The body was taken up and brought to Medicine Lodge and was put in a house there, and layed there over night, and the next day started with the team and body to Lawrence, Kansas.

Q. 65. How did you start with the body?

A. 65. Started with it in a spring wagon, with the body in a coffin; took it to Hutchinson, Kansas, and put it on the cars.

Q. 66. Who had charge of the body from Medicine Lodge to Hutchinson, Kansas, where you shipped it?

A. 66. Levi Baldwin and his brother.

Q. 67. How did you go to Lawrence from Hutchinson?

A. 67. I went on the cars.

Q. 68. What did you do with the team and wagon and other things at Hutchinson when you left for Lawrence?

A. 68. The team and wagon was left in charge of Albert Baldwin, Albert, I believe was his name; the other things were taken on the cars.

Q. 69. What time did you arrive in Lawrence?

A. 69. Early in the morning.

Q. 70. What was done at Lawrence.

A. 70. The coffin was taken up to an undertaker's, and I went to the Lawrence House to breakfast. I don't know what was done with the body or coffin that day. I was summoned as a witness to appear at the court house.

(The defendant moves to strike out all of the witness' answer, commencing with the words, "I was summoned" for the reason that it is not responsive to any question and is incompetent as evidence.)

Q. 71. Did you appear at the court house and give testimony?

(The defendann objects to the foregoing question as calling for irrelevant, incompetent testimony.)

A. 71. Yes, sir.

Q. 72. After giving your testimony, where did you go?

A. 72. I went to Wyandotte, to my home close to Wyandotte.

Q. 73. Where have you been since that time.

489 (The foregoing question is objected to by defendant for the reason that it calls for irelevant and incompetent and immaterial testimony.)

A. 73. In Platte County, Missouri.

Q. 74. Where is Platte County, Missouri?

A. 74. Right across the Missouri river north of Wyandotte County, Kansas.

Q. 75. Where have you been in Platte County, Missouri, and what have you been doing there?

(The foregoing question is objected to by the defendant because it calls for incompetent and immaterial testimony.)

A. 75. I have been working for W. J. Fulton, railroad contractor, contractor for lumber and piling and wood, until the last five weeks or six. Since then I have been working for Smith & Pitztel, walnut lumber men.

Q. 76. While you were working for W. J. Fulton, where were you?

(The foregoing question is objected to by defendant because it calls for incompetent and immaterial testimony.)

A. 76. I was in the neighborhood of Parkville, Platte County, Missouri, and the rest of the time near Smithville, Clay County, Missouri.

Q. 77. Where were you while you were working for Smith & Pitztel?

(The defendant objects to the foregoing question because it calls for incompetent and immaterial testimony.)

A. 77. Part of the time in near Smithville, about five miles from Smithville, Clay County, Missouri, and part of the time in Platte County, near the line.

Q. 78. How far from Wyandotte, Kansas, is each of the places, Smithville and Parkville?

(The defendant objects to the foregoing for the reason that it calls for incompetent and immaterial testimony.)

A. 78. Parkville about seven miles straight across the river, Smithville, about twenty.

Q. 79. What work have you been engaged in at those places?

(The defendant objects to the foregoing question for the reason that it calls for incompetent and immaterial testimony.)

A. 79. The first work I done on Fulton's job was driving my brother's team, hauling logs, piling and wood and lumber, next driving Mr. Fulton's team, hauling the same kind of material. The next for Smith & Pitztel, I had charge of their work, his men and teams, hauling and chopping and shifting their lumber from the mills to Platte City.

Q. 80. What was the purpose of the last trip you made with Hillmon, from Wichita around through Medicine Lodge, Sun City to the place where you say Hillmon was shot?

(The defendant objects to the foregoing question because it is indefinite, leading and calls for incompetent, irrelevant and immaterial testimony.) (Overruled Oct. 20, '99.)

A. 80. It was for the purpose of finding a stock ranch, suitable with range and water, without getting too close to the farmers around on the creeks.

Q. 81. About what time in the evening was it that you took the gun out of the wagon when the lock caught, and the gun went off, shooting Hillmon in the head?

A. 81. It was about sunset or a little after.

Q. 82. Have you contemplated leaving Missouri, and do you now contemplate doing so before next June?

(The defendant objects to the foregoing question because it calls for incompetent and immaterial testimony.)

A. 82. Yes, sir, that is my calculation.

Q. 83. Where do you intend to go?

A. 83. I was calculating on going to Colorado.

Q. 84. About how far from the city of Leavenworth in Kansas?

A. 84. From Leavenworth I would call it from 700 or 800 miles.

Q. 85. About how far from the city of Topeka, Kansas.

A. 85. It would be very near the same [digerence.]

Cross-examination

By Counsel for the Defendant:

Q. 1. Have you any trade? A. 1. No trade outside of farming.

Q. 2. You formerly resided in Wyandotte County, State of Kansas, did you not? A. 2. Yes, sir.

Q. 3. From what place did you come to Wyandotte County, Kansas?

A. 3. From Kansas City, Jackson County, Missouri.

Q. 4. How long did you live in Kansas City, Missouri, and with whom did you live there?

A. 4. Lived there near six or eight months at home with my father.

Q. 5. In what year did you reside in Kansas City?

A. 5. In '61 or '62.

490 Q. 6. From what place did you remove to Kansas City?

A. 6. From about three miles from Lee Summit, Jackson County, Missouri.

Q. 7. How long did you live at that place?

A. 7. About one year.

Q. 8. During what year was that?

A. 8. In the year of '60 and '61, as near as I remember.

Q. 9. From what place did you move to this place near Lee Summit?

A. 9. From Independence, Jackson County, Missouri.

Q. 10. How long did you live at Independence, and during what years?

A. 10. Don't remember how long. I lived there two or three years, as near as I can remember, from '60 to '57 or '59, as near as I can remember.

Q. 11. From what place did you remove to Independence, Missouri?

A. 11. Moved from off the Neosho river, Kansas.

Q. 12. In what county in Kansas did you reside and during what years?

A. 12. I don't know what county; don't know what year, either.

Q. 13. From what place did you remove to Kansas?

A. 13. Moved from the state of Indiana.

Q. 14. From what county?

A. 14. From Putnam; what year, I don't remember.

Q. 15. At what place in Putnam county did you reside?

A. 15. I don't know.

Q. 16. Are you a married, or single man?

A. 16. Single man.

Q. 17. Your parents reside in Wyandotte County, Kansas, now do they not? A. 17. Yes, sir.

Q. 18. In what year did you go to Colorado the first time?

A. 18. I went the first time to Colorado in '65 or '66.

Q. 19. How many times have you been to Colorado?

A. 19. Three different times.

Q. 20. On the fourth day of March, A. D. 1879, were you living in Wyandotte county, Kansas, with your father; that is, my home.

A. 20. Yes, sir, I call that my home.

Q. 21. State if on the 4th day of September, A. D. 1879, your residence was not at the same place, to wit, with your parents in Wyandotte County, Kansas?

A. 21. I think I was stopping with my brother in Platte County. I always call this place my home when I am stopping at other places; at that time was making my brother's my home.

Q. 22. How long did you remain in Colorado the first time you went there?

A. 22. Don't know how long; came back here to Wyandotte in the spring of '66.

Q. 23. State as near as you can how long you were gone?
A. 23. Four or five months, as near as I can remember.
Q. 24. How did you go, overland or by rail?
A. 24. Drove an ox team out.
Q. 25. For whom?
A. 25. I don't remember the Company's name; freighters.
Q. 26. Who had charge of the train?
A. 26. Young and Chrisman were the wagon bosses.
Q. 27. State the full name, if you know, of each of these parties.
A. 27. Can't state either one of their names. I don't remember.
Q. 28. Do you know where they, or either of them, now live? A. 28. I do not.
Q. 29. What other persons composed that party beside yourself, Chrisman and Young?
A. 29. There was about thirty-five or forty.
Q. 30. Do you remember the names and residence now of any of them?
A. 30. I don't believe I remember any of their names, and the residence I don't know.
Q. 31. From what place did you start with that train?
A. 31. Leavenworth, Kansas.
Q. 32. What time of the year did you start?
A. 32. In the fall of the year; late in the fall.
Q. 33. To what place, or places in Colorado did you go at that time?
A. 33. Up the Arkansas river to Aubrey. We got snowed in in the mountains at Cedar Springs, and didn't go any further, and I came back in the spring.
Q. 34. How did you return, and to what place did you come?
491 A 34. Returned part of the way back with a team of cattle to Aubrey; from Aubrey to Leavenworth in mule teams.
Q 35. Whose train did you return with?
A. 35. Government train.
Q. 36. Who was in charge of it?
A. 36. A man by the name of Simpson was wagon boss.
Q. 37. State his name in full.
A. 37. I can't state his name; I don't remember.
Q. 38. Do you know his place of residence?
A. 38. I do not.
Q. 39. How long did you remain at Leavenworth at that time? A. 39. Two or three days.
Q. 40. From Leavenworth where did you go?
A. 40. Home, Wyandotte county, Kansas.

Q. 41. What year and what time of the year did you arrive at home?

A. 41. Spring of '66; don't remember the month.

Q. 42. When and from what place did you start for Colorado again the next time?

A. 42. Started in the spring of '73 from Wyandotte, Kansas.

Q. 43. How did you go.

A. 43. With a four-mule team.

Q. 44. From 1866 to 1873 where were you living?

A. 44. In Wyandotte county, Kansas.

Q. 45. Were you living [—] during that entire period?

A. 45. No, sir, not all of the time.

Q. 46. Where else?

A. 46. I was working on the Fort Scott & Gulf Railroad between Paola and Fort Scott.

Q. 47. During what year or years were you working on that railroad? A. 47. I don't remember exactly.

Q. 48. State as near as you can.

A. 48. It was between the years of 1868 and '71, to the best of my remembrance.

Q. 49. For whom did you work on the railroad, and what did you do?

A. 49. Worked for railroad contractors; bridge work and trustle work. Jim Schaddock and Bill Butterfield were the bosses.

Q. 50. Did you work in the construction of these bridges as a bridge carpenter?

A. 50. The first work was raising these trestles after they were framed. The carpenters done the frame work.

Q. 51. In what capacity did you work upon these bridges, and what did you do on them or in their construction?

A. 51. After this work was framed, we put it all together, then raised them and put them to their places after they were framed and pinned together.

Q. 52. Did you work upon the construction of those bridges as an ordinary day laborer or as a bridge carpenter or builder?

A. 52. I would call it ordinary day labor, but the two gangs of us called the bridge gangs.

Q. 53. How long did you work upon this railroad?

A. 53. Commenced early in the fall and worked right along until the spring.

Q. 54. On what portion of the line of the road did you work?

A. 54. Commenced at what is called the third crossing of Marias Des Ceygne river, at what is known as the Barnard Station now, on to Fort Scott and then back to La Cygne.

The hour for adjournment having arrived, the further taking of these depositions is postponed until tomorrow morning at 9 o'clock, December 31, A. D. 1881.

[Seal] HENRY McGREW,
Notary Public.

My commission expires April 21, 1883.

December 31st, 1881. The further taking of these depositions is resumed pursuant to adjournment.

Q. 55. During the period above mentioned, to wit, from 1866 to 1873 in what other business were you engaged besides working upon this railroad?

A. 55. Sawmill work and farming.

Q. 56. For whom did you work in the milling business, and where?

A. 56. For a man by the name of Browning near Jefferson, Texas.

Q. 57. During what year or years did you work for Browning near Jefferson, Texas?

A. 57. During the years of '68, from '68 up to '71.

Q. 58. Did you work for anybody else in Texas during that time, to wit, between 1866 and 1873? A. 58. No, sir.

492 A. 59. When did you go to Texas during that time, and from where did you start?

A. 59. Went during the years of '68 and '70, and started from home, Wyandotte county.

Q. 60. Did you make more than one trip to Texas during the period above mentioned, to wit, between 1866 and 1873.

A. 60. No, sir.

Q. 61. In what year then did you go to Texas?

A. 61. Went in the years between '68 and '70; I can't fix it any more definite now.

Q. 62. How long did you remain in Texas during that time? A. 62. Six or eight months.

Q. 63. How did you go there, by rail or overland?

A. 63. By rail and steamboat.

Q. 64. From what place to what place by rail did you go?

A. 64. By rail from Kansas City to St. Louis.

Q. 65. From St. Louis how did you go? A. 65. By boat.

Q. 66. To what place? A. 66. To Jefferson, Texas.

Q. 67. Who went with you upon that trip?

A. 67. Reub. Brown, my brother.

Q. 68. In what year, and what season of the year did you return from Texas?

A. 68. In the summer season. I can't call the year, I don't believe; about '70, as near as I can remember.

Q. 69. Was this trip to Texas made before or after your working upon the railroad, concerning which you have testified? A. 69. Afterwards.

Q. 70. How long after you finished working upon the road did you make this trip to Texas?

A. 70. Eight or ten days after.

Q. 71. How did you return from Texas?

A. 71. By steamboat and rail.

Q. 72. Did you return by the same route you went down?

A. 72. Yes, sir.

Q. 73. Did your brother return with you?

A. 73. Part of the way back he did.

Q. 74. Did any one else come back with you?

A. 74. Not in our company they didn't.

Q. 75. After your return from Texas, where did you live and in what business were you engaged in up to 1873?

A. 75. Lived with my father, and was farming at home.

Q. 76. Were you engaged in no other business during that time? A. 76. No other business in particular.

Q. 77. In what time in 1873 did you start for Colorado the second time? A. 77. In the spring.

Q. 78. State in what month?

A. 78. In April or May; I don't remember just what month.

Q. 79. Who went with you upon that trip, and how did you travel?

A. 79. Dick Smith, Dave Ryus, Bonny Pierpont, Bush Andrews and myself was all, and with a four-mule team.

Q. 80. State what route you pursued, and some of the principal places or points through which you passed?

A. 80. Followed the Kansas Pacific railroad out; went through all the principal towns from Topeka to Denver.

Q. 81. When did you arrive in Denver?

A. 81. In the month of June; to the best of my memory.

Q. 82. What year? A. 82. 1873.

Q. 83. From Denver where did you go?

A. 83. South to what is called the Divide, about 60 miles; a lumber country.

Q. 84. Were the same parties who started with you, with you at this place. A. 84. All of them but one, Dave Ryus.

Q. 85. From Divide where did you go?

A. 85. All went to work there.

Q. 86. For whom did you work, and what did you do, and how long did you remain at Divide?

493 A. 86. Worked for Sloan & Company's saw mill logging. Remained there all that summer until the next spring.

Q. 87. Did you work for the same parties and do the same work all the time you remained at Divide?

A. 87. Worked at the same business for a man by the name of Cantrol, near by.

Q. 88. Did you work for any other person?

A. 88. No, sir.

Q. 84. When did you leave Divide, and where did you go, and who went with you?

A. 84. Left the Divide in the spring of 1874. Went to Quartzville, Colorado. Went with John Mann, Samuel Mann and his family.

Q. 85. How far is Quartzville from Divide, and in what county in Colorado?

A. 85. About one hundred miles from the Divide. In Summit county, I think.

Q. 86. In what month did you arrive in Quartzville?

A. 86. Don't remember the month. It was early in the spring.

Q. 87. State, as near as you can, what month.

A. 87. April or May.

Q. 88. In what business did you first engage in in Quartzville? A. 88. Help put up a house.

Q. 89. What was the next business you engaged in?

A. 89. Mining.

Q. 90. On your own account, or for somebody else?

A. 90. For myself.

Q. 91. How long did you continue to mine on your own account? A. 91. Two or three months.

Q. 92. Then what did you do?

A. 92. Went to working, mining by the day for a company.

Q. 93. For whom did you work by the day mining?

A. 93. Worked under John W. Hillmon, foreman.

Q. 94. For what company or persons was John W. Hillmon working or acting as foreman?

A. 94. What is called the Alexander mines.

Q. 95. Who was acting as superintendent of that work or mine at that time? A. 95. Hillmon was at that time.

Q. 96. Was there no other person or persons at Quartzville at that time representing this company?

A. 96. Not at Quartzville.

Q. 97. Where did the officers and proprietors of this mine reside?

A. 97. One of them at Fair Play, Colorado; the others I am not certain whether at Denver or back east here, as it is termed there.

Q. 98. State the name of the one that resided at Fair Play and his official position in the company?

A. 98. Name was Alexander. I don't know what position he held in the mines.

Q. 99. State the name of any officer or person connected with that company?

A. 99. Can't state the names. I don't remember.

Q. 100. How did you receive your pay while working for this company, by check or in currency?

A. 100. By check on a bank in Fair Play.

Q. 101. State, if you remember, who acted as president, secretary or treasurer of that company?

A. 101. Couldn't state just now. Don't remember the names.

Q. 102. State by whom your checks or drafts on the bank were signed. A. 102. Don't remember.

Q. 103. State definitely in which month and year you first commenced to work under John W. Hillmon as foreman at Quartzville, Colorado?

A. 103. I don't remember the month. In the year of 1874.

Q. 104. How long had you been in Quartzville, Colorado, before you commenced to work under John W. Hillmon as foreman? A. 104. About three months.

Q. 105. State, as near as you can, the month you commenced to work under John W. Hillmon as foreman?

A. 105. The month of July, as near as I can remember.

Q. 106. From that time, that is from July, 1874, how long did you continue to work under John W. Hillmon?

A. 106. Two or three months.

Q. 107. Can you fix the time you worked under him more definitely? A. 107. Not at the present. I don't remember.

Q. 108. About how many men did he have under his charge as foreman when you commenced working for him?

A. 108. When I first commenced he had two.

494 Q. 109. Who were they?

A. 109. Milt Mann and George Stone.

Q. 110. Afterwards, and during the time you worked under him, did he have other persons in his employ?

A. 110. Yes, sir, two or three others.

Q. 111. Then when you first commenced to work for Hillmon he was foreman of a gang of men consisting of two?

A. 111. Two others and myself. Three of us in all, when we commenced.

Q. 112. And this gang of men were engaged in doing what? A. 112. In mining, blasting rock and mineral.

Q. 113. Did Hillmon work with the men?

A. 113. Part of the time he did.

Q. 114. While you were in Quartzville, Colorado, was Hillmen engaged in any other business except as acting as foreman of this gang of men? A. 114. Not that I know of.

Q. 115. Was he engaged in the same business when you arrived in Quartzville? A. 115. Yes, sir.

Q. 116. How long had you been in Quartzville before you became acquainted with Hillmon?

A. 116. About two months, as near as I can remember.

Q. 117. Do you know how long he had been in Quartzville when you got there? A. 117. I don't know.

Q. 118. Do you know that he was acting as foreman for this company when you arrived in Quartzville?

A. 118. I think he was not, at the same mine at least.

Q. 119. At what mine was he working then?

A. 119. Don't know the name of the mine. It was the same company.

Q. 120. State when Hillmon ceased working for that company in that year. A. 120. Early in the fall of that year.

Q. 121. State, as near as you can, what month?

A. 121. September or October, as near as I can remember.

Q. 122. Did he remain in Quartzville after he ceased working for that company? A. 122. No, sir.

Q. 123. When did he leave Quartzville?

A. 123. In a few days after he quit working.

Q. 124. Did you remain in Quartzville after he left?

A. 124. No, sir.

Q. 125. Did you and Hillmon leave Quartzville at the same time and together? A. 125. Yes, sir.

Q. 126. State, as near as you can, when you and Hillmon left Quartzville and where you went?

A. 126. Left in September or October, 1874, and went to Central City, Colorado, from Quartzville.

Q. 127. During the time you worked under John W. Hillmon as foreman at Quartzville, Colorado, what other men beside Mann, yourself and Stone worked under him?

A. 127. I don't remember the names just now.

Q. 128. Can you give the name of others than those you have mentioned?

A. 128. I can of one other. His given name was George. His other name I don't remember.

Q. 129. State the largest number of men who worked under Hillmon during any time you worked under him?

A. 129. Six, I believe. I don't remember just how many.

Q. 130. Of those six men have you stated the names of all you can? A. 130. Yes, sir, all I can for the present.

Q. 131. From what place did Hillmon come to Quartzville? A. 131. I don't know.

Q. 132. Did he never tell you?

(Objected to by plaintiff as incompetent, calling for hearsay testimony.)

A. 132. He told me formerly where he was from, but not direct to that place.

Q. 133. When did you and Hillmon arrive in Central City, Colorado?

A. 133. About the month of November, as near as I remember, 1874.

Q. 134. How did you travel from Quartzville to Central City, Colorado?

A. 134. State to Denver, railroad to Central City.

Q. 135. How long did you and Hillmon remain in Central City?

A. 135. I remained there until the spring of 1875. I don't know how long he remained there.

Q. 136. Did you and Hillmon remain together in Central City until he, Hillmon, left?

495 A. 136. I don't know how long he remained there.

Q. 137. Did you or Hillmon leave Central City first?

A. 137. I left first.

Q. 138. When did you leave Central City?

A. 138. In the spring of 1875.

Q. 139. State as near as you can what time in the spring?

A. 139. April or May, as near as I remember.

Q. 140. Then the winter '74-'75 you and Hillmon spent in Central City, Colorado, did you? A. 140. Yes, sir.

Q. 141. In what business was Hillmon engaged in during that winter? A. 141. Mining.

Q. 142. On his own account, or was he working for somebody else?

A. 142. Part of the time for himself, and part of the time for someone else.

Q. 143. For whom did he work at Central City?

A. 143 Worked for Thompson & Barrett.

Q. 144. From what time to what time did he work for them? A. 144. From November up to about New Year's.

Q. 145. In what capacity did he work?

A. 145. Worked by the day in the mines.

Q. 146. What was you doing during the time he was working for Thompson & Barrett at Central City?

A. 146. I was working for the same men, in the same business.

Q. 147. After about New Year's in 1875, what was Hillmon doing from that time until you left Central City?

A. 147. He was working on his own mine part of the time, the other part he was burning brick under contract.

Q. 148. What was you doing during the same time?

A. 148. I was mining; working for other companies.

Q. 149. For whom did Hillmon burn brick in Central City, Colorado? A. 149. I don't know who the men were.

Q. 150. What was Hillmon doing when you left Central City?

A. 150. He was repairing up and fixing up for a brick yard.

Q. 151. From Central City where did you go?
A. 151. Back to Quartzville, Colorado.
Q. 152. When did you arrive in Quartzville, Colorado, the second time? A. 152. In May or June of 1875.
Q. 153. Did you go direct from Central City to Quartzville?
A. 153. Yes, I went direct by the way of Denver and Fair Play.
Q. 154. In what business did you engage when you returned to Quartzville the second time? A. 154. Mining.
Q. 155. Was it for the same company?
A. 155. No, sir; I worked for a different company.
Q. 156. For what company did you work the second time?
A. 156. Sidell & Clark.
Q. 157. How long did you remain in Quartzville, Colorado?
A. 157. Remained there the balance of that summer until the next spring.
Q. 158. When did you leave Quartzville, Colorado, and where did you go.
A. 158. I left Colorado in 1876 for Wyandotte county, home.
Q. 159. What time in 1876 did you leave Quartzville, Colorado? A. 159. I left there in August.
Q. 160. When did you arrive in Wyandotte county?
A. 160. In the same month, August.
Q. 161. Who came home with you at that time?
A. 161. I came alone.
Q. 162. When you returned home in August, 1876, where was John W. Hillmon? A. 162. I don't know where he was at.
Q. 163. When you were in Quartzville the second time, did you receive any letters from Hillmon?
A. 163. Yes, sir, one or two letters.
Q. 164. Up to what time while you were in Quartzville, did you receive letters from Hillmon?
A. 164. I don't remember what time.
Q. 165. After you returned to Wyandotte county in 1876, did you receive any letters from John W. Hillmon?
A. 165. Did not.
496 Q. 166. Do you know from the letters of Hillmon, or from any other source, about how long he remained in Central City after you left there?

(Objected to by the plaintiff as incompetent as calling for hearsay testimony.)

A. 166. No, I don't know how long.
Q. 167. Do you know from his letters, or from any other source, in what business he was engaged in Central City, Colorado, after you left there?

(Objected to by the plaintiff on the same ground as the question last above.)

A. 167. Did not know.

Q. 168. Do you now know from his letters, or from any other source, in what business he was engaged in after you left there?

(Objected to by plaintiff on same ground as question last above.)

A. 168. I do not, only what he told me.

Q. 169. From what he told you, what business did you understand he was engaged in?

(The question is objected to by plaintiff's counsel for the reason that it calls for hearsay testimony, incompetent, irrelevant and immaterial.)

A. 169. Burning brick.

Q. 167. Was he in any other business?

(Objected to on the same ground as the last above.)

A. 167. Mining.

Q. 168. Do you know from what he told you when he left Central City?

(Objected to by the plaintiff's counsel on the same grounds as the last preceding question.)

A. 168. I don't remember now.

Q. 169. Where did you next see Hillmon, and when?

A. 169. Seen him at the Union Depot in Kansas City in 1876. I don't just remember when; it was in the fall of the year, as near as I remember.

Q. 170. Are you positive that you next saw him in the place you have named, in the fall of the year 1876?

A. 170. I am positive the next time I saw him was at the Union Depot in Kansas City; as to the time of the year, I won't be so positive.

Q. 171. Did you next see him (Hillmon) at Kansas City in the fall of '76?

(Objected to by plaintiff's counsel on the ground that the question has been once asked, and fully and fairly answered.)

A. 171. I won't be positive that it was in '76.

Q. 172. Are you positive that it was in the fall of the year that you saw him there first?

(Objected to by the plaintiff's counsel on the ground that it assumes that the witness has testified that it was in the fall of the year, and because it has once been asked and been fully and fairly answered.)

A. 172. I won't be positive.

Q. 173. From the time you returned to Wyandotte in August, 1876, up to the time you first saw Hillmon in Kansas City, where had you been living, and in what business had you been engaged?

A. 173. I had been living at home, working on the farm some.

Q. 174. Had you been doing any other business?

A. 174. No, not at the time.

Q. 175. Had you been engaged in any business in Kansas City, or working there?

A. 175. I was not in any business in Kansas City.

Q. 176. When after seeing Hillmon at the Union Depot in Kansas City in the fall of 1876, where and when did you next meet him?

A. 177. I went with him to Lawrence, and was with him from that time on for quite a while.

Q. 178. Did you return with him to Lawrence on the same day you met him in Kansas City? A. 178. Yes; sir.

Q. 179. How long did you remain in Lawrence at that time? A. 179. I remained there with him for several days.

Q. 180. Where did you and he stop in Lawrence?

A. 180. I don't know the name of the hotel. I would know it if I could hear it; I think it was the Place house.

Q. 181. What were you and Hillmon doing in Lawrence on this occasion?

A. 181. I wasn't doing anything; he had been shipping some hogs.

Q. 182. Did you visit any other place with him on that occasion?

A. 182. Yes, I visited a place or two; Levi Baldwin's and Mrs. Quinn, I won't be positive as to the name, I think that was it.

Q. 183. How long after you returned to Lawrence with Hillmon before you and he went out to Levi Baldwin's?

A. 183. In a few days afterwards.

497 Q. 184. How long did you and Hillmon remain at Levi Baldwin's?

A. 184. A few hours. I don't remember just how long.

Q. 185. Did you meet Levi Baldwin there?

A. 185. Yes, sir.

Q. 186. Who else?

A. 186. Mrs. Baldwin and the family.

Q. 187. Had you ever met Levi Baldwin before this time?

A. 187. Never met him before that I remember of, unless it was in Lawrence a few days before.

Q. 188. Where was Mrs. Quinn living at this time you were in Lawrence? A. 188. She was living in Lawrence.

Q. 189. Upon what street and in what part of the city?

A. 189. Don't know what street. The western part of the city, I believe.

Q. 190. How many times did you meet Levi Baldwin while you were in Lawrence?

A. 190. I don't remember how many times. Once or twice.

The further taking of these depositions is, by consent of the attorneys of the parties—plaintiff and defendant—adjourned until 9 o'clock a. m. January 3d, 1882.

[Seal] HENRY [illegible], Notary Public.

My commision expires April 21, 1883.

December 31, A. D. 1881.

Tuesday, January 3d, A. D. 1882. The further taking of these depositions is hereby resumed pursuant to adjournment.

Q. 191. After your visit to Lawrence with Hillmon in the fall of 1876, as you have stated, did you return to Wyandotte again, and if so state when, as near as you can?

I wish to be more accurate about the date of the year. My second trip to Colorado instead of being in 1873 it was 1872, and it was in 1876 that I went to Lawrence with Hillmon, and it was in the spring instead of the fall.

(The defendant objects to the foregoing statement of the witness, for the reason that it is not responsive to the question.)

A. 191. I returned again in August or September of 1877.

Q. 192. From the spring of 1876, when you now claim that you visited Lawrence with Hillmon, until the fall of 1877 where were you and what was you doing?

A. 192. I was with Hillmon, driving team for him in Texas.

Q. 193. When and where did you become acquainted with Hillmon first?

A. 193. I became acquainted with Hillmon first in the spring of '72, instead of 1873, in Colorado. Quartzville, Colorado.

Q. 194. Then after your meeting him in the spring of 1876 at the Union Depot you went with him to Lawrence, and you did not return to your home again until August, 1877. Is that correct?

A. 194. I did not return. That is correct, as I stated.

Q. 195. Did you meet Hillmon at the Union Depot in Kansas City by any agreement or understanding between you and him?

A. 195. No, sir.

Q. 196. Was your meeting with him at that time entirely accidental?

A. 196. Yes, sir.

Q. 197. What time did you meet Hillmon in Kansas City, and how long did you remain there before leaving for Lawrence?

A. 197. About a half a day; probably a little over.

Q. 198. Where did you make your contract of employment with him for that Texas trip, in Kansas City or in Lawrence?

A. 198. Partly in Kansas City and in Lawrence both.

Q. 199. In what month and year did you start on what you called that Texas trip?

A. 199. About June, in the year 1876.

Q. 200. From what place did you and Hillmon start?

A. 201. From Lawrence.

Q. 202. Are you positive you and Hillmon started from Lawrence on what you call the Texas trip in the year of 1876?

A. 202. Yes, sir, to the best of my memory, I am.

Q. 203. Did you not on or about the 5th of April, A. D., 1879, in the office of George J. Barker, in Lawrence, and in his presence and in the presence of others state that "we," meaning yourself and Hillmon, "left Lawrence in May, 1877, to go to western Texas?"

(Objected to by plaintiff as incompetent, being an attempt to impeach the witness by proving different statements made by him touching an immaterial matter, and as irrelevant and immaterial and as not cross-examination.)

498 A. 203. I don't remember whether I did or not.

Q. 204. What was the terms of contract between you and Hillmon for this Texas trip; when were you to go, what were you to do and what were you to receive?

(Objected to by plaintiff as immaterial.)

A. 204. I was to work for him by the month by whatever the customary wages were, no designated price at that time. I was to go into Texas with him, and to freight and haul buffalo hides and skinned buffalo.

Q. 205. What was Hillmon going to Texas for?

A. 205. Going there to trade and traffic with buffalo hides, and hunt them also.

Q. 206. To what point in Texas did you and him agree to go?

A. 206. First to go to Sweet Water, Texas, and from no other designated point at that time.

Q. 207. When you and Hillmon started upon that trip was anyone with you?

(The plaintiff's counsel objects to the question as incompetent, irrelevant and immaterial.)

A. 207. No, sir.

Q. 208. How did you travel upon that trip?

(Objected to on same ground as last preceding question.)

A. 208. By railroad and wagon.

Q. 209. From what place to what place did you travel by railroad, and on what line of road did you travel?

(Objected to by plaintiff on same ground as the last preceding question.)

A. 209. From Lawrence to Fort Dodge on the Atchison, Topeka & Santa Fe, and from there by wagon to Sweet Water.

Q. 210. At what time of day did you and Hillmon leave Lawrence upon that trip?

(Objected to by plaintiff on same ground as question last above.)

A. 210. Don't remember what time.

Q. 211. Did you start in the day time or at night?

A. 211. In the day time.

Q. 212. Was Levi Baldwin in town the day you left?

A. 212. I don't remember whether he was or not.

Q. 213. Was not Levi Baldwin at the depot when you and Hillmon took the train for that western trip?

A. 213. I don't remember just now whether he was or not.

Q. 214. Where did you and Hillmon stay the night previous to your starting upon that western trip?

A. 214. I don't remember where he stayed; I think I stayed at the Place house.

Q. 215. Did not you and Hillmon take the train about noon, and did not Hillmon and Levi Baldwin come into town together that morning from Baldwin's farm?

A. 215. I don't remember whether they did or not.

Q. 216. In what month and in what time in the month did you and Hillmon get into Dodge City?

A. 216. It was in May or June; don't remember which month. I think it was one of the two; that is as near to the time of the month as I can get.

Q. 217. In what year was this?

A. 217. In 1876.

Q. 218. How long did you and Hillmon remain in Dodge City?

A. 218. Several days; I don't remember just the number of days.

Q. 219. From Dodge City to what place did you and Hillmon go?

A. 219. Sweet Water.

Q. 220. How long were you in making the trip from Dodge City to Sweet Water, Texas?

A. 220. About ten or twelve days or less, as near as I can remember.

Q. 221. Through what places did you pass in going from Dodge City to Sweet Water, Texas?

A. 221. No particular places; in fact, there was no places to go through.

Q. 222. Did you travel by any known road or trail, and if so, state the name by which the road or trail is known?

A. 222. Stage road from Dodge City to Sweet Water.

Q. 223. Did anyone accompany you and Hillmon upon this trip from Dodge City to Sweet Water, or any portion of it?

A. 223. Several of us sometimes, and sometimes we would be alone.

Q. 224. State the name of anyone who traveled in the same conveyance with you and Hillmon upon that trip from Dodge City to Sweet Water?

A. 224. Couldn't state any of their names. No particular one in our company; there were other wagons along.

Q. 225. Where did you and Hillmon obtain the guns and ammunition which you had upon that trip?

A. 225. Got some there at Dodge, and some at Sweet Water.

Q. 226. How many guns did you and Hillmon have; what kind were they, and where did you get them?

499 A. 226. One or two, I believe, he had with him; Sharp's rifles, got them at Dodge City; don't know what house or the name.

Q. 227. Did Hillmon have all the guns, and you none?

A. 227. He had the guns; I didn't own any of them. I used them sometimes.

Q. 228. Then of what did the outfit of yourself and Hillmon from Dodge City to Sweet Water consist?

A. 228. Wagon, team, guns, provisions, bed and ammunition.

Q. 229. What was the team, mules or horses?

A. 229. Horses.

Q. 230. Was it a new wagon or an old one?

A. 223. It was a wagon that had been used.

Q. 224. State as definitely as you can the date when you and Hillmon arrived at Sweet Water.

A. 224. I think it was in June, 1876.

Q 225. How long did you and Hillmon remain at Sweet Water?

A. 225. Several days; I don't remember just the number of days.

Q. 226. Were you engaged in business here, or did you simply remain or stay in camp at Sweet Water?

A. 226. Remained in camp and the restaurant there, and in no particular business.

Q. 227. From Sweet Water where did you and Hillmon go, and how did you travel?

A. 227. Went from thirty to about sixty miles south of Sweet Water; went in a wagon.

Q. 228. Was it the same conveyance that you had used from Dodge to Sweet Water?

A. 228. Same conveyance.

Q. 229. At what particular place did you stop?

A. 229. No particular place; camped at first one place and then another.

Q. 230. How long did you remain camped at or about the place you have last mentioned?

A. 230. Until about August or September.

Q. 231. State as denifitely as you can about how many weeks you were camped there.

A. 231. Couldn't state exactly; two weeks in one place and two or three in another place, as near as I can remember, and made three or four camps there. We were trying to stay right with the buffalo, and we came mighty near doing it.

Q. 232. From this place just mentioned where did you and Hillmon go?

A. 232. From that neighborhood we went south to a place called Double Mountain, Reynoldsville or Store.

Q. 233. In what county in Texas is Reynoldsville?

A. 233. I don't know.

Q. 234. Is it on any stream, and if so what?

A. 234. It is on what is called Salt Fork; some call it North Fork of Brazos river.

Q. 235. State definitely when you and Hillmon arrived at Reynoldsville.

A. 235. Couldn't state; I don't remember just what time.

Q. 236. State as definitely as you can.

A. 236. It was in the early part of the fall, as near as I can remember, of the year 1876.

Q. 237. From the time you and Hillmon left Lawrence up to this time, had you and Hillmon been engaged in any other business except hunting buffalo?

A. 237. No other business, except freighting hides, buffalo hides.

Q. 238. And from what place to what place had you freighted buffalo hides upon this trip?

A. 238. To Sweet Water from off the range around where we were camping.

Q. 239. Were the hides freighted by you and Hillmon to Sweet Water taken from Buffalo killed by you or were they purchased?

A. 239. They were both. Killed some ourselves and purchased some.

Q. 240. To whom were these hides sold in Sweet Water?

A. 240. To Lee and Runnels, as near as I can remember.

Q. 241. State the distance, as near as you can, from Reynoldsville to Sweet Water.

A. 241. About two hundred miles.

Q. 242. When you and Hillmon arrived at Reynoldsville did you have the same team you had when you left Dodge City?

A. 242. Yes, sir; the same team and another one with it.

Q. 243. Where did you get the second team, and from whom?

A. 243. From Sweet Water. I don't know from whom he got the team.

Q. 244. Another pair of horses? A. 244. Mules.

Q. 245. Was there any one with you and Hillmon when you arrived at Reynoldsville?

A. 245. Yes, sir; when we got in the neighborhood.

Q. 246. Who was it, or who were they that was with you?

A. 246. Mike West, Thorn Collins, the other name I don't remember.

500 Q. 247. Were these men or either of them in the employ of Mr. Hillmon? A. 247. Yes, sir.

Q. 248. In what capacity was they employed?

A. 248. Skinning buffalo.

Q. 249. When and where did he hire them?

A. 249. In Sweet Water, when we first went down.

Q. 250. When you arrived at Reynoldsville how long had these men been working for Hillmon?

A. 250. Had been working for two or three months.

Q. 251. How long did you and Hillmon remain in and about Reynoldsville?

A. 251. Remained there between ten and twelve months, as near as I can remember.

Q. 252. What were you and Hillmon doing during the time you and Hillmon were there?

A. 225. Hillmon was buying, killing and selling buffalo, buying and selling buffalo hides and killing buffalo.

Q. 253. What was you doing?

A. 253. I was freighting hides for him most of my time with an ox train.

Q. 254. How long did the three men you have mentioned, or either of them, continue to work for Hillmon?

A. 254. I don't remember just how long. Up to Christmas, them two, near about. I don't remember just how long.

Q. 255. Which two? A. 255. West and Collins.

Q. 256. Were you freighting during this time with the ox team to Sweet Water?

A. 256. No, sir, I was freighting to Sherman and to Fort Griffin.

Q. 257. During the time Hillmon was at Reynoldsville, or about there, did he have a partner or associate in business?

A. 257. He had no partner. I don't know what you mean by associate in business.

Q. 258. During the time Hillmon was at Reynoldsville did you work for any one except him?

A. 258. No one else but him.

Q. 259. Was he engaged in any business other than that you have mentioned?

A. 260. No other business that I [now] anything of.

Q. 261. During his stay at Reynoldsville state with whom Hillmon boarded?

A. 261. Couldn't state who. Don't remember the names.

Q. 262. Did you and he board together during the time you were at Reynoldsville or during any portion of the time you were there?

A. 262. Boarded together a good deal in his camp together.

Q. 263. Did you board together at any other place?

A. 263. No other place that I remember anything of, only in camp.

Q. 264. Did Hillmon camp out and board in his camp during the entire time he was in and about Reynoldsville?

A. 264. About all the time that I know anything of. When he was away from camp I don't know where he boarded.

Q. 265. How far was his camp from this place or town of Reynoldsville?

A. 265. Different distances. All the way from sight there to 60 and 70 miles.

Q. 266. During this ten or twelve months you have mentioned what was the post-office address of yourself and Hillmon?

A. 266. Griffin was the main post office. Mail was forwarded from there to Reynoldsville and to McCammay's store.

Q. 267. Was there a post-office at Reynoldsville?

A. 267. I don't know whether it was a regular post-office or not?

Q. 268. Did you or Hillmon during that time receive mail through the post-office at Reynoldsville?

A. 268. I didn't. I don't remember whether he did or not.

Q. 269. Was there a store or hotel at Reynoldsville?

A. 269. Store there, but no hotel. There was restaurants, I believe.

Q. 270. State the name of the proprietor of the store there?

A. 270. I couldn't call his name now. I don't remember.

Q. 271. State the name of any business man residing there during the time you and Hillmon were living in that vicinity?

A. 271. Akers; I don't remember the given name, and a man by the name of Rath.

Q. 272. In what business was each engaged?

A. 272. Rath was a hide buyer, and Akers was a restaurant man.

Q. 273. Who assisted you in freighting hides to Griffin?

A. 273. The hands we had driving team.

501 Q. 274. How many of them were they, and what were their names?

A. 274. They was two; John Caffey was one, I don't remember the other's name.

Q. 275. Of how many yoke of oxen did your train consist?

A. 275. Thirty-two yoke, when we had them all with us; we didn't have only part of the outfit with us then.

Q. 276. What portion of the outfit did you have with you, and where was the balance of the outfit?

A. 277. I had about half of it, and the other was in Hillmon's camp.

Q. 278. How many wagons did you have?

A. 278. In all we had eleven wagons; nine ox wagons and two horse wagons.

Q. 279. How many of these wagons did you use at any one time in freighting buffalo hides to Griffin?

A. 279. Six only, I believe at Griffin, if I remember right.

Q. 280. State the distance from Reynoldsville to Griffin.

A. 280. About eighty or one hundred miles.

Q. 281. Besides the men assisting you in freighting, and what other men were there working for Hillmon?

A. 281. There was three, four or five others, I don't remember their names; I might remember one or two.

Q. 282. State the names of those you remember.

A. 282. Jim Dobbs, and Cook, was one; the others I don't remember their names.

Q. 283. Did Hillmon ever go with you from Reynoldsville to Griffin? A. 283. No, sir.

Q. 284. When, where and from whom did he get this train?

A. 284. He got it from a man by the name of McCamey; it was in the winter season '76 and '77, as [as] well [—] I remember, and at his store on the range close by, west of Griffin about 50 or 75 miles.

Q. 285. What part of the business of killing buffalo and freighting hides did Hillmon, himself perform?

A. 285. He, part of the time, killed buffalo himself, and in other times he would be buying hides around camp and have them hauled up to his camp.

Q. 286. From Reynoldsville where did you and Hillmon next go? A. 286. Went to Mexico.

Q. 287. How were the Buffalo killed; by rifles?

A. 287. Yes, sir.

Q. 288. When did you and Hillmon leave Reynoldsville, state definitely, with Mexico?

A. 288. As well as I can remember we left there in June or July, 1877.

Q. 289. How did you travel; of what did your train consist, and who were with you?

A. 289. Traveled with oxen and a mule team; the train consisted of about thirty yoke of oxen and nine or ten wagons, a mule team, two saddle ponies, the wagons were trailed up together and made three teams out of the cattle; four teamsters, Hillmon and myself were the persons.

Q. 290. State the names of the teamsters.

A. 290. John Caffey, Jim Dobbs, John Cook and Joe, I don't remember his other name; I know his name was Joe.

Q. 291. State the residence of either of said teamsters.

A. 291. I don't know.

Q. 292. To what person or firm did you sell the hides which you freighted to Griffin? A. 292. To McCamy.

Q. 293. Do you mean McCamy, the same man from whom Hillmon got the train? A. 293. Yes, sir, the same man.

Q. 294. Did he live or do business at Griffin?

A. 294. He done business there at Griffin?

Q. 295. State definitely when you delivered the last load of hides at Griffin, and who was with you?

A. 295. It was in the winter of '76 and '77; there was two teamsters with me, the same two was with me both trips.

Q. 296. After delivering this last load of hides at Griffin, how long did you and Hillmon remain in and about Reynoldsville?

A. 296. Until about June or July from that time on from the time we delivered the last load of hides?

Q. 297. To what place did you freight your hides after that? A. 297. To McCamy's store.

Q. 292. State definitely when you delivered the last load of hides at McCamy's store.

A. 292. Near about the first of June, as well as I remember.

Q. 293. What was the next place at which you stopped after leaving Reynoldsville?

A. 293. Las Vegas, New Mexico.

Q. 294. Did you and Hillmon go direct from Reynoldsville to Las Vegas, New Mexico? A. 294. Yes, sir.

Q. 295. When did you and Hillmon arrive at Las Vegas, New Mexico?

502 A. 295. In July, as well as I can remember, 1877.

Q. 296. How far is Reynoldsville from Las Vegas, New Mexico?

A. 296. I don't know; I guess it was 150 or 175 miles.

Q. 297. Did you have the same train and teamsters with you with which you started from Reynoldsville?

A. 297. Yes, sir, just the same.

Q. 298. In what business, if any, did Hillman engage at Las Vegas? A. 298. None that I know of.
Q. 299. How long did you and Hillmon remain at Las Vegas? A. 299. A day or two only.
Q. 300. From Las Vegas where did you and Hillmon go with your train? A. 300. Trinidad, Colorado.
Q. 301. Were you at Fort Elliot?
A. 301. Yes, sir. Been there once.
Q. 302. Was Hillmon with you? A. 382. Yes, sir.
Q. 303. When were you and Hillmon at Fort Elliot?
A. 303. When we was at Sweet Water; when we first went down.
Q. 304. In what year was that? A. 304. In 1876.
Q. 305. Were you and Hillmon at Camp Supply?
A. 305. Went through there.
Q. 306. Were you and Hillmon ever at Camp Supply and Fort Elliot on more than one occasion?
A. 306. No, sir, never was.
Q. 307. When did you and Hillmon leave Fort Elliot?
A. 307. In the summer of 1876. It was right there within three miles of Sweet Water, where we were all summer, and I happened to be there one day with him.
Q. 308. From Fort Elliot did you and Hillmon not go to Croton Creek, Texas, in the fall of 1877?
A. 308. No, sir. Went there in the summer.
Q. 309. State if you did not on or about the 5th day of April, 1879, in the office of George J. Barker, in the city of Lawrence, in his presence and in the presence of others, make the following statement:

"We," meaning Hillmon and yourself, "left Fort Elliot in fall of 1877 and went to Croton Creek, Texas, about 175 miles and continued same business?"

(Objected to by plaintiff as incompetent, being an attempt to impeach the witness by proving different statements concerning an immaterial matter and as irrelevant, immaterial and not a proper cross-examination.)

A. 309. I made a statement similar to that, but as to the date of the year I might have been mistaken.
Q. 310. Did you not make and swear to the statement I have just made at the place and time mentioned?

(Objected to by plaintiff, same grounds as the question last preceding.)

A. 110. I don't remember whether I swore to the statement or not, but I made similar statements; and Sweet Water and Fort Elliot being the same place I could[e]n't well leave one without leaving the other.

(Defendant moves to strike out the last answer, for the reason that it is not responsive to the question.)

Q. 311. The question is not whether you made a similar statement, but is, did you not make the statement at the time and place mentioned to which your attention has been called in question 309?

(Objected to by plaintiff on same ground as question last preceding.)

A. 311. I made a statement at the place, but just whether it was that statement or not I don't remember.

Q. 312. Did not you and Hillmon leave Croton Creek in July, 1878, and go from there to the town of Las Vegas, New Mexico?

(Objected to by plaintiff on same ground as question last above).

A. 312. No, sir.

Q. 313. Did you not state at the time and place mentioned in question 309, that "We," meaning Hillmon and yourself, "left Croton Creek in July in 1878 and went into Mexico to the town of Las Vegas?

(Objected to by plaintiff on same ground as question last preceding.)

A. 313. I made that statement, but as to it being that year I don't know whether I stated it was that year or not.

Q. 314. When you and Hillmon went from Croton Creek to Las Vegas how many teams did you have, and who drove them?

A. 314. Had four teams. John Caffey, Jim Dobbs, John Cook and Joe; don't remember his last name.

Q. 315. Did you not state at the time and place mentioned in question in 309, I drove one team, Jerry Herrigan drove one, and one fellow we called Kid drove one, and a fellow we called Hubbell drove one?

503 (Objected to by plaintiff as incompetent, being an attempt to impeach the witness by proving contradictory statements on an immaterial matter and as irrelevant and immaterial and not cross-examination.)

A. 315. I made similar statements to that, but the names I wouldn't be positive about. This man we called Joe was called Kid, too, and as to my driving team I did drive it part of the time.

Q. 316. Did you not state at the time and place mentioned that from Croton Creek to Las Vegas, Mexico, you drove one

am, Jerry Herrigan drove one and one fellow we called Kid rove one and a fellow we called Hubbell drove one.

(Objected to by plaintiff on same ground as question last receding, and for the additional reason that the question has een once asked and fully answered.)

A. 316. I am not certain whether I made just such a state- ent or not; those names that you spoke of were men working or Hillmon before we started.

Q. 317. Did you and Hillmon ever go from Croton Creek o Las Vegas, New Mexico, more than once?

(Objected on same ground as question last preceding it.)

A. 317. No, sir, never did.

Q. 318. And out that trip did you not have four teams, and did you not drive one team, Jerry Herrigan drive one, a man called Kid drive one, and a man called Hubbell drive one?

(Objected to on the same ground as the question last above.)

A. 318. We had four teams on that trip; I drove a team part of the time, Herrigan didn't drive any team on that trip, Joe the Kid drove one, Caffey drove one, and Dobbs drove one, Cook drove one.

Q. 319. Did Hubbell drive a team on that trip?

A. 319. No, sir.

Q. 320. Was Hubbell and Herrigan with you on that trip?

A. 320. No, sir; they was with us before that, but they was not with us on that trip.

Q. 321. Did you not state at the time and place mentioned in Question 309, in substance that Jerry Herrigan and Hubbell each drove a team on that trip?

(Objected to by plaintiff as incompetent for reasons stated in objection to Question 316.)

A. 321. I don't remember whether I stated their names or not; I made such a statement, but as to using their names, I don't remember whether I did or not.

Q. 322. From Las Vegas did not you and Hillmon go to Fort Union? A. 322. Yes, sir, we went.

Q. 323. When did you and Hillmon arrive at Fort Union, and who were with you?

A. 323. In July, as well as I can remember; the four drivers, myself and Hillmon.

Q. 324. Was Herrigan with you at this place?

A. 324. No, sir.

Q. 325. Was Hubbell? A. 325. No, sir.

Q. 326. How long did you and Hillmon remain at Fort Union?

A. 326. Didn't stop there; passed right on through.

Q. 327. During the time you were in Texas or New Mexico with Hillmon did you freight anything but hides?

A. 327. Yes, sir, we freighted grain, flour, "some groceries, none to amount to anything."

Q. 328. For whom did you haul the merchandise above mentioned? A. 328. For McCamy.

Q. 329. Were you and Hillmon or the men in his employ engaged in picking up and hauling bones? A. 329. No, sir.

Q. 330. From Fort Union to what place did you and Hillmon next go? A. 330. To Trinidad.

Q. 331. When did you and Hillmon arrive at Trinidad?

A. 331. In July or August; the latter part of July or the first of August.

The further taking of these depositions is on account of the arrival of the hour for adjournment postponed until to-morrow morning at 9 o'clock, January 3d, A. D. 1882.

[Seal] HENRY McGREW,
Notary Public.

My commission expires April 21, 1883.

January 4th, A. D. 1882. The further taking of these depositions is hereby resumed.

HENRY McGREW,
Notary Public.

January 4th, A. D. 1882.

Q. 332. When you and Hillmon arrived at Trinidad did you have the same train with which you left vicinity of Reynoldsville and Las Vegas, New Mexico?

A. 332. Yes, sir, the same train with the exception of two yoke of cattle; traded them off for a pair of mares.

Q. 333. State how much Hillmon paid for that train, and how he paid for it.

504 (Plaintiff's counsel objects to this question because it calls for immaterial, irrelevant and incompetent testimony, and second, that the inquiry is not a legitimate subject of cross-examination.)

A. 333. I don't know just what he did pay for it; he paid for it in buffalo hides and freighting, as far as I know.

Q. 334. Was this train loaded from Las Vegas to Trinidad?

(Same objection as to last preceding question.)

A. 334. No, sir.

Q. 335. Was it loaded from the vicinity of Reynoldsville to Las Vegas?

(The same objection is made by plaintiff's counsel as to last preceding question.)

A. 335. No, sir.

Q. 336. Is it not a fact that McCamy furnished Hillmon with this train to freight with, and that while Mr. Hillmon had it in his possession he caused it to be driven to Colorado and sold?

(Objected to by plaintiff's counsel for the following reasons: First, because the question calls for immaterial, irrelevant and incompetent testimony. Second, that the subject of inquiry is not a legitimate subject of cross-examination. Third, because the question is leading.)

A. 336. Not that I know anything about. I supposed the train belonged to Hillmon, and that he had a right to go any place he pleased with it.

Q. 337. Did not Hillmon have difficulty about this train, and was he not accused of running this train out of the country?

(Objected to by plaintiff's counsel on the same ground as the last preceding question, and also for the reason that the question calls for hearsay evidence.)

A. 337. Not that I know anything of.

Q. 338. On the 4th day of April, A. D. 1879, in the office of George J. Barker, in Lawrence, Kansas, were you not shown a postal card from Griffin, Texas, directed to Mr. Brocklesby, city marshal of Lawrence, inquiring if a man by the name of Hillmon lived in Lawrence, and stating in substance that he had a difficulty with reference to a train of cattle, also stating that Hillmon formerly lived near Grass Hopper, and if you were not asked if Hillmon was ever at Griffin, Texas, and if in reply thereto you did not state that he, Hillmon, had been at Griffin, Texas, and that you was with him there?

(Objected to by plaintiff's counsel. First, because the question calls for immaterial, irrelevant and incompetent testimony. Second, because the subjects of inquiry are not proper subjects of cross-examination. Third, because the question is leading. Fourth, because the question calls for the oral statement of the contents of a written instrument which is not the best evidence of such contents. Fifth, the question contains inquiries as to several separate and distinct subjects. Sixth, if the question is asked for the purpose of obtaining an answer from the witness to be contradicted it is incompetent, because the subjects of inquiry are immaterial to the issues in this case.) (Objection sustained.)

A. 338. I don't have any knowledge of anything of the kind, or being shown anything of the kind; and as stating whether I said he was ever in Griffin or I ever met him there or not I don't remember.

Q. 339. When, where and to whom did Hillmon sell this train?

(Objected to by plaintiff's counsel on the same ground as the last preceding question.)

A. 339. In the month of August, as near as I can remember, in the year 1877, in Trinidad and Pueblo, Colorado. The names to whom sold I don't remember of the persons to whom sold.

Q. 340. What part of the train was sold at Trinidad?

(Objected to by plaintiff's counsel for the reason that the question calls for irrelevant and immaterial testimony.)

A. 340. Six or seven yoke of cattle, two or three wagons, a pair of mares and harness and one or two ponies and a pair of mules.

Q. 341. How much did he receive from the sale at Trinidad?

(Same objection by plaintiff as to last preceding question.)

A. 341. I could[e]n't say; not knowing.

Q. 342. What part of the train was sold at Pueblo?

A. 342. The rest of the train—cattle and wagons and two saddle ponies.

Q. 343. How much did he receive for this portion of the train?

(Objected to by plaintiff on the same ground as the last preceding question.)

A. 343. [Coulden't] say; not knowing.

Q. 344. What teamsters were with you at Pueblo?

(Objected to by plaintiff on the same ground as the last preceding question.)

A. 344. Joe, the Kid, and I couldn't call the other name, for I don't remember.

Q. 345. You were paid off in Pueblo, were you not?

(Objected to by plaintiff on the same ground as the last preceding question.)

A. 345. Yes, sir.

Q. 346. How much did Hillmon pay you?

505 (Objected to by plaintiff on same ground as the yast preceding question.)

A. 346. About three hundred dollars near as I can remember.

Q. 347. How long did you and Hillmon remain in Pueblo?

A. 347. About two days.

Q. 348. State in what month and what day of the month you and Hillmon left Pueblo?

A. 348. In the month of August in 1877, as well as I can remember.

Q. 349. Where did you and Hillmon go from Pueblo, and how did you travel?

A. 349. I came to Wyandotte and he came to Lawrence. On the cars.

Q. 350. Over what road?

A. 350. The Atchison, Topeka & Santa Fe.

Q. 351. When did you and Hillmon arrive at Lawrence?

A. 351. August or September, 1877, as near as I can remember.

Q. 352. When did you first become acquainted with Sally E. Quinn, the woman whom Hillmon married?

A. 352. In the year of 1876, as well as I can remember.

Q. 353. Where? A. 353. At Lawrence, Kansas.

Q. 354. After your return to Wyandotte in 1877 when did you next see Hillmon?

A. 354. In August or September, of 1877, as well as I can remember.

Q. 355. When did you first see Levi Baldwin after your return from the west? A. 355. I don't remember just now.

Q. 356. State about how long it was after you got back.

A. 356. Inside of two or three months.

Q. 357. Is that as definitely as you can fix the time?

A. 357. Yes, sir, it is just now.

Q. 358. When and who was with Baldwin when you first saw him after your return from the west?

A. 358. I don't remember when, and I don't remember who was with him at present.

Q. 359. Where did you see Hillmon the second time after your return, and who was with him on that occasion?

A. 359. I don't remember just where, either at my father's or at Lawrence. I don't remember who was with him. Sometimes he was down here and I was up to Lawrence, back and forward three or four different times.

Q. 360. When you were at Lawrence did you see Levi Baldwin? A. 360. Yes, sir, I saw him there at Lawrence.

Q. 361. Was Baldwin with Hillmon when Hillmon was down here?

A. 361. I don't remember whether he was either time or not.

Q. 362. State as definitely as you can the first time you went to Lawrence after your arrival home in 1877?

A. 362. In two or three weeks after I came home, as near as I can remember.

Q. 363. Did you and Hillmon go out to Baldwin's on that occasion? A. 363. I think we did, as near as I can remember.

Q. 364. Was Baldwin living on the same farm that he was living on at the time you went west in 1876?

A. 364. Yes, sir, the same place.

Q. 365. How long did you remain in and about Lawrence at that time?

A. 365. I don't remember. A day or two, as near as I can guess at it.

Q. 366. Do you know at that time whether Hillmon was making his home with Baldwin or at Lawrence?

A. 366. Couldn't say whether he called his home at Baldwin's or at Lawrence.

Q. 367. How long was it after that that you again saw Hillmon, and where did you see him?

A. 367. He came down home with me, if I remember right. Saw him at the stock yards, Kansas City and Wyandotte. Was with him at the time.

Q. 368. Was Levi Baldwin with him at either of the places you have mentioned?

A. 368. No, sir, I think not.

Q. 369. When did you next go to Lawrence?

A. 369. In November or December of that year, as well as I remember—of 1877.

Q. 370. Who went with you? A. 370. I went alone.

Q. 371. Did you see Hillmon on that occasion?

A. 371. Yes, sir.

Q. 372. Stay with him?

A. 372. Yes, sir, part of the time.

506 Q. 373. Did you and Hillmon go out to Levi Baldwin's on this occasion? A. 373. I think not.

Q. 374. Levi Baldwin was in town during that visit was he not? A. 374. I don't remember whether he was or not.

Q. 375. Did you not see and converse with Levi Baldwin during the time of your visit in Lawrence in November or December of 1877? A. 375. I don't think I did.

Q. 376. After your second visit to Lawrence, when and where did you next see Hillmon?

A. 376. If I remember right I next saw him in Lawrence. When he first came down from Lawrence he bought a lot of hogs, about 250 head of hogs, and drove them out to my father's and fed them there; I was taking care of the hogs there for him.

(The defendant moves to strike out all of witness' answer in reference to hogs for the reason that it [—] not in responsive

to the question; it is simply the uncalled for statement of the witness.)

Q. 377. Did you not on or about the 5th day of April, A. D. 1879, in the office of George J. Barker in Lawrence, Kansas, state in his presence and in the presence of others, "We arrived at Pueblo last of August, 1878; he paid me off there, stayed in Pueblo only a few days whence we came direct home."

(Objected to as incompetent, being an attempt to impeach the witness by proving different statements in relation to an immaterial matter, and as irrelevant, immaterial and not legitimate cross-examination.)

A. 377. Yes, sir, I made a statement similar to that, but as to the date of the year I must have been mistaken at that time.

Q. 378. After your visit to Lawrence in November or December, 1877, as you have stated, when did you next go up there?

A. 378. I went up there in the month of December, if I remember right, a while before Christmas?

Q. 379. State the time of this visit as definitely as you can with reference to Christmas.

A. 379. A few days before Christmas, as well as I can remember, in the year 1877.

Q. 380. Are you positive as to the year?

A. 380. I wouldn't be right positive of it.

Q. 381. Was this last visit to Lawrence a while before Christmas, of which you have spoken, before or after John W. Hillmon was married to Sally E. Quinn?

A. 381. It was afterwards.

Q. 382. Did you see John W. Hillmon on the occasion of that visit? A. 382. Yes, sir.

Q. 383. Did you see Levi Baldwin also?

A. 383. Yes, sir.

Q. 384. How long before your visit to Lawrence about Christmas, 1877, was Hillmon married to Miss Quinn?

A. 384. Don't know just how long?

Q. 385. State as nearly as you can.

A. 385. Two or three months, as near as I can guess at it.

Q. [286.] Did you and Hillmon go out to Levi Baldwin's during your visit to Lawrence, on that occasion?

A. 386. Don't think we did.

Q. 387. Was Levi Baldwin in Lawrence, and did he stay over night at Hillmon's house during that time?

A. 387. He was in Lawrence; I don't know where he stayed.

Q. 388. At this time where was Hillmon living?

A. 388. West of the court house in Lawrence, as near as I can tell.

Q. 389. Was it on the same street running east and west on the same street on which the court is situate?

A. 389. I think it was.

Q. 390. With whom was he living at that time?

A. 390. He was living at Mrs. Judson's place, as near as I can remember the name; he was living with his wife.

Q. 391. Was there no other persons or family living in the house with Hillmon at that time?

A. 391. No one but Mrs. Judson and her son, that I know of.

Q. 392. How long did you remain in and about Lawrence at this time?

A. 392. Two or three days, as well as I remember.

Q. 393. Was Levi Baldwin in Lawrence during every day of your stay on that visit?

A. 393. Don't know whether he was or not.

Q. 394. Did you visit Mr. and Mrs. Hillmon at the house you have mentioned?

A. 394. Yes, sir, a time or two.

Q. 395. Besides Mr. and Mrs. Hillmon, Mrs. Judson and her son, what other persons residing in the city of Lawrence were you acquainted with at that time; give the names of two such persons if you can?

507 (Objected to by plaintiff as immaterial and irrelevant.)

A. 395. Was acquainted with Mrs. Hillmon's sister, I don't remember her given name, who was living with Mrs. Hillmon; acquainted with no other particular one that I remember of.

The further taking of these depositions is on account of the arrival of the hour of adjournment postponed until to-morrow morning at 9 o'clock.

[Seal] HENRY McGREW,
Notary Public.

My commission expires April 21, 1883.

January 4th, 1881.

January 5th, A. D. 1882. The further taking of these depositions is hereby resumed pursuant to adjournment.

Q. 396. Was this visit to Lawrence which you have mentioned as being about Christmas, 1877, the time referred to, by you, in your direct examination as being the time when you was employed by Hillmon to go southwest from Wichita with him to hunt up a cattle ranch?

A. 396. Yes, sir, that was about the time; soon after I was under his employ.

Q. 397. Was the contract of employment made between you and Hillmon during that visit of yours to Lawrence?

A. 397. Yes, sir, it was at that time, the year 1878; if I stated it was in 1877 I was mistaken.

Q. 398. Is it a fact that you were employed by Hillmon at that time for the purpose of going with him to hunt a cattle ranch, and for no other purpose?

A. 398. It was for no other purpose; no specified price for labor until he located a stock ranch, only to bear my expenses.

(The defendant moves to strike out all of the foregoing answer of the witness except the words, "It was for no other purpose," for the reason that the rest of said answer is not responsive to the question, but is simply the uncalled for statement of the witness.)

Q. 399. When did you and Hillmon leave Lawrence?

A. 399. A few days before Christmas, as well as I can remember.

Q. 400. In what year?

A. 400. In 1878, if I remember right.

Q. 401. Did you and Hillmon leave Lawrence at that time for the sole purpose of hunting a stock ranch, or was that the ostensible purpose?

A. 401. It was for the purpose of locating a stock ranch and hunting one; that was our only purpose.

Q. 401. On or about the 4th day of September, A. D. 1879, in Platte County, State of Missouri, in the presence of W. J. Buchan, of Wyandotte, Kansas, did you not make the following statement, to wit: "Along about the 10th of December, 1878, John W. Hillmon, Levi Baldwin and myself talked about and entered into a conspiracy to defraud the New York Life Insurance Co., and the Mutual Life of New York out of some money, to be obtained by means of affecting a policy or policies on the life of said John W. Hillmon; Baldwin was to furnish the money to pay the premiums and to keep up the policies in case they had to be renewed. Our orginal arrangement was to get Hillmon's life insured for fifteen thousand but it was afterward changed to twenty-five thousand dollars. Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find a subject to pass off as the body of John W. Hillmon, for the purpose of obtaining the insurance money aforesaid. We had no definite plan of getting the subject, but to in some way get one, the final termination of the matter was the last idea thought of. Our first trip out from Wichita the last days of December, while the snow was on the ground, we expected to find a subject, that would appear to be Hillmon, frozen to death, and that could not be identified only by the clothes and papers found upon it, and so could pass off as

Hillmon. We went from Wichita to Medicine Lodge, then direct to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, thence to Larned and on to Wichita via Hutchinson; Hillmon and myself were entirely alone on this trip. Iliff of Medicine Lodge saw Hillmon on this trip. We put up at his stable," and did you not at said time and place, sign a written statement and swear to the same before one Francis M. McDonald, a Notary Public, and did not said statement in writing include the statement embraced in this question?

(Objected to by plaintiff's counsel on the ground of incompetency, because the original statement being in writing and in the possession of the defendant is the best evidence, and should be produced, shown to the witness and offered in evidence.)

A. 401. Myself and Buchan, together, made such a statement similar to that at my brother's in Platte county. Don't think the statement included over half as much as this. I signed it or swore to it in Parkville, I don't remember which, with the understanding that that paper should never be used in law, and couldn't be used. He only wanted it to show to the insurance men and no one else, and was to hand it back to me and I was to destroy it myself, and I done so. He said he only wanted this statement from me to show to the insurance men in order that he should get his pay for his work, stating that the statement was not lawful and wouldn't injure me hereafter any more at all, and if I didn't the insurance men would hunt me down and have me put in the penitentiary for murder, and by doing this I would be released from any other trouble from them.

508 (The defendant moves to strike out all of the witness's answer commencing with the words—with the understanding—for the reason that the same is not responsive to any question, but is simply the uncalled for statement of the witness, and because the understanding and that portion of the statement of the witness is not competent evidence and is irrelevant to any issue in this case.)

Q. 402. Did you not both sign and swear to the statement in writing, to which your attention has been called in question 401?

A. 402. Don't remember whether I did or not.

Q. 403. Did you sign it?

A. 403. I don't remember whether I did or not.

Q. 404. Did you not go with said Buchan to the office of Francis M. McDonald and swear to said statement before him?

. 404. I went with him to that office. I don't remember
ther I swore to it or not.
. 405. In September, 1879, where was the office of Fran-
M. McDonald and in what business was he engaged?
. 405. McDonald's office was in Parkville. A lawyer was
business, I believe.
. 406. What did you go to his office with Buchan for?
. 406. To sign or swear to the statement he and I had
de. I think that was our business there, as well as I re-
mber.
. 407. Did you do at his office what you went there for
purpose of doing?
. 407. Yes, sir, I suppose we did. Went away from there
isfied.
. 408. What did you and Buchan do at this time in Mc-
nald's office?
. 408. He done a little writing, I believe, and looked on
e map to find for the county of Kingman and the town of
ingman, and for me to sign or swear to this paper or state-
ent he and I had there. That was all the business that I
ow of that we was there for.
Q. 409. State what you did in the office of McDonald, in
rkville, when you was there with said Buchan at this time?
A. 409. Didn't do anything, only swear or sign this paper
statement we had there.
Q. 410. Did not the paper which you have stated you
gned or swore to in McDonald's office, in the presence of
id Buchan, in Parkville, Platte county, state of Missouri,
ntain the statement to which your attention has been called
nd which is contained in question 401 of this deposition?
A.. 410. Similar to that.
Q. 411. Did it not contain that very statement?
A. 411. I don't think it did, as well as I can remember.
Q. 412. Do you swear that it did not contain that very
tatement?
A. 412. Wouldn't swear it. I don't think it did, to the
est of my memory.
Q. 413. State definitely what portion, if any, of the state-
ment contained in question 401 was not included in the state-
ment or paper which you have testified to signing or swearing
to in McDonald's office?

(Objected to by the plaintiff as incompetent, for the reason that the original paper which was signed or sworn to is in the possession of the defendant or its attorneys, and can and should be produced for identification by the witness, and as the best evidence in this case and as otherwise incompetent.)

A. 413. Can't testify definitely. I don't remember.

Q. 414. Did you not, at the time and place mentioned in question 401, make the following statement to said Buchan: "Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find the subject to pass off as the body of John W. Hillmon, for the purpose of obtaining the insurance money aforesaid;" or did not the statement or paper which you have testified to signing or swearing to in McDonald's office contain said statement?

(Objected to on same ground as the question last preceding.)

A. 414. Yes, sir, that is about the substance of it as near as I remember.

Q. 415. When you and Hillmon left Lawrence together in December, 1878, to what place did you go?

A. 415. To Wichita, Kansas, by railroad.

Q. 416. What time of day did you leave Lawrence?

A. 416. Don't remember what time of day.

Q. 417. Did you leave at night or in the day time?

A. 417. In the day time.

Q. 418. From what place in Lawrence did you start to the depot on that day?

A. 418. Started from Hillmon's.

Q. 419. Who was at Hillmon's house that morning when you and Hillmon left for the depot?

A. 419. His wife and wife's sister and Judson's folks, as well as I can remember was all.

Q. 420. Was Mrs. Hillmon confined to her bed or was she up that morning you left for the depot?

A. 421. She was up and about the house.

Q. 422. What was the condition of the weather the day you left?

A. 422. Tolerably cold weather; snow on the ground.

509 Q. 423. Can you state the day of the month you and Hillmon started for Wichita?

A. 423. I can't the day. A few days before Christmas, as well as I remember.

Q. 424. Is it not a fact that at that time the weather was very cold; that there was so much snow on the ground that sleighs were in general use in Lawrence?

A. 424. I don't remember whether it was so very cold or not. A good deal of snow on the ground.

Q. 425. Was Levi Baldwin at the depot when you and Hillmon left for Wichita?

A. 425. I don't remember whether he was at the depot or not. I think he was in town that day, as well as I remember.

Q. 426. Was not Levi Baldwin at Hillmon's house the morning you left, or did he not go to the depot with you the morning you and Hillmon left?

A. 426. Don't remember whether he was at the house or not. I think, as well as I remember, he was in town, and while I was on my way to the depot I think I saw him.

Q. 427. You and Hillmon arrived at Wichita on the night of the same day you left Lawrence, did you not?

A. 427. As well as I remember I believe we did.

Q. 428. State, if you know, whether you and Hillmon arrived at Wichita on the night of the same day you left Lawrence?

A. 428. Not knowing I couldn't state whether it was on the same night or not.

Q. 429. When you and Hillmon arrived at Wichita in December, 1878, at what hotel did you and he stay the first night? A. 429. I don't know the name of the house.

Q. 430. How long did you and he remain at the hotel at which you stopped the first night in Wichita?

A. 430. Over night only.

Q. 431. From that hotel to what hotel did you and Hillmon go? A. 431. To Draws & Bidde, the Globe house.

Q. 432. How long did you and Hillmon remain at the Globe hotel at this time? A. 432. About a week.

Q. 433. Were you and Hillmon stopping at the Globe hotel Christmas day, 1878? A. 433. Yes, sir.

Q. 434. Had Hillmon bought a pair of ponies and a wagon at that time? A. 434. Yes, sir.

Q. 435. The next day after Christmas, 1878, you and Hillmon left Wichita with a pair of ponies and a wagon, did you not? A. 435. Yes, sir, for Medicine Lodge.

Q. 436. Was there any one with you and Hillmon when you left Wichita on this occasion? A. 436. No, sir.

Q. 437. Where did you stay the first night after leaving Wichita on this trip? A. 437. Couldn't call the name.

Q. 438. Was it at a hotel, or what is known or commonly called a ranch in that country? A. 438. A ranch.

Q. 439. How far was that ranch from Wichita, in what direction and on what road?

A. 439. Thirty-five or forty miles west from Wichita, and Medicine Lodge road.

Q. 444. Where did you and Hillmon stay the second night out from Wichita?

A. 444. Stayed at a ranch sixty or seventy-five miles west of Wichita.

Q. 441. On what road?

A. 441. Wichita and Medicine Lodge road.

Q. 442. Who kept this ranch?

A. 442. Don't know the name.

Q. 443. Was this ranch situated near any stream, if so, what?

A. 443. No, not any that I know of; it was on the high prairie.

Q. 444. How far was the house from the road, and in what direction, and what kind of a house was it at which you and Hillmon stopped the second night out from Wichita?

A. 444. About half a mile south of the road, and in a sod house.

Q. 445. Of whom did the man's family consist who lived there?

A. 445. The man and his wife, his brother and child, the best I can remember.

Q. 446. State where the house at which you and Hillmon stayed the first night out from Wichita was located, with reference to the road you traveled, the kind of house and the number of the members of the family who occupied it.

A. 446. About one hundred or two hundred yards north of the road, a frame house, a man and his wife and two or three children.

Q. 447. Did you stay over night on the road the third night between Wichita and Medicine Lodge?

A. 447. No, sir, stayed in Medicine Lodge.

510 Q. 448. From whom did Hillmon purchase the ponies and wagon with which you made that trip?

A. 448. I don't know their names.

Q. 449. Where did they live? A. 449. In Wichita.

Q. 450. In what business were they engaged?

A. 450. Feed stable business, the man we bought the horses from; and the wagon I don't know who he bought it from.

Q. 451. On what street in Wichita did this man keep a feed stable?

A. 451. I don't know what street; right there in the business part of town.

Q. 452. In what direction was the feed stable located from the Globe hotel?

A. 452. West, three or four or five blocks.

Q. 453. From Medicine Lodge to what place did you and Hillmon next go on this trip? A. 453. Sun City.

Q. 454. What road did you travel from Medicine Lodge to Sun City?

A. 454. Medicine Lodgfe and Sun City road that is all I know.

Q. 455. From Sun City to what place or ranch did you go?

A. 455. Went to a ranch six or seven miles northwest of Sun City; I don't remember the man's name.

Q. 456. Was not that ranch known as Meyer's ranch?

A. 456. That is the name, I believe.

Q. 457. From the time you and Hillmon left Wichita until you arrived at this ranch, had not the weather been very cold, and did not you and Hillmon remain at this ranch some two or three days on account of the weather being too cold for you to travel?

A. 457. The weather was changeable; a part of the time cold, part of the time it was pleasant. We did remain at this ranch two or three days on account of it being too cold to travel.

Q. 458. From Meyers' ranch you and Hillmon next went to a place on the Atchison, Topeka & Santa Fe road, called Kinsley, did you not? A. 458. Yes, sir.

Q. 459. How long were you in making the trip from Meyers' ranch to Kinsley? A. 459. About one day and a half.

Q. 460. Where did you stay over night on that trip?

A. 460. Smith's ranch, four or five miles before we got to Kinsley.

Q. 461. From Kinsley you and Hillmon next went to a place on the Atchison, Topeka & Santa Fe road by the name of Larned did you not? A. 461. Yes, sir.

Q. 462. About how long were you in going from Kinsley to Larned? A. 462. About a day, as near as I remember.

Q. 463. From Larned you and Hillmon went to a place called Great Bend, on the Atchison, Topeka & Santa Fe road, did you not? A. 463. Yes, sir.

Q. 464. And from Great Bend you next proceeded to a place on the Atchison, Topeka & Santa Fe road, called Sterling, did you not? A. 464. Yes, sir.

Q. 465. And from Sterling you and Hillmon went to another place on the Atchison, Topeka & Santa Fe road, called Hutchinson, did you not? A. 465. Yes, sir.

Q. 466. From Kinsley to Hutchinson how did you and Hillmon travel upon this trip, and what road did you travel over?

A. 466. Wagon and team; road leading from Kinsley to Hutchinson, as near as I can tell what road.

Q. 467. How did the road over which you traveled run with reference to the track of the Atchison, Topeka & Santa Fe railroad, from Kinsley to Hutchinson?

A. 467. Right alongside of the railroad.

Q. 468. Did you and Hillmon stay over night in Hutchinson, and if so, where did you stop?

A. 468. Did not stay in Hutchinson.

Q. 469. After leaving Hutchinson where was the first place you and Hillmon stopped over night, and about how far from Hutchinson?

A. 469. Stopped at a ranch about one-half days drive from Hutchinson over night; don't remember the man's name.

Q. 470. What was the condition of the weather when you and Hillmon arrived at Hutchinson?

A. 470. As well as I can remember it was pleasant overhead; the ground was frozen some, ice and snow on the ground.

Q. 471. What was the condition of the weather when you arrived at Sterling? [Q.] 471. About the same.

511 Q. 472. What road did you and Hillmon travel from Hutchinson; where was the house at which you stopped the first night after leaving Hutchinson situate with reference to the road, and state the number of the members of the family who occupied that house, and the kind of house it was?

A. 472. On the Hutchinson and Wichita road south of the Arkansas river; the house stood about 100 yards off the road, the north side of the road, frame house; the family consisted of the man, his wife and three or four children.

Q. 473. Where did you, Hillmon stay over night the next night? A. 473. Globe restaurant in Wichita.

Q. 474. Do you mean by the Globe restaurant, the same place as the Globe hotel? A. 474. Yes, sir, same place.

Q. 475. What was the condition of the weather when you were at Medicine Lodge on this trip; was it cold, pleasant or stormy? A. 475. It was cold and stormy.

Q. 476. After you and Hillmon arrived at Wichita how long did you remain at the Globe hotel?

A. 476. About two weeks, to the best of my knowledge.

Q. 477. In what month, and upon what day of the month did you and Hillmon return to Wichita from this trip?

A. 477. About the 20th or 25th of January, 1879.

Q. 478. When you and Hillmon were in Medicine Lodge upon this trip, you kept the team with which you traveled at Iliff's stable, did you not? A. 478. Yes, sir.

Q. 479. Upon that trip what time of day did you and Hillmon arrive at Medicine Lodge? A. 479 In the evening.

Q. 480. On your arrival there, you and Hillmon drove direct to Iliff's stable did you not with your team and put it up there? A. 481. Yes, sir.

Q. 482. Where did you and Hillmon sleep the first night you stayed in Medicine Lodge on that trip?

A. 482. Iliff's stable loft.

Q. 483. Did you and Hillmon sleep in that same loft on each night during your stay in Medicine Lodge on that trip?

A. 483. I believe we did every night.

Q. 484. Do you not know that you did?

A. 484. Wouldn't be positive of it; we might have stopped in the hotel a night or two.

Q. 485. Do you swear that you and Hillmon did sleep over night at any hotel in Medicine Lodge during the time you remained there upon this trip? A. 486. No, sir.

Q. 487. Did Hillmon remain there with you at the Globe hotel in Wichita after your return there in January, 1879, as long as you did; if not, state how long he was gone, and when he returned there?

A. 487. He stayed there a day or two and then he went home to Lawrence; I don't know just how long he had been gone, he was gone several days, as near as I can remember; I don't remember just when he returned.

Q. 488. Was this the first time Hillmon had been to Lawrence since you and he left there in December?

A. 488. Yes, sir.

Q. 489. When you and Hillmon returned to Wichita on this trip did you arrive there in the morning or in the evening?

A. 489. In the evening.

Q. 490. Did you go directly to the Globe hotel?

A. 490. Yes, sir, right away after we put the team up in the stable.

Q. 491. Did you register? A. 491. Yes, sir.

Q. 492. Was that not upon the 20th day of January, 1879, and was there not a letter or dispatch at the hotel for Hillmon, and did he not leave for Lawrence on the next day?

A. 492. Don't remember just whether it was that date or not; I don't remember whether there was a dispatch or letter at the hotel for Hillmon or not; I wouldn't be certain whether he went to Lawrence the next day or not, it was within a day or two, as near as I can remember.

Q. 493. Up to what time did you and Hillmon continue to board at the Globe hotel, and where did you go after leaving there?

A. 493. Up to about the first of February, as near as I can remember; went to the restaurant adjoining the Globe house.

Q. 494. What was the name of that restaurant?

A. 494. Couldn't call the name now.

512 Q. 495. On what street was the Globe hotel situate; what kind of a building was it, number of stories, size, and number of rooms as near as you can?

(Objected to by the plaintiff as immaterial.)

A. 495. I don't know what street it was called; a frame building, two story house, I don't know what size house it is, eight or ten rooms, as near as I know.

Q. 496. How does this house compare in size with the Douglas Avenue house in Wichita and the Tremont hotel?

A. 496. Not knowing, I couldn't tell how it would compare.

Q. 497. Do you mean to say that you never saw the Douglas Avenue hotel or the Tremont hotel in Wichita?

A. 497. No, sir, I don't mean to say anything of the kind.

Q. 498. You have seen both of those hotels frequently have you not?

A. 498. I suppose I have if they were in Wichita, but to remember one from the other now I couldn't state.

Q. 499. Then why can not you tell how the Globe hotel compares with those hotels in size?

(Objected to by plaintiff's counsel as immaterial and incompetent.)

A. 499. Because I don't know the names of those hotels for certain.

Q. 500. When you and Hillmon went to the restaurant to board where did you room?

A. 500. Roomed in the same house.

Q. 501. How long did you and Hillmon continue to board at this restaurant?

A. 501. A week or two, to the best of my knowledge.

Q. 502. Why did you and Hillmon leave the Globe hotel to go to this restaurant?

A. 502. Because he believed he would rather board at the restaurant.

Q. 503. Did not Hillmon have some trouble and words with one of the proprietors of the Globe hotel about Hillmon's neglecting or refusing to pay them for your's and his board, and did he not thereupon leave the hotel and go to this restaurant? A. 503. I don't know whether he did or not.

Q. 504. From this restaurant where did you and Hillmon next go to board in Wichita?

A. 504. I went to Ben Helda's and Hillmon went there after he came back from Lawrence.

Q. 505. State the name of this hotel or restaurant where you went to board at this time and where it was situated.

A. 505. It was a private place in the northwest part of town. He was keeping batch there.

Q. 506. How long did you and Hillmon remain there, as near as you can state?

A. 506. I stayed there about two weeks or over; Hillmon didn't stay but a day or two or three.

Q. 507. In what business was this man engaged?

A. 507. Gardner was his business.

Q. 508. Was this the last place that you and Hillmon boarded in Wichita? A. 508. Yes, sir.

Q. 509. Describe, as accurately as you can, this place, where this house was located; also describe the house, its size, and

color, and with reference to the way it was located with reference to the street.

(Objected to by plaintiff as immaterial.)

A. 509. Northwestern part of the town, a small frame house, brown color, and stood right on the corner of the street.

Q. 510. How many rooms were there in the house, and how many stories high was it?

(Objected to by plaintiff as immaterial.)

A. 510. Two rooms, and the house was one story high.

Q. 511. Was there a barn or stable upon this place, and did you keep this team there while you boarded?

A. 511. Yes, sir, there was a stable and we kept the team there.

Q. 512. Did you do your own cooking at that place?

A. 512. Ben Helda done it with my assistance and his brother.

Q. 513. How many persons were living at that place during the time you were stopping there?

A. 513. Two others besides myself.

The hour of adjournment having arrived the further taking of these depositions is postponed until tomorrow morning at 9 o'clock.

HENRY McGREW,
Notary Public.
January 5th, 1882.

[Seal]

My Commission expires April 21, 1883.

January 6, 1882. Pursuant to adjournment the further taking of these depositions is hereby resumed, parties appearing by their respective counsel.

Q. 514. Were you or Hillmon engaged in any business while you stayed in Wichita? A. 514. No, sir.

Q. 515. Where was Hillmon when you went to the last place at which you boarded?

513 A. 515. He went home to Lawrence.

Q. 516. State when that was, that Hillmon went home to Lawrence the second time?

A. 516. In February, as near as I can get at the time.

Q. 517. Where was he boarding at the time he left Wichita for Lawrence the second time?

A. 517. Boarding at the restaurant by the Globe house.

Q. 518. Who kept that restaurant?

A. 518. I don't know.

Q. 519. How long was Hillmon gone on the second trip?

A. 519. I don't know just how long he was gone? A week or two, as well as I remember.

Q. 520. Did he not leave Wichita on the 25th day of February, 1879, and return on the 1st day of March, 1879?

A. 520. Couldn't state just now whether he did or not?

Q. 521. Did he receive a letter or dispatch just prior to or before he started? A. 521. Don't know.

Q. 522 When he returned from this trip to Lawrence did he go to the same place to board at which you was boarding?

A. 522. Yes, sir, come to the same place.

Q. 523. How long did you and he remain at this place after his return from Lawrence?

A. 523. Two or three days, to the best of my memory.

Q. 524. State on what day of the month, and in what month, you and Hillmon left there, and how you traveled?

A. 524. About the 4th of March, 1879. We traveled with a wagon and team.

Q. 525. Was it the same wagon and team with which you and Hillmon made your former trip?

A. 525. The same wagon and different team.

Q. 526. When, where and from whom did Hillmon get this team?

A. 526. A few days before he started. He traded teams with Ben Helda at Ben Helda's house.

Q. 527. Describe the team with which you and Hillmon started on the second trip?

A. 527. A grey and bay; a pony team. The bay was in good flesh, and the grey was a little thin. Ages I don't know. The grey was a mare and the bay a horse, if I remember right.

Q. 528. Describe the team with which you and Hillmon made your first trip?

A. 528. Two good sized ponies, pretty good flesh, both horse ponies, bay and a brown; the brown was about four old, the bay was called six year old.

Q. 529. Now describe the wagon with which you and Hillmon made both of these trips?

A. 529. A second-hand spring wagon, shallow bed with two new side boards, blue colored wagon, as near as I can get at the color, the side boards were not painted, and end spring wagon with bows and a cover.

Q. 530. How high was this wagon from the ground to the top of the box?

A. 530. About five feet, as near as I can guess it.

Q. 531. What was the depth of this wagon, and including the side boards?

A. 531. Twelve or fourteen inches, as near as I can guess at it.

Q. 532. When you and Hillmon left Wichita with a team the second time of what did the contents of your wagon consist?

A. 532. Some bedding, cooking utensels, some provision, trunk, little hand valise, gun, pair of gum boots or two, and ourselves, was all.

Q. 533. What kind of a gun was that, describe it?

A. 533. Breach loading rifle, calibre about 40 or 44.

Q. 534. Was that kind of a gun known by any name, if so state what? A. 534. Yes, sir, but I couldn't call the name.

Q. 535. What time in the day did you and Hillmon leave Wichita on this second trip, what road did you travel and at what place did you first camp?

A. 535. In the forenoon, Wichita and Medicine Lodge road. Camped first at a place called Elm creek, seven or eight miles west of Wichita.

Q. 536. Was that creek sometimes called "Cow Skin?"

A. 537. I don't know but that is the name. Since I have heard the name, it is one or the other. Cow Skin, I think is the name.

Q. 538. You remained in camp at Cow Skin some three days, did you not, at this time?

A. 538. Two or three days, if I remember right.

Q. 539. What was the state of weather when you and Hillmon left Wichita?

A. 539. Nice weather for the time of the year.

Q. 540. Was it cold or warm?

A. 540. It wasn't particular either one, but pleasant out.

Q. 541. You and Hillmon started from Wichita alone, did you not, on this trip? A. 541. Yes, sir.

514 Q. 542. When you got to Cow Skin, where you camped the first night, there was another man with you, was there not?

A. 542. Yes, sir, and stayed with us all the time we was there.

Q. 543. Where abouts did this man get in company with you and Hillmon?

A. 543. About three miles out from Wichita.

Q. 544. Did he ride from there to Cow Skin, where you went into camp, with you and Hillmon?

A. 544. Yes, sir, rode pretty near all the way.

Q. 545. Were there houses or settlements in and about the Cow Skin where you camped for two or three days?

A. 545. Yes, sir, several of them.

Q. 546. How for was your camp from the nearest house?

A. 546. About a half a mile the nearest.

Q. 547. How many other houses were in the neighborhood of your camp, and about how far distant?

A. 547. Several other houses; all the way from a half to three mile off.

Q. 548. When did you leave the Cow Skin where you camped the first night, and what road did you follow, and

where did you camp the first night after leaving the Cow Skin?

A. 548. Left in the morning; went on the Medicine Lodge and Wichita road; camped south of Kingman about two miles on the road, on a little branch, it was a regular camping place for freighters and travelers.

Q. 549. On what road was it, and on what stream?

A. 549. Wichita and Medicine Lodge road; don't know the name of the stream.

Q. 550. How far was this from Wichita?

A. 550. Thirty or forty miles, as near as I can guess it.

Q. 551. On what day of the month was this?

A. 551. About the 10th of March.

Q. 552. Have you no means of telling definitely the places and dates at which you camped at the various places on that trip? A. 552. None, only by memory.

Q. 553. How long did you remain in camp at this place?

A. 553. Over night, only.

Q. 554. From this place what road did you take, and what place did you camp the next night?

A. 554. Kingman and Harper City road; camped about five miles north of Harper City over night.

Q. 555. At what place?

A. 555. Right on a ranch; I don't [—] the name of the place, on a branch close to the house.

Q. 556. Of what stream was this a branch, and what was the name of the branch?

A. 556. I don't know the name.

Q. 557. What was the state of the weather at this time?

A. 557. Nice weather, as well as I can remember.

Q. 558. Had you camped during your entire trip up to and including this place? A. 558. Yes, sir.

Q. 559. Had you remained in camp except at the Cow Skin for more than one night at a place? A. 559. No, sir.

Q. 560. How long did you remain in camp at this the last place you have mentioned? A. 560. Just over night.

Q. 561. From this place what road did you follow, in what direction did you travel, about how far did you travel and where did you camp the next night?

A. 561. Harper City and Cedar Mountain or Cedar Hill road leading to Medicine Lodge, west from Harper City; don't know just the distance we traveled, it was a day's travel; stopped over night on a creek, don't know the name, stopped there two nights, since I remember.

Q. 562. Was your camping place during these two nights upon the Harper City or Cedar Hill or Cedar Mountain road?

A. 562. Yes, sir.

Q. 563. How far from Harper City, and what direction from it was this camping place?

A. 563. About 20 or 30 miles west, as near as I can guess.
Q. 564. In reaching this camping place had you passed through either Sun City or Medicine Lodge?
A. 564. No, sir.
Q. 565. From this place what road did you travel; in what direction did you travel; how far, and at what place did you camp?
A. 565. Harper City and Medicine Lodge road; traveled northwest; traveled about a day's drive, I don't know how far it is called; we camped on the Medicine river, 8 or 10 miles from Medicine Lodge, on the Medicine Lodge and Sun City road.
Q. 566. What direction was that from Medicine Lodge, I mean your camp?
515 A. 566. Northwestward.
Q. 567. Where did you camp for dinner on that day?
A. 567. About one-half mile from Medicine Lodge.
Q. 568. In what direction was that, and upon what stream?
A. 568. Southeast from Medicine Lodge, and on Elm Creek.
Q. 569. From [—] direction, and on what road did you enter Medicine Lodge upon that day?
A. 569. From the southeastrn direction; two or three roads came in there, I don't know what road it would be called there.
Q. 570. These various roads of which you speak, all meet at crossing at Elm Creek do they not?
A. 570. Yes, sir; all meet there.
Q. 571. And all these roads enter the town and reach the main street of the town at the same place do they not?
A. 571. Yes, sir.
Q. 572. When you and Hillmon reached the main or principal street in Medicine Lodge, you drove directly north on that street to near the post office did you not?
A. 572. Yes, sir; stopped before we got to the post office awhile at Iliff's stable.
Q. 573. Did you put up at Iliff's stable at that time?
A. 573. No, sir.
Q. 574. From there you went direct to the post office with the team did you not?
A. 574. Yes, sir.
Q. 575. When you got near the post office you stopped the team and went into the post office did you not?
A. 575. Hillmon did; I don't think I did.
Q. 576. Did you go into Iliff's stable at that time?
A. 576. No, sir.
Q. 577. How long did you stop there in front of Iliff's stable?

A. 577. A few minutes, as near as I can remember.

Q. 578. State as definitely as you can.

A. 578. That is as near as I can state it.

Q. 579. Where was the post office situated with reference to Updegraph's hotel at that time?

A. 579. Across the street and a little further north.

Q. 580. Did you not on that occasion get out of the wagon and go up to the post office?

A. 580. Don't remember whether I went direct to the post office or not from the wagon.

Q. 581. Did not one of you remain with the team and the other go to the post office?

A. 581. Yes, sir, I had the team looking after it; I didn't stay right with it all the time; Hillmon went to the post office.

Q. 582. How long did the team remain there by the post office?

A. 582. Not over a half an hour, to the best of my knowledge.

Q. 583. Did it remain there that length of time?

A. 582. To the best of my knowledge, I think it remained there near that length of time.

Q. 584. How long were you in Medicine Lodge upon that day?

A. 584. About half or three-quarters of an hour.

Q. 585. Did Hillmon go with you from Iliff's stable to near the post office?

A. 585. Yes, sir.

Q. 586. With whom did you talk up there by the post office?

A. 586. Couldn't call any of their names, unless it was one, the hotel keeper, Updegraff, I believe was his name.

Q. 587. Any one else, if so, state whom?

A. 587. Spoke to one or two others, but couldn't call their names.

Q. 588. Do you swear that while the team was standing near the post office in Medicine Lodge, Barber county, Kansas, that Hillmon went to the post office, and that you did not go to the post office during that day.

A. 588. I would swear that Hillmon went there. As to myself I wouldn't swear that I did.

Q. 589. Did you, or did you not, go to the post office upon that day?

A. 589. I wouldn't be positive whether I did or not.

Q. 590. Upon what day of the month and in what month and year did you and Hillmon arrive in Medicine Lodge, Barber county, Kansas, upon this your second trip?

A. 590. About the middle of March, 1879.

Q. 591. Did you not at that time and place get out of the wagon and go up to the post office in Medicine Lodge?

A. 591. Don't think I did.

Q. 592. Did you not on or about the 5th day of April, A. D., 1879, at a coroner's inquest held in Lawrence, uglas county, Kansas, state, upon oath, in answer to the estion: "What did you do when you got in there," as fol- v, "Got in there and stopped, didn't unhook, but just stop- d and I got out of the wagon and I went up to the post ice," and did you not make the foregoing answer to said estion at that time and place?

A. 592. I made an answer similar to that.

Q. 593. Did you, or did you not, make that exact answer?

A. 593. I wouldn't be certain whether I did or not, not owing.

Q. 594. Did you, or did you not, at that time and place ake this statement: "I got out of the wagon and I went up the post office?"

A. 594. I don't remember whether I made just such a atement or not.

Q. 595. Did either you or Hillmon get a letter from the ost office at Medicine Lodge at this time?

A. 595. Hillmon did; I didn't.

Q. 596. Who got that letter from the office?

A. 596. Hillmon did.

Q. 597. Did you not on or about the 5th day of April, A. . 1879, at a coroner's inquest, held in the city of Lawrence, Douglas county, Kansas, in reply to the question, "get any nail there," say in answer thereto, "one letter, that is, Mr. Hillmon got one; I got out at the post office for him;" and did you not make the foregoing answer to the said question?

A. 597. I remember stating that Hillmon got a letter; don't have any knowledge of stating I got out and got it for him.

Q. 598. Did you, or did you not, make the statement to which your attention has been called, to-wit: in the ques- tion 597?

A. 598. I don't remember whether I made such a statement or not.

Q. 599. Did you not at said inquest in Lawrence, on or about the 5th day of April, 1879, in the answer to the ques- tion you didn't go into any house in Medicine Lodge, answer and state: "No, sir, I was into the post office, that was all the house I was in, I believe;" or did you not make the foregoing statement at that time and place?

A. 599. I remember I stated I wasn't in any house unless it was the post office, and I don't remember whether I stated I was in there or not.

Q. 600. Did you, or did you not, make the statement con- cerning which you have been asked in the last question, to- wit: in question 599?

(Objected to by the plaintiff on the ground that the same question in substance and intent has been twice before asked of the witness and fully and fairly answered.)

A. 600. I don't remember that I made the statement or not.

Q. 601. Did you not at said time and place, to-wit, at said inquest make the following statement: "I was into the post office?"

(Objected to on same ground as question last before.)

A. 601. I wouldn't be positive whether I stated so or not.

Q. 602. Did you make the foregoing statement in substance at that time and place?

(Objected to by plaintiff as misleading in form and indefinite, and because the same question has been three times answered by this witness and fairly answered.)

A. 602. I made a statement similar to that.

Q. 603. Has your attention ever been called to the testimony or statements of persons or witnesses in this matter residing at Medicine Lodge, either by having their testimony read to you or in your presence, or by having anyone talk about the same to you or in your presence?

(Objected to by plaintiff's counsel as immaterial and incompetent.)

A. 603. Never heard a witness say or read anything about it; never heard anyone from Medicine Lodge, or that lived there, say anything about it. I have heard them read some of the testimony of Medicine Lodge witnesses to me.

Q. 604. When was the evidence or testimony of witness residing at Medicine Lodge read to you the last time?

A. 604. The fore part of last week.

Q. 605. Where was you when it was read to you?

A. 605. Kansas City.

Q. 606. Was you upon the street or in the room of some building, and if so what building?

A. 606. Metropolitan hotel.

Q. 607. How long was that before you was examined in chief in this case?

A. 607. The day after, I believe.

Q. 608. Then that evidence has been read to you during and pending your cross-examination in this case, has it not?

A. 608. Yes, sir.

517 Q. 609. State the name of the witnesses whose evidence or testimony was read to you, if you remember.

(Objected to as immaterial.)

A. 609. I don't remember but two, and I wouldn't be positive to their names—Smith and Iliff, I think.

Q. 610. Who was present at the time this evidence was read?

A. 610. Mr. Hutchings, Mr. Riggs and myself.

Q. 611. Have you had any conversation with any person since that time in regard to the testimony of said witnesses at Medicine Lodge, or in regard to the testimony of any of them. A. 611. No, sir.

Q. 612. When the team was standing near the post office in Medicine Lodge, upon which side of the street was it standing and in which direction was it facing?

A. 612. Standing on the east side of the street, facing a northerly direction.

Q. 613. Nearly opposite from the post office were vacant lots, and across these lots the road ran, leading up Medicine river in a northwesterly direction, did it not?

A. 613. The road lead northwest from Medicine Lodge after you get out of town a little ways. I don't know whether the road led in a northwesterly direction across these lots or not. There were some vacant lots there.

Q. 614. Did not this road leave the main street in Medicine Lodge near Updegraff's hotel?

A. 614. Not that I know anything of.

Q. 615. Were there not vacant lots immediately north from Updegraff's hotel, up the street for some distance?

A. 615. There were some, but how many I can't tell anything about.

Q. 616. Was there not a street or road or traveled way running from near the southeast corner of said lots, near the Updegraff hotel, in a northwesterly direction across said lots?

A. 616. I don't know anything about them cross corner lots road. I don't know anything about it.

Q. 617. Describe the place where you camped that night after passing through Medicine Lodge; state the distance and direction it was from Medicine Lodge.

A. 617. Camped on the Medicine Lodge river, close to a farm house, where the road left the Medicine Lodge bottom road, and bore up on the ridge 8 or 10 miles northwest of Medicine Lodge.

Q. 618. What time did you get there.

A. 618. Early in the evening.

Q: 619. Before or after sundown.

A. 619. Before sundown.

Q. 620. Was the stranger whom you and Hillmon invited to ride with you about two and one-half to three miles from Wichita, and who was with you at the camp at Cow Skin, with you at this camp last spoken of? A. 620. No, sir.

Q. 621. Was he with you at the place where you camped the night previous to this time? A. 621. No, sir.

Q. 622. Did you not on or about the 4th day of September in 1879, in Platte county, State of Missouri, sign a written statement and swear to the same before one Francis M. McDonald, a Notary Public, at Parkville in said county and state, which statement contained the following statement: "We got there about an hour before sundown and stayed in camp until the next evening. We overtook a stranger on this trip the first day out from Wichita, about 2 or 2½ miles from town, who Hillmon invited to get in and ride, and who, he, Hillmon, proposed to hire and work for him on the ranch as proposed to be located. This man was with us during all this trip. Hillmon proposed to me that this man would do for a subject to pass for him. I told him and contended with him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because his proposition was to take the man's life, and I protested and said that was going beyond what we had agreed and something I had never before thought of, and was beyond my grit entirely, but Hillmon seemed to get more deeply determined and more and more desperate in the matter. Pains were taken not to have more than two of us seen together in the wagon; sometimes one and then the other would be kept back out of sight. On his trip up to Lawrence Hillmon was vaccinated; his arm was quite bad. Hillmon kept at the man until he let him vaccinate him, which he did, taking his pocket knife and using virus from his own arm for the purpose. He also traded clothes with him, Hillmon first giving him a change of underclothing, then traded suits, the one he was killed in; the suit he was buried in was a suit Hillmon traded with Baldwin for. The man appeared to be a stranger in the country; a sort of easy go long fellow, not suspicious or very attentive to anything. His arm became very sore and he got quite stupid and dull. He said his name was either Berkley or Burgess, or something sounding like that; we always called him Joe. He said he had been around Fort Scott awhile, and also said he had worked at Wellington or Arkansas City. I don't know where he was from or where his home or friends were. I did not see him at Wichita that I know of. I had but very little to say to the man and less to do with him. He was taken in charge
518 by Hillmon and yielded willingly to his will. I dreaded what I thought was to be done and kept out of having any more to do with him than possible. I frequently remonstrated with Hillmon and tried to deter him from carrying out his intention of killing the man. The next evening after we got to the camp last named, the man Joe was sitting by the fire; I was at the hind end of the wagon either putting feed in the box for the horses or taking a sack out, when I heard a

gun go off. I looked around and saw the man was shot, and Hillmon was pulling him around to keep him out of the fire."

[A.] (Objected to by the plaintiff for the reason that the original statement is in the possession of the defendant and its attorneys and should be produced for identification by the witness and to enable him to refresh his recollection as to the statement he did sign, if any, and for the further reason that the question does not, and does not pretend to embody the whole of the statement which it is claimed the witness made at the time and place stated in the question, and because the witness is fairly entitled to an inspection of the entire statement before being compelled to testify in relation thereto, and because the question is otherwise incompetent, irrelevant and immaterial, and the plaintiff hereby formally demands a full and accurate copy of said pretended statement in order that she and her attorneys may be fully advised as to the nature and extent of said pretended statement in order to intelligently examine this witness in relatoin thereto.)

A. 622. I signed or swore to a statement that Buchan and I made out, but what the contents were I don't know anything about now, and as to this being the statement, I don't have any recollection or thought about it; he done all the writing and getting up of the paper. I gave him the details of our trip down there and back; told him who was with us after leaving Wichita at the camp there. He said he could fix it so he could make it appear to the insurance company that he and I could kill this man and pass him off for Hillmon. He first stated that he could make it appear that he froze to death or killed some way. After I told him of this man that camped with us at Cow Skin, then he said that he could make it appear that this man was killed instead of Hillmon, and stated in his paper in writing to that effect, and by me consenting to do this would insure me that I would never have any trouble about it from that time on, and if I didn't the insurance men would hunt me down and penitentiary me for murder, and that they had plenty of money, and never calculated to paying the woman her money, and it would enable him to get big pay for this paper, and that if I needed any money or anything he would give me all I wanted. I told him as to the money that it was not that I was wanting at all; all I wanted was to be freed from the insurance company, as he had often told me, before this, that they had been after me all the time or a wanting me, to arrest me and put me in jail, and that it was through him, that he had been keeping them off of me.

At this point and before the witness had finished his answer to the question the counsel for plaintiff asked of the Notary the time of day, to which the Notary answered, "Ten minutes past 6 o'clock." Counsel for plaintiff then asked for an adjournment, to which counsel for defendant objected until witness should finish his answer. To this plaintiff's counsel objected and refused to proceed further at this time, thereupon the further taking of these depositions was by the undersigned Notary Public adjourned until to-morrow morning at 9 o'clock.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.
January 6th, A. D., 1882.

Saturday morning, January the 7th, A. D., 1882. The further taking of the dispositions is hereby resumed pursuant to adjournment.

(And now plaintiff's counsel objects further to the question last asked the witness, for the reasons: That it calls for the contents of a written instrument which should first be produced and proven and which would then be the best evidence of such contents. Second, Said question is leading and is not a proper question for cross-examination. Third, The paper speaks for itself and the contents can not be proven by parol or secondary evidence until its loss is duly shown. Fourth. The plaintiff demands the production of the original instrument so that she or her attorneys may inspect the same in order to ascertain whether it is subject to any legal objections, and, if so, that they may have an opportunity to make such objections, if any exist, before said statement or its contents [or] put in evidence. Fifth, That the evidence called for is immaterial and irrelevant.)

(Defendants counsel objects and protests against any further objections being interposed until the witness shall have fully completed his answer to the question, and here asks that the deposition show that this objection and protest were made before the said objection of the plaintiff were interposed and now moves to strike out the objections of said plaintiff.)

The plaintiff's counsel now asks that the question be read to the witness before he is required to make further answer, which then is accordingly done, which makes the second time the said question had been read to the witness in full by me, the Notary, since the commencement of the taking of the depositions on this day.

That is my answer; that is sufficient. I don't know anything about what the statement was I signed or swore to.

Q. 623. Since the adjournment of last evening have you had any conversation with any person, concerning this case, or concerning your evidence in this case?

519 A. 623. No, sir, I have not.

Q. 624. Were you not called out of this office this morning by D. B. Hadley, Esq., and at his request did you not go to his office and there meet him and some of the other attorneys in this case?

A. 624. I was called out by D. B. Hadley this morning; I didn't go to his office or didn't meet any one or talk with them concerning this case or concerning anyone interested in this case.

Q. 625. Did you have any conversation with said Hadley concerning this case or any matter connected with it?

[A. 625.] The defendant's counsel here asks the Notary Public to make the follow- entry: "John Hutchings, Esq., stated in the presence of the witness the best way to answer this question is by telling what was said, to which statement the defendant's counsel then and there objected and asked to have the same taken down, entered by the Notary."

John Hutchings, Esq., desires to make the following statement and have it entered by the Notary: "He says he can see no reason why the witness should not state what was said between him and Mr. Hadley or any other person in regard to this case, if the plaintiff or any other person makes no objection thereto; if the witness states what was said it will then be seen whether any proper communication had been had, and for the plaintiff he consents that the witness may state fully all that was said between him and Mr. Hadley or any other person since the adjournment of the taking of these depositions last evening, or any conversation that the witness may ever have had with him, the said Hutchings, in regard to this case." To which defendant's counsel replied and asked to have the same taken down by the Notary, that upon the cross-examination of this witness they are entitled to have direct answers from the witness without his being directed therein by suggestions from plaintiff's counsel. To which plaintiff's counsel agree and say they will try to make their conduct conform thereto.

A. 625. I had a few words with Mr. Hadley. He asked me if Buchan gave me them papers; I told him he hadn't; he asked me a second time if I got them; I told him I hadn't. This was about the substance of it.

(The defendant moves to strike out all of the witness' last answer from the words, "He asked me," for the reason that

the remainder of said answer is not responsive to the question, but is the uncalled for statement of the witness simply.)

Q. 626. Did Mr. Hadley take you from this office, across the street to the building in which his office is situate, this morning? A. 626. I went over there with him; yes, sir.

Q. 627. Did you meet Mr. Hutchings in that building this morning? A. 627. No, sir.

Q. 628. Did you not on or about the 4th day of September, A. D. 1879, near Parkville, Platte county, State of Missouri, tell said Buchan, in substance: "This man was with us during all this trip; that this was the man Hillman shot," and did you not tell him, in substance, that you did not kill Hillmon, but that Hillmon killed the stranger who got in to ride with him, about 3 miles out from Wichita, on the first day out on this trip?

Plaintiff's counsel asks the following preliminary question:

Q. 629. Was W. J. Buchan, at the time referred to in the last question by defendant's counsel, acting as your attorney?

(To which question the defendant objects as being irregular in order, and an improper question to ask at this time, and because it is otherwise improper, incompetent, irrelevant and immateral and asks that the Notary direct the witness to first answer the last question asked him by defendant's counsel, which the Notary then and there refuses to do; to which action of the Notary the defendant then and there accepts.)

Answer to preliminary question number 629:

A. 629. Yes, sir; that is what he told me.

(The plaintiff's counsel objects to the question of defendant's counsel number 628, for the following reasons: First, That the statements called for by said question, if made at all, were made to said Buchan when acting as attorney for the witness. Second, because it already appears that whatever statements were made by the witness to Buchan at that time, or consented to him, were reduced to writing and signed by the witness, which writing is the best evidence, and the plaintiff's counsel demand that said writing be here produced.)

A. 628. Didn't have any knowledge of knowing what the statement was at this time.

Q. 630. Did you not at the time and place in the last question, to wit, in question 628, mentioned tell said W. J. Buchan, in substance, that you did not kill Hillmon, but that Hillmon killed the man whom you have called the stranger, and that you tried to prevent and keep said Hillmon from killing the man?

(Objected on same ground as the question last above.)

A. 630. I don't have any knowledge at present of telling Buchan anything of the kind, but told him time and again before that, that I killed Hillmon accidentally, and that I didn't see how that he and I could make out that we killed him in any other way.

520 (The defendant moves to strike out all of the last answer of the witness commencing with and including the words, "but told him," for the reason that said answer is not responsive to the question, and is simply the uncalled for statement of the witness.)

Q. 631. Do you swear now that you did not tell said Buchan, at said time and place, in substance, what is mentioned in question number 630? Here notary reads the question again to the witness.

(Objected to by plaintiff on same ground as the question last preceding.)

A. 631. I will swear that I told Buchan that I didn't do anything of the kind.

Q. 632. From Medicine Lodge to what place did you and Hillmon go upon this trip?

A. 632. Northwest from Medicine Lodge, on the Medicine Lodge and Sun City road, eight or ten miles from Medicine Lodge, to a point on the Medicine Lodge river.

Q. 633. How long did you remain in camp there?

A. 633. Over night.

Q. 634. Where, and in what direction from this camping place, did you camp the next night?

A. 634. Northwest from there on the Medicine Lodge river, two or three miles from Sun City.

Q. 635. About how far from where you camped the night before?

A. 635. About 20 or 25 miles, as near as I could guess at it.

Q. 636. Upon what day of the month was it that you camped at this place?

A. 636. It was about the 14th or 16th of the month, as near as I can guess it.

Q. 637. About what time did you go into camp that night, near Sun City?

A. 637. It was in the afternoon. I don't remember just what time; I would say before sundown.

Q. 638. How did you sleep that night; in your wagon or upon the ground, or at a house?

A. 638. Sleep on the ground.

Q. 639. Were they not three persons who stayed in that camp, near Sun City, the night you camped there?

A. 639. Yes, sir.

Q. 640. How long did you remain in camp at that point, near Sun City?

A. 640. I think we camped there two nights, if I remember right.

Q. 641. What was the state of the weather at this time?

A. 641. If I remember right, the weather was a little cool, the wind blowing.

Q. 642. From this camp, near Sun City, in what direction did you travel; how far did you travel, and where did you camp the next night?

A. 642. Northeast direction; about a day's drive, I don't know how far we traveled; camped on a little stream called Crooked Creek or Spring Creek.

Q. 643. State as near as you can, how many miles you traveled that day?

A. 643. Fifteen or twenty-five miles, as near as I can guess at it.

Q. 644. How far, and in what direction was this camp on Crooked Creek from where you camped out the first night from Medicine Lodge?

A. 644. A northeast direction, as well as I can remember; I could hardly make a guess at the distance, I would call it 25 or 30 miles to guess at it.

Q. 645. Do you know on what day of the month you arrived at this camp on Crooked Creek?

A. 645. About the 17th of the month, I think.

Q. 646. Well, of what month and year?

A. 646. In March, 1879.

Q. 647. Was this camping place on a traveled road?

A. 647. Close to a traveled road.

Q. 648. What road?

A. 648. I don't know what the road was called.

Q. 649. How far was the place where you camped from a traveled road?

A. 649. From 1 to 300 yards, to the best of my memory.

Q. 650. That road was a main traveled road was it?

A. 650. As far as I know, it was a main traveled road.

Q. 651. It had that appearance did it?

A. 651. It had the appearance of a traveled road.

Q. 652. Of a road in general use?

A. 652. I would say it was for that country.

Q. 653. Were there houses near by; if so, state in what direction from this camp they were situated?

A. 653. There was a house in a southern direction, and one northwest from there; they were the only two houses that I remember of being any ways close; there was houses all the way along down the creek.

Q. 654. How far was the house in a southern direction from this camp?

A. 654. About three-quarters of a mile, as near as I can guess at it.

Q. 655. How far was the house in the northwest direction from this camping place?

A. 655. A mile or mile and one-half, as near as I can guess at it.

521 Q. 656. Could you see either of these houses from your camp on Crooked Creek?

A. 656. I don't remember whether I could see either one or not.

Q. 657. Were there any other houses in that vicinity that could be seen from your camp on Crooked Creek?

A. 657. None, that I remember of.

Q. 658. During your trip out from Wichita, had you got any provisions upon the road? A. 658. Yes, sir.

Q. 659. Where and when did you buy, and of what did it consist?

A. 659. At Sun City the first, of what it was I don't just remember; the next was at a ranch between the two last camps, bought some eggs and butter, I believe was all.

Q. 660. How long before you went into camp on Crooked Creek did you buy provisions at Sun City?

A. 660. About two days.

Q. 661. Where did you leave the main road to reach this place where you camped on Crooked Creek?

A. 661. Left it within a few hundred yards of where we camped.

Q. 662. After you went into camp at Crooked Creek, in which direction did your wagon face?

A. 662. Southeastern direction, as well as I can remember.

Q. 663. At this time had the grass started sufficiently to support a team, or did you carry grain with you for your team?

A. 663. Carried grain with us; the grass wasn't sufficient to keep a team; that is, green grass wasn't sufficient to keep a team.

Q. 664. Was the location of your wagon changed at any time while you remained in camp at this place?

A. 664. No, sir.

Q. 665. Did you build a campfire?

A. 665. Yes, sir.

Q. 666. How far was the campfire from the wagon, and in what direction?

A. 666. Six or eight feet from the wagon; western direction from the side of the wagon.

Q. 667. How long did you remain in camp at this place?

A. 667. Remained there two nights.

Q. 668. Where did you and Hillmon sleep the first night you were there, on the ground or in the wagon?

A. 668. On the ground.

A. 669. Did you let your ponies loose at this camp?

A. 669. Tied them out with lariats close to the camp.

Q. 670. On the second day, state as definitely as you can, what time you had supper.

A. 670. About an hour by sun, if I remember right.

Q. 671. You and Hillmon eat supper together that night did you?

A. 671. Yes, we eat together; he didn't eat much, if I remember right.

Q. 672. Did you have a campfire burning at the time?

A. 672. Yes, sir.

Q. 673. Was it in the same locality that you have mentioned? A. 673. Yes, sir.

Q. 674. Where and when did you and Hillmon eat supper the first night you camped there?

A. 674. At the same place.

Q. 675. Did you and Hillmon eat your breakfast and dinner the next day at this camp? A. 675. Yes, sir.

Q. 676. Was there a man at your camp the next morning, or the next day, after you went into camp on Crooked Creek?

A. 676. Yes, sir.

Q. 677. What time in the day did that man come to your camp; before or after you eat your dinners on that day?

A. 677. Before dinner.

Q. 678. About how long before dinner?

A. 678. He came along there about 8 or 10 o'clock, as near as I remember.

Q. 679. Are you sure it was before you eat your dinners upon that day he came?

A. 679. It was before I eat mine, and as to Hillmon I don't remember whether he eat very much or not; he might of eat a lunch, he didn't set down and eat a regular dinner.

Q. 680. After supper on the night of the second day that you were in camp at this place, what was Hillmon doing?

A. 680. Hillmon was dead, laying on the ground by the fire.

(The defendant moves to strike out the last answer of the witness as not being responsive to the question, and as being the mere voluntary statement of the witness, and ask the Notary to repeat the same question to the witness.)

522 Q. 681. After supper on the night of the second day that you were in camp at this place, what was Hillmon doing?

A. 681. He wasn't doing anything but sitting around the fire.

Q. 682. On which side of the campfire was he sitting?

A. 682. No particular place.
Q. 683. Can you not tell on which side of the campfire he was sitting after supper on that night?
A. 683. No, sir; I couldn't state any particular place.
Q. 684. You also sat by the campfire after supper that night did you not? A. 684. Yes, sir.
Q. 685. On which side or direction of the campfire did you sit, and about how far from it?
A. 685. I don't remember just what side of the fire I set on; I don't remember just how far I was sitting from the fire.
Q. 686. Was you and Hillmon sitting in the same direction from the campfire?
A. 686. I don't know now whether I was or not.
Q. 687. In which direction was the wind blowing at that time?
A. 687. From a northern direction, if I remember right.
Q. 688. Was there a pretty stiff breeze blowing at that time?
A. 688. Not that I remember of.
Q. 689. When you up from the campfire to take the gun or things from the wagon, was Hillmon still sitting by the campfire; if not, what was he doing?
A. 689. If I remember right he was sitting down.
Q. 690. But you can not tell where he was sitting, with reference to the campfire, can you?
A. 690. No, I couldn't tell just now.

January 7th, A. D. 1882. The hour of adjournment having arrived the further taking of these depositions is hereby continued by consent of the attorneys of the parties, plaintiff and defendant, until Monday morning, January 16th, at 9 o'clock.

My commission expires April 21, 1883.
[Seal] HENRY McGREW, Notary Public.

Monday, January 16th, 1882. In consequence of my sickness, and by consent of the parties hereto, plaintiff and defendant, by their respective attorneys, the further taking of this deposition is continued until to-morrow morning at 9 o'clock a. m.

My commission expires April 21, 1883.
[Seal] HENRY McGREW, Notary Public.

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,
vs.
The Mutual Life Insurance Company of New York, Defendant.

It is hereby stipulated and agreed by and between the parties hereto, plaintiff and defendant, that the further taking

of the depositions of John H. Brown and other witnesses before Henry McGrew, Esq., Notary Public, under notice heretofore served, and under which said deposition has been commenced, shall be and is hereby continued until Tuesday, January 31st, 1882, at the same place in said notice mentioned.

Wyandotte, Kansas, January 17th, 1882.

JOHN HUTCHINGS and
SAM'L A. RIGGS,
Attys. for Plaintiff
GEO. J. BARKER and
J. W. GREEN,
Attys. for Defendant.

Tuesday, January 31st, 1882, 9 o'clock a. m. Pursuant to the last adjournment the further taking of the deposition of John H. Brown is hereby resumed, respective parties being present by their attorneys.

My commission expires April 21, 1883.

[Seal] HENRY McGREW, Notary Public.

Q. 691. Can you now tell where Hillmon was sitting, with reference to the campfire, when you got up and went to the wagon to take the gun out?

A. 691. Couldn't tell just where he was sitting.

Q. 692. Which direction was he sitting from the fire?

A. 692. Don't remember just where he was sitting.

Q. 693. Do you know on which side of the fire he was sitting?

A. 693. No, I don't remember just what side of the fire he was sitting on.

Q. 694. Had you been sitting near him just before you got up to go to the wagon?

A. 694. I had been sitting by the fire; I don't remember just how close or where we had been sitting around the fire.

Q. 695. How far was this campfire from the wagon, and in which direction?

A. 695. Six or eight feet from the wagon, in a southwesterly direction, if I remember right.

523 Q. 696. If I understand you, when you got up to go to the wagon you left Hillmon sitting near the fire?

A. 696. Yes, sir.

Q. 697. Did you go direct from the campfire to the wagon?

A. 697. Yes, sir.

Q. 698. This gun was in the wagon, with a portion of the barrel sticking out above the wagon box, was it?

A. 698. Yes, sir.

Q. 699. How deep was the box to that wagon?

A. 699. Fifteen or twenty inches deep, as near as I can guess at it.

Q. 700. How much of the barrel of the gun extended above

. 700. Half of the length of it or more, as near as I can
ss.
. 701. When you went up to the wagon and took the gun
were you facing the wagon? A. 701. Yes, sir.
. 702. State where you took hold of the gun.
. 702. Took hold of the barrel of the gun near about the
ldle of it.
. 703. State what you then did?
. 703. Went to pull the gun out of the wagon.
. 704, Did you raise the gun up or pull it out over the side
ard of the wagon?
. 704. I went to pull it out over the side board of the
gon.
. 705. Did you seize the gun with both hands or only one?
. 705. One hand.
. 706. You- right hand? A. 706. Right hand.
. 707. When the gun was discharged did you still have
ld of the gun with your right hand, and was the breach
n still in the wagon, or was the gun free from the box of
e wagon?
A. 707. The gun was in my right hand when it was dis-
arged, and after it was discharged it was not in my right
nd. I dropped the gun. I don't remember whether the
n was free from the wagon or not.
Q. 708. When the gun was discharged, had you succeeded
getting it out of the wagon box, or was the gun, or a
ortion of it, still in the box of the wagon?
A. 708. I got it out of the wagon andit fell on the ground.
don't know whether a part of the gun was in the wagon
hen it was discharged or not.
Q. 709. Did you let the gun fall or drop intentionally?
A. 709. I dropped the gun. I don't know that I did it
ntentionally or by accident. I was excited.
Q. 710. How far from the wagon did the gun fall?
A. 710. Fell almost between the fore wheel and hind wheel.
don't suppose it was a foot from the wagon.
Q. 711. In which direction from the wagon did the gun lie?
A. 711. I don't remember.
Q. 712. Do you know whether the gun lay with the breech
or muzzle toward the wagon?
A. 712. I don't know just how the gun did lay.
Q. 713. Was the gun laying on the ground with its breech
or muzzle toward the wagon?
A. 713. I don't remember just how the breech or muzzle
of the gun did lay from the wagon.
Q. 714. Did either end of the gun point toward the wagon
or was the gun laying parallel with the wagon?
A. 714. I don't have any knowledge now of remembering
of how the gun did lay on the ground.

Q. 715. When did you remove that gun from where it fell?

A. 715. I didn't remove it at all myself as I remember of.

Q. 716. When and by whom was the gun removed, and what was done with it?

A. 716. Don't know just when the gun was removed; the men that came there that night or the next morning picked the gun up and was looking at it. I don't remember who it was.

Q. 717. Do you know who first picked the gun up?

A. 717. No, sir.

Q. 718. After taking hold of the gun at the wagon, what did you next do?

A. 718. I went to pull it out of the wagon.

Q. 719. What next?

A. 719. I pulled the gun out of the wagon and it went off.

Q. 720. What did you then do?

A. 720. Catched Hillmon, as I thought he was falling in the fire, and layed him on the ground.

Q. 721. Where abouts did you seize him—that is upon what portion of his person?

A. 721. About his shoulders or arms, if I remember right.

Q. 722. What was his position with reference to your own? How far was he from you, and in which direction was he facing at the time you caught him?

524 A. 722. He was standing behind me as well as I remember. I turned to catch him as he was sinking down, and as I catched him I was standing at the side of him as well as I remember.

Q. 723. When you turned to catch Hillmon, in which direction was he facing?

A. 723. I don't remember which way he was facing.

Q. 724. When you turned to catch Hillmon, how far was he from you?

A. 724. I don't know; he was standing between me and the fire. I don't think it could have been two feet at the outside from me, if that far.

Q. 725. How far was you from the wagon?

A. 725. I don't know just how far; it couldn't have been over a foot and a half.

Q. 726. In catching Hillmon did you take a step in advance? A. 726. I don't remember whether I did or not.

Q. 727. In what part of the wagon was this gun sitting?

A. 727. About middle ways of the wagon from the ends.

Q. 728. To catch Hillmon to save him from falling, did you have to take a step in advance?

A. 728. I don't remember whether I did or not; I took several steps after I caught him. As I caught him I swung his body off from the fire, and it took several steps to swing his body away from the fire.

Q. 729. When you finally layed him down, where did you place the body with reference to the wagon and the campfire?

A. 729. He was lying rather quartering from the way the wagon stood, with his feet toward the wagon; his feet was closer to the fire than his body, if I remember right.

Q. 730. After he was thus layed down by you, where were his feet with reference to where they were at the time you say you caught him?

A. 730. As near as I can guess, they couldn't have been over a foot and a half from where they was when I caught him.

Q. 731. In which direction were they moved from where they were when you caught him?

A. 731. In a southwesterly direction, if I remember right.

Q. 732. How far from the muzzle of the gun did you take hold of it when you went to take it out of the wagon?

A. 732. I don't know just how far, about middle ways of the barrel.

Q. 733. Did you not at a coroner's inquest, held on this body at Lawrence about April 4th, 1879, in answer to the following question, "How far from the muzzle of the gun did you seize the barrel?" did you not answer and testify as follows: "It must have been four or five inches from the muzzle of the gun?"

A. 733. I don't remember that I testified to that or not.

Q. 734. Do you remember that you testified on that occasion?

A. 734. I don't remember just now whether I did or not.

Q. 735. Do you remember whether you were sworn or examined as a witness at the inquest in Lawrence?

A. 735. Yes, sir, I remember that I was.

Q. 736. When you caught Hillmon what was he doing?

A. 736. He was sinking down.

Q. 737. Was he sinking down or staggering around when you caught him?

A. 738. I don't think he was staggering around; I think he was sinking down and apparently falling one way.

Q. 739. When you caught him was he staggering or simply sinking? A. 739. Appeared to be sinking down.

Q. 740. Did you not before a coroner's inquest in Lawrence, Kansas, held about April 4th, 1879, testify as follows: "He was staggering, not making much effort; I just grabbed him in my arms, I thought he was going to reel over into the fire."

A. 740. Yes, sir, I believe I remember stating something similar to that.

Q. 741. Did you or did you not, at the time and place above mentioned, make the statement to which your attention has been called, to wit, in question number 740?

A. 741. I did make such a statement; I don't remember whether it was just word for word like that?

Q. 742. In what position did you lay the body of Hillmon at that time? A. 742. On his back on the ground.

Q. 743. In what position did you place his hands?

A. 743. Don't remember now whether I moved his hands at all or not.

Q. 744. Can you say positively that you did move his hands?

A. 744. I couldn't say positively whether I did or not.

Q. 745. Is it not a fact that you placed one of his arms across his breast, while he way lying on the ground, and before you went for any assistance?

A. 745. I couldn't state now whether it was or not.

Q. 746. Upon what did you place the head of the body?

525 A. 746. On some wood lying by the fire.

Q. 747. When you left this body did it lie just as it fell, or had some portions of the body been arranged by you?

A. 747. It lay just as it fell. I might have moved his feet some, but I don't remember whether I did or not.

Q. 748. Why do you say you might have moved his feet?

A. 748. Because I think I moved them, but I wouldn't be positive of it.

Q. 749. Why do you think you moved the feet if you have no recollection of doing so?

(Objected to by plaintiff as incompetent, being unfair and misleading, the witness not having stated that he had no recollection of moving the feet, and having stated that he thought he moved them but couldn't be positive about it.)

(The defendant's counsel moves to strike out the objection, that said objection is made for the purpose of enabling counsel for the plaintiff to get a suggestion to the witness and the question withdrawn for the present.)

Q. 750. Do you now remember that you did move the feet of that body?

(Objected to by plaintiff's counsel as incompetent for the reason that the same question has been once asked and fairly answered.)

A. 750. I don't remember positively whether I did or not.

Q. 751. Have you any recollection of moving the feet of that body? If so, when did you move them?

A. 751. I don't have any recollection now of doing so. If I did I did it before I left the body. They were close to the fire.

(The defendant moves to strike out all the last answer of the witness, commencing with the words: "If I did," for the reason the statement is incompetent as evidence, is not responsive to the question, the question not calling for what the witness did unless he had some recollection in regard to it.)

Q. 752. What other, if any, portion of the body did you fix or move, after the body had fallen?

A. 752. No other that I remember of.

Q. 753. Did this body accidentally fall upon this pile of wood or did you see the wood while the body was falling and direct the body toward it, or did you place the head upon this wood after the body had fallen?

A. 753. Never thought anything about the wood; wasn't directing it toward the wood or ground. I wasn't thinking anything about it. I did not place the head upon this wood after the body had fallen.

Q. 754. How long did you remain at camp after you had layed the body down as you have stated?

A. 754. Don't think I stayed there a minute, not longer than I could get a horse and get on the horse.

Q. 755. Were all the changes which were made in the position of that body made before you left the camp on horseback? A. 755. All that I know of.

Q. 756. This man was killed by the discharge of the gun which you have described in this examination and which was present at coroner's inquest at Lawrence, was he not?

A. 756. Yes, sir, the same gun.

Q. 757. Describe accurately the position of this body when you left camp on horseback that evening.

A. 757. Laying on his back and full length of his body, laying out straight; one of his hands laying out from his body like on the ground or wood, I don't remember which. His other hand was laying by his side or on his body, I don't remember which; I believe it was on his body.

Q. 758. Had you straightened out the body?

A. 758. No, the body was pretty well straightened out when it fell.

Q. 759. What time did you leave camp on horseback that night? A. 759. About sun down.

Q. 760. When that gun was discharged, was the wind blowing a pretty stiff breeze or was it pretty quiet?

A. 760. The wind was blowing some.

Q. 761. In catching hold of the body did you get any blood upon your clothes? A. 761. None that I know of.

Q. 762. And you now swear that that man whom you killed was Hillmon, do you? A. 762. Yes, sir.

Q. 763. Did you not on or about the 4th day of September, A. D. 1879, in Platte county, in the State of Missouri, state to

W. J. Buchan in substance, as follows: "The next evening after we got to the camp last named, the man Joe was sitting by the fire. I was at the hind end of the wagon, either putting feed in the box for the horses or taking a sack of corn out, when I heard a gun go off. I looked around and saw the man was shot, and Hillmon was pulling him around to keep him out of the fire. Hillmon changed a day-book from his own coat to Joe's, and said to me everything was all right, and in shape just as he wanted it, and that I need not be afraid, but it would be all right. He told me to get on a pony and go down to a ranch about three quarters of a mile and get some one to come up. He took Joe's valise and started north; this was about sundown. We had no arrangements about
526 communicating with each other. He first proposed to do so, but I told him I did not want to know where he was, that in case I should I might find out some other way. I have never heard a word from him since. At Lawrence Mrs. Hillmon gave me to understand that she knew where Hillmon was and that he was all right. The man over whom an inquest was held at camp afterwards at Medicine Lodge and at Lawrence, Kansas, was this man Joe Burges or Berkley, killed by Hillmon, as related above, and John W. Hillmon I believe to be still alive; at least he left our camp and went north as stated above. After killing Joe, Hillmon said he would assume the name of William Marshall. Baldwin's wife and Mrs. Hillmon know all about this. In my testimony at Lawrence I stated the route taken as above described, but the man who I described as being in camp with us and who I said went off with some waggoner, was Joe, the man killed," or did you not, about the time and place above mentioned, in the presence of one Francis M. McDonald, sign or swear to a statement in writing which contained, among others, the foregoing statement in substance.

(Plaintiff's counsel objects to the question last asked the witness for the reasons, first, That it calls for the contents of a written instrument which should first be produced and proven, and which would then be the best evidence of such contents. Second, Said question is leading and is not a proper question for cross-examination. Third, The paper speaks for itself, and the contents can not be proven by parol or secondary evidence until its loss is duly shown. Fifth, That the evidence called for is immaterial and irrelevant.)

A. 763. I didn't state such as that to Buchan but Buchan made such a statement to me and asked me how it would do. I told him he was doing that and knew better than I did. He told me he hadn't left anything undone; that it was all right

and that he wanted me to swear to it before a justice of the peace or a lawyer at Parkville and I done so.

The question asked me is about the substance of what he got in the statement.

Q. 764. Where did you sign this statement?
A. 764. In McDonald's office in Parkville, I think.
Q. 765. Did you swear to it at the same time?
A. 765. I don't have any recollection now whether I swore to it or not.
Q. 766. Do you remember of having any conversation with McDonald with regard to the contents of that paper, or hearing any conversation between him and Buchan in regard to it?
A. 766. No, sir, I don't.
Q. 767. This instrument had been written before you and Buchan went to McDonald's office, had not?
A. 767. Yes, sir, it had been written before at my brother's.
Q. 768. What is that brother's name, and where did he live at that time, in what direction and how far from Parkville?
A. 768. Rheuben Brown is his name; lived in Platte county about 4 miles east of Parkville.
Q. 769. Does he reside at the same place now?
A. 769. Yes, sir; same place.
Q. 770. Who went with you and Buchan to Parkville to the office of McDonald?
A. 770. Buchan, myself and a man by the name of Ward went to Parkville together, and Buchan and I went to McDonald's office.
Q. 771. Did you or did you not at that time swear to the contents of that paper which you state contained, in substance, the statement to which your attention has been called, to wit, in question number 763?

(Plaintiff's counsel objects to last above question as incompetent, as not being the best evidence.)

A. 771. I wouldn't be positive now, as to whether I swore to it or not.
Q. 772. Do you know whether you swore to it or not?

(Objected to by plaintiff on same ground as question last preceding.)

A. 772. I don't know now whether I did or not.
Q. 773. You signed a paper in which you charged your friend Hillmon with the murder of a man by the name of Joe, and yet, do you state now that you do not know whether you swore to such a statement or not?

A. 773. I don't remember; couldn't say whether I did or not; I have stated heretofore that I signed or swore to such a paper, but I don't remember which it was.

Q. 774. Did you not both sign and swear to that paper?

(Plaintiff counsel objects to the last above question on the same ground as in question 771.)

A. 774. Not that I remember of now, I didn't.

Q. 775. Do you now testify that you never did swear to the contents of that paper, before Francis M. McDonald at Parkville, Missouri, or before any other person?

A. 775. I never swore to it before any other person, and whether I did before McDonald, I don't remember.

Q. 776. What did you, Buchan and Ward go to Parkville on that day for?

A. 776. Buchan and I went there to see McDonld, or went there to go to his office rather, for the purpose of me signing or swearing to that statement he had, and to look at the map of Kansas to look for a town out in southwestern Kansas; and I don't know what Ward's business was there.

527 Q. 777. You now say that that statement which you there signed was false, and that you do not remember whether you swore to that false statement or not, do you not?

A. 777. I say that was a false statement; don't remember whether I signed or swore to it or not, don't remember which one I done.

Q. 778. After the shooting you did leave the camp about sundown upon a pony did you not? A. 778. Yes, sir.

Q. 779. In what direction, and where did you go?

A. 779. Went in a southern direction from camp to Mr. Graves' house; I wouldn't be positive, I think that's his name.

Q. 780. How far was that from the camp?

A. 780. Half or three-quarters of a mile from the camp.

Q. 781. Did this man come back with you?

A. 781. Yes, sir.

Q. 782. Who else returned with you, if any one, at that time? A. 782. No one else.

Q. 783. Did you remain at camp then, that is, after you returned with this man Grave? A. 783. Yes, sir.

Q. 784. Graves went away again did he not?

A. 784. Yes, sir.

Q. 785. You were then left alone with the dead body were you not? A. 785. Yes, sir.

Q. 786. How long did Graves remain at camp before he went away?

A. 786. Not longer than a half an hour at the outside.

Q. 787. State as definitely as you can, how long you and this man you have called Graves remained there at that camp together?

A. 787. Not longer than between a quarter and a half an hour; this best that I can remember.

Q. 788. What, if anything, was done with or to the body while he was there? A. 788. Nothing at all.

Q. 789. Where was the gun laying at this time?

A. 789. Laying on the ground.

Q. 790. Did you and Graves examine the gun at this time?

A. 790. No, sir, not that I have knowledge of.

Q. 791. Did you call his attention to the gun and where it was lying?

A. 791. I don't know now whether I did or not.

Q. 792. Did you and he have any conversation or talk about the gun at this time?

A. 792. Not that I recollect of now.

Q. 793. Did either of you pick the gun up at this time?

A. 793. I didn't, and don't think that he did.

Q. 794. How was the feet of this body clothed at this time?

A. 794. With shoes and socks on.

Q. 795. What kind of shoes, high or low shoes?

A. 795. Kind of a gaiter shoe.

Q. 796. Were they similar to the kind of shoes you were wearing at that time?

A. 796. No, sir, I was wearing boots.

Q. 797. At the time of shooting, were the ponies hitched to the hind end of the wagon?

A. 797. No, sir, they were picketed out close to the wagon.

Q. 798. After Graves left, how long did you remain alone with the dead body?

A. 798. About an hour or an hour and a half, as near as I can guess at it.

Q. 799. Was this man Graves the same man who was at your camp on the morning of the same day this shooting took place? A. 799. Yes, sir.

Q. 800. And he was the first man at the camp after the shooting took place was he not? A. 800. Yes, sir.

Q. 801. There was an inquest held over this body at camp; afterwards at Medicine Lodge, and at Lawrence, Kansas, was there not? A. 801. Yes, sir.

Q. 802. Was you present when the clothing was examined on this body? A. 802. Yes, sir.

Q. 803. Did you find among other things, Hillmon's day-book in the pocket of the coat which was upon this body?

A. 803. Yes, sir.

Q. 804. Who did next arrive at camp after this man Graves left?

528 A. 804. There was two or three of them; I don't know their names.

Q. 805. Did you afterwards ascertain their names?

A. 805. I learnt one or two of their names, but I couldn't call any of their names now.

Q. 806. Did you see the gun while you were alone in camp after Graves left?

A. 806. Yes, I see it; I couldn't help seeing it, it was laying on the ground close to me.

Q. 807. Did you pick it up or move it?

A. 807. Never touched it.

Tuesday, January 31st, 1882. The hour of adjournment having arrived the further taking of this deposition is hereby adjourned until to-morrow at 9 o'clock a. m.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.

Wednesday, February 1st, 1882. The further taking of these depositions is hereby resumed pursuant to adjournment.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.

Q. 808. When you got up from the fire to go to the wagon to take the gun out, you left Hillmon sitting down by the fire did you not? A. 808. Yes, sir.

Q. 809. State the position in which he was sitting, with reference to the wagon and the fire?

A. 809. I don't remember now just how he was sitting around the fire.

Q. 810. Do you know whether he was sitting between the wagon and the fire or not?

A. 810. I couldn't say positively whether he was or not.

Q. 811. Have you any knowledge or recollection as to where he was sitting, when you got up to go to the wagon?

A. 811. I think he was sitting on the south side of the fire; I wouldn't be positive of it.

Q. 812. State in what direction the wind was blowing at that time? A. 812. From a northerly direction.

Q. 813. Which side of the fire was nearest to the wagon?

A. 813. The eastern side of the fire was the nearest, if I got the point of the compass right.

Q. 814. Did you know that Hillmon was standing behind you, when you was taking the gun out of the wagon?

A. 814. No, sir.

Q. 815. When did you first ascertain that fact?
A. 815. Soon as the gun went off.
Q. 816. Did he make any exclamation of pain or outcry at the time? A. 816. He groaned a little was all.
Q. 817. Did you hear this groan before you turned around; and was the hearing of this groan, the first intimation you had that Hillmon was injured?
A. 817. Couldn't say whether it was or not.
Q. 817. Did you hear this groan before you turned round?
A. 817. I couldn't state positively whether I heard it before or not.
Q. 818. State the position Hillmon was in when you caught him?
A. 818. He was sinking down, and reeling toward the fire.
Q. 819. Then in which direction was he reeling?
A. 819. Western direction.
Q. 820. When you caught the body had it just begun to sink, or had it nearly reached the ground?
A. 820. As well as I remember, it must have been half way down to the ground.
Q. 821. What was the position of the arms of the body while it was reeling around?
A. 821. I couldn't say what their position was.
Q. 822. Were the- extended or close to the body?
A. 822. I couldn't say whether they were to the extreme either way, stretched out or close to the body; I never took a thought anything about it.
Q. 823. When you grasped the body did you take hold of the arms?
A. 823. I took hold of his shoulders; might have had hold of his arm between his elbow and his shoulder.
Q. 824. When you turned around after the discharge of the gun, was the body in an upright position?
A. 824. Partly that way; it was leaning toward the fire.
Q. 825. How far was this body standing from the fire, and in which direction?
A. 825. About three feet from the fire, as near as I can guess, on the eastern side of the fire.
Q. 826. State how the gun was sitting in the wagon, whether in perpendicular position or not?
A. 826. Wasn't setting perpendicular, straight up and down.
529 Q. 827. State how it was setting?
A. 827. Setting with the breach in the wagon and sticking out over the sideboards.
Q. 828. Was it setting with the trigger next to the wagon box?

A. 828. Yes, sir; toward the botom of the wagon box; the trigger was down.

Q. 829. What portion of the gun rested upon the side of the box? A. 829. The barrel of the gun.

Q. 830. Which side of the barrel?

A. 830. The top side of the barrel.

Q. 831. Do you mean by the top side of the barrel, the side upon which the sights are located. A. 831. Yes, sir.

Q. 832. Then the gun was laying with its back across the side of the wagon box was it not? A. 832. Yes, sir,

Q. 833. How far did the barrel of the gun extend over the side of the wagon box?

A. 833. About the middle of the gun rested on the side of the wagon box, as near as I can guess at it.

Q. 834. This gun was nearly in the middle of the wagon box, was it not?

A. 834. Near about the middle from the ends.

Q. 835. In which direction did the muzzle of this gun point, as it lay across the side of the wagon box?

A. 835. In a western direction.

Q. 836. What was the direction of the fire from where this gun lay? A. 836. Western direction.

Q. 837. Was the fire directly opposite to where the gun lay?

A. 837. Nearly that direction, as near as I could name it.

Q. 838. In laying the body down, did you carry it any distance?

A. 838. I didn't carry it any distance; I might have drug it a small distance from where it was falling.

Q. 839. In which direction did you drag it?

A. 839. Southern direction.

Q. 840. When you layed this body down, how did it lie with reference to the fire?

A. 840. Layed with his head from the fire, with his feet nearest to the fire.

Q. 841. How was the body lying with reference to the points of the compass?

A. 841. North and south, as near as I can tell.

Q. 842. Was the head lying to the north and the feet toward the south.

A. 842. Feet to the north and head to the south.

Q. 843. How far were the feet lying from where the wagon was standing?

A. 843. Six or seven feet, as near as I can guess at it.

Q. 844. How far were the feet from the fire?

A. 844. Two or three feet from the fire.

Q. 845. How far was the head of the body from the wagon?

A. 845. Ten or twelve feet, as near as I can guess.

Q. 846. Have you no knowledge as to these distances?

A. 846. Yes, sir.

Q. 847. How far was the head of the body from the fire?
A. 847. Pretty near the length of the person.
Q. 848. State in feet, as near as you can?
A. 848. About 4 feet, as near as I can guess.
Q. 849. Now on which side of the fire was this body lying?
A. 849. Southern side of the fire.
Q. 850. On which side of the wagon was it lying?
A. 850. Western side of the wagon.
Q. 851. Was it lying parallel with the wagon?
A. 851. No, sir; quartering with the wagon rather.
Q. 852. Was there any blood upon the face of this person when you seized the body?
A. 852. There was on the side of the face.
Q. 853. When did you first observe blood there?
A. 853. When I wa[y] laying him down.
Q. 854. Did you at the same time observe where he was wounded? A. 854. No, sir.
Q. 855. Was this gun discharged while you were raising it from the wagon, over your shoulder with your right hand?
A. 855. Yes, sir.
Q. 856. Was it a cold day on which this shooting occurred. A. 856. It was rather a cool day.
Q. 857. At that time did Hillmon have on the same shoes that he had worn on that whole trip?
530 A. 857. The same shoes he had been wearing; he had been wearing them and a pair of gum boots.
Q. 858. Were they high or low shoe?
A. 858. They were a gaiter shoe, medium size in height?
Q. 859. Do you mean by a gaiter shoe, one that comes up well on the ankle?
A. 859. Yes, sir; they come up on the ankle, but I couldn't say how far up.
Q. 860. Did you not, in the office of George J. Barker, in the City of Lawrence, on or about April 4th, 1879, make the following statement, "Hillmon was dark complexion; his shoes were low cut, wore on whole of last trip?"

(Objected to by plaintiff's counsel as immaterial and irrelevant. Second, Because no foundation has been layed for the inquiry for the purpose of contradicting the witness; if such statement was in writing it should be produced.)

A. 860. I stated Hillmon was of dark complexion, and stated that he wore them shoes on that trip; don't know whether I stated they were low cut shoes or not.
Q. 861. At the time this gun was discharged, did Hillmon have on a hat? A. 861. Yes, sir.
Q. 862. Describe that hat?
A. 862. A dark hat, common size.
Q. 863. What became of that hat?

A. 863. Fell in the fire and burnt up.

Q. 864. Did it fall in the fire before, or at the time, or after this alleged accident? A. 864. Right at the time.

Q. 865. Is it not a fact that this hat was blown into the fire some time after the shooting took place?

A. 865. No, sir; right at the time.

Q. 866. How do you know it was right at the time of the shooting?

A. 866. Because I seen the hat in there while I had hold of him.

Q. 867. Was this wool, felt or fur hat?

A. 867. It was what I would call a fur hat.

Q. 868. Was it a soft or stiff hat?

A. 868. It was a soft hat.

Q. 869. What color? A. 869. It was a dark hat.

Q. 870. Was it bound about the rim or not?

A. 870. I couldn't say whether it was or not.

Q. 871. You have stated your camp fire was in a hole; now you may state how much ground your fire would cover?

A. 871. About 2 feet or 2½ feet, as near as I can guess at it.

Q. 872. Did you have a brisk fire at the time or but little?

A. 872. Yes, sir; we had a brisk fire at the time.

Q. 873. The reason you had a brisk fire was on account of the inclemency of the weather, was it not?

A. 873. Yes, sir.

Q. 874. Was that hat in the fire when you mounted the pony and left the camp? A. 874. Yes, sir.

Q. 875. Are you positive as to that? A. 875. Yes, sir.

Q. 876. Did you ever see that hat, or any portion of it, after that?

A. 876. I think I did after I came back; I wouldn't be positive of it.

Q. 877. When and where did you see it?

A. 877. Laying by the fire when I came back to camp.

Q. 878. What was its condition then?

Q. 878. Pretty near all burnt up; I think it was yet burning.

Q. 879. What did you do with it?

A. 879. I didn't do anything with it that I remember of.

Q. 880. Did the gentleman who was with you do anything with it? A. 880. Not that I know of.

Q. 881. When you returned was the fire much lower than when you left?

A. 881. I don't know; I never noticed whether it was or not.

Q. 882. Did you call the attention of this first man, who came to camp with you, to this hat?

883. Did you see the hat, or any portion of it, burning
r he left?
. 883. Not that I remember of; I didn't pay any attention

. 884. Did you see the trunk which you had with you ex-
amined? A. 884. Yes, sir.
Q. 885. When first?
A. 885. The next morning after the shooting.
. 886. Was there a hat found among the contents in that
ık?
.. 886. I think there was; I wouldn't be positive of it.
. 887. Whose hat was that?
.. 887. It was Hillmon's hat.
. 888. That hat was brought to Lawrence with the other
tents of the trunk was it not? A. 888. Yes, sir.
. 889. You saw that hat at camp, at Medicine Lodge, at
ire Paddock's, and you took it out of the trunk at Law-
ce at the time of the coroner's inquest there, did you not?
A. 889. I don't recollect now whether I did or not.
. 890. Did you not see the hat at each of the places above
ntioned?
A. 890. I think I did, but I wouldn't be positive of it.
. 891. Now you may describe the hat, as accurately as
ı can, which was found in Hillmon's trunk after the shoot-
g.
A. 891. The best I can recollect of the hat, was a com-
on size felt hat or fur; I don't remember as to the quality
it.
Q. 892. State wherein it was differed from the hat you
y was burned up.
A. 892. I think this hat was a dark bluish color, and as
the size about the same.
Q. 893. Was that all the difference between the two hats?
A. 893. That's all the difference I could describe now.
Q. 894. This hat was in the trunk at the time of the shoot-
g was it not; if not, state when it was put in the trunk?
A. 894. It was in the trunk, if I recollect right.
Q. 895. Both of these hats were partially worn were they
ot? A. 895. Yes, sir.
Q. 896. Then Hillmon had with him two hats, almost
entically alike, did he not?
A. 896. He had two hats; as to them being almost alike
couldn't say.
Q. 897. State wherein they differed in every respect that
ou can, if there was any difference between them?
A. 897. I think one was a bluish color, and the other a
ark color, was all the difference that I can remember.
Q. 898. Which was the better hat; the one that was burned

A. 898. I think that the one that was burnt was the best hat.

Q. 899. Did you not before the coroner's inquest in Lawrence, in April, 1879, testify as follows: "You think the hat he had on was the better of the two?" in reply to the above question did you not testify and answer, "Yes, sir, it was the best hat?"

(Objected to by plaintiff's counsel as: First, Immaterial and Irrelevant. Second, It is incompetent because the inquiry is intended to elicit contradictory statements of the witness about immaterial matters, and with regard to testimony drawn out by defendant's counsel by which they are bound and not inquired into by the plaintiff; and further, the testimony before the coroner's inquest is in writing and should be produced and identified by the witness and is the best evidence.)

A. 899. I don't recollect now whether I did or not.

Q. 900. And did you not on the same time and occasion, in answer to the following question, "Then at the time of the accident he was wearing his best hat?" answer, "Yes, sir?"

(Same objection by plaintiff's counsel as to last preceding question.)

A. 900. I don't remember now whether I did or not.

Q. 901. What was done with the shoes that were upon the feet of this body at the time of shooting?

A. 901. They were put in the wagon or trunk, I don't remember which; they were left on the road, at Kingman or Hutchinson; I never missed them until I got to Lawrence.

Q. 902. When and where were they delivered to you?

A. 902. At Mr. Paddock's, about the 20th or 25th of March, in Barber county, Kansas.

Q. 903. Then neither the hat nor shoes, which were upon the body at the time of the shooting, were brought to Lawrence? A. 903. No, sir.

Q. 904. When did you last see the shoes that the deceased had on at the time of shooting?

A. 904. At Mr. Paddock's was the last time I remember of seeing them.

Q. 905. Who was with you then?

A. 905. Mr. Paddock and Mr. Ferguson.

Q. 906. Did you not see them at Kingman when you took some of the things out of your trunk?

A. 906. I don't recollect now whether I did or not.

532 Q. 907. Did you not so testify at the coroner's inquest at Lawrence?

(Same objections made by plaintiff counsel as to question number 899.)

A. 907. I don't remember just now whether I did or not.
Q. 908. Describe the hat which the stranger wore who was with you in camp at Cow Skin.
A. 908. Black hat; that is as near as I can describe it.
Q. 909. Do you know whether it was a stiff hat or soft hat?
A. 909. I couldn't say now whether it was or not.
Q. 910. Have you given all the description you can of the stranger's hat?
A. 910. That's all I can give now. Yes.
Q. 911. Did you not testify at the coroner's inquest on this body at camp, in Barber county, Kansas, on or about the 17th day of March, 1879, and at a coroner's inquest held upon the same body at Medicine Lodge, in said county, on or about the 19th day of March, 1879, and at a coroner's inquest held upon the same body in Lawrence, Kansas, about the 4th day of April, 1879, that your residence was in Wyandotte county, Kansas?

(Objected to by plaintiff's counsel for the reasons: First, That the question calls for irrelevant and immaterial testimony. Second, The witness' testimony before the coroner's inquiry is, or should be, in writing, and should be produced and identified by the witness and is then the best evidence of the testimony he then gave. Third, That the evidence sought is incompetent to contradict the witness, it being in regard to immaterial matters and matters inquired of only by defendants.)

A. 911. Yes, sir, I stated that residence or home, I don't know which it was.
Q. 912. Then your residence was in Wyandotte county, Kansas, on the 4th day of April, 1879, was it not?
A. 912. Yes, sir.
Q. 913. When did you arrive in Lawrence on your return from Barber county, Kansas?
A. 913. About the last of March.
Q. 914. Do you not know the day of the month in which you arrived in Lawrence on that occasion?
A. 914. No, sir, I don't know the day.
Q. 915. How long was it before the coroner's inquest was begun?
A. 915. I believe the same day after I got there.
Q. 916. You were sworn as a witness at that inquest, were you not, and examined? A. 916. Yes, sir.
Q. 917. Before leaving Barber county state the names of all the persons to whom you wrote concerning this accident, as you call it.
A. 917. Mrs. Hillmon was the only one.
Q. 918. When and from where did you write to her?

A. 918. About the 19th or 20th of March, from Medicine Lodge. Since I come to think I don't believe I wrote at all; but I think Mr. Paddock wrote, and I wrote some in the letter. I wouldn't be positive whether I wrote or no.

Q. 919. Did you, or did you not, write Mrs. Hillmon concerning this so-called accident?

A. 919. I don't recollect now whether I did not.

Q. 920. Had you ever written to her before this shooting took place? A. 920. No, sir.

Q. 921. Are you positive as to that?

A. 921. Yes, sir, I feel positive of it.

Q. 922. How many letters, if any, did you write her from Barber county?

A. 922. I might have written one. If I did, it was the only one.

Q. 923. How many post office money orders did Hillmon receive after you and he went to Wichita, and during the time you were there and about there, in 1878 and 1879?

A. 923. I don't recollect now at this time of any.

Q. 924. Did he not receive postal money orders both at Wichita and Medicine Lodge during this time?

A. 924. I couldn't say now whether he did or not.

Wednesday, February 1st, 1882. The hour for adjournment having arrived the further taking of this deposition is postponed until to-morrow morning at 9 o'clock a. m.

My commission expires April 21, 1883.

[Seal] HENRY McGREW, Notary Public.

Thursday, February 2d, 1882, 9 a. m. The further taking of these depositions is hereby resumed pursuant to adjournment.

My commission expires April 21, 1883.

[Seal] HENRY McGREW, Notary Public.

Q. 925. How long did you remain in Barber county after this shooting took place, and where did you stay while you remained there?

533 A. 925. About ten days. Stayed at Mr. Paddock's, and at Medicine Lodge a night or two.

Q. 926. Where did you stop over night in Medicine Lodge at that time, to wit, after the shooting.

A. 926. It Iliff's restaurant or at the hotel, I don't remember which.

Q. 927. Where did you sleep during that time?

A. 927. I think I slept at the hotel, I wouldn't be positive.

Q. 928. What hotel?

A. 928. I can't call the gentleman's name now; a brick hotel.

Q. 929. Did you sleep in Mr. Iliff's livery stable during any of that time?

A. 929. I don't recollect just now whether I did or not.

Q. 930. How many days were you in attendance upon the coroner's inquest at Lawrence?

A. 930. Four or five days, as near as I can guess.

Q. 931. At what stage of the proceedings of that inquest did you leave Lawrence; that is, what witnesses had been examined when you left?

A. 931. I left Lawrence twice during the proceedings there; I don't know who had been examined when I left Lawrence the first time; when I left the second time, myself and Levi Baldwin, Mrs. Hillmon, two or three others, I don't remember who they were, had been examined.

Q. 932. Were you about the court room when the coroner's inquest was being held at Lawrence each day until you left finally? A. 932. Yes, sir.

Q. 933. Were you present most or all of the time the inquest was being held until you left finally?

A. 933. Most of the time I was.

Q. 934. During the time the inquest was being held in Lawrence upon this body, where did you board?

A. 934. At Mr. Sampson's hotel, the Douglas or Lawrence house, I don't know which it was called.

Q. 935. Where was that hotel situated with reference to the court house where the inquest was being held?

A. 935. About a block south on the same street.

Q. 936. Did Levi Baldwin stay at the same hotel during that time? A. 936. One night only, that I remember of.

Q. 937. Did he board there during that time, or any portion of that time?

A. 937. I don't remember of him eating more than one or two meals there.

Q. 938. Was he at that hotel the night that you left Lawrence finally?

A. 938. Not that I know of; I didn't leave there in the night.

Q. 939. When did you during this inquest leave Lawrence the first time?

A. 939. It was on a Saturday evening, I think.

Q. 940. Who went with you? A. 940. No one.

Q. 941. Where did you start from?

A. 941. From the Atchison, Topeka and Santa Fe depot, I think.

Q. 942. You did not start then from the hotel there where you were stopping? A. 942. I first started from the hotel.

Q. 943. Did any person go with you from the hotel?

A. 943. No, sir, not that I recollect of.

Q. 944. What time did you leave the hotel?

A. 944. Along towards evening.

Q. 945. Fix the time as definitely as you can when you left the hotel on that occasion?

A. 945. That's near as I can tell you.

Q. 946. Was it before or after the coroner's inquest had adjourned that night? A. 946. Afterwards.

Q. 947. Was it before or after supper at the hotel?

A. 947. It was before, I think.

Q. 948. Was it before or after sunset?

A. 948. Before sunset, if I recollect right.

Q. 949. Did you return to the hotel again that night?

A. 949. No, sir.

Q. 950. How many days had the coroner's inquest been in session at Lawrence then?

A. 950. About two days, to the best of my knowledge.

Q. 951. What witnesses had been examined when you left the first time?

A. 951. Myself and Levi Baldwin, as well as I recollect.

Q. 952. You were present at the inquest the next Monday morning were you not? A. 952. Yes, sir.

Q. 953. State as definitely as you can, how many days you were in attendance at this inquest after you returned.

534 A. 953. Two or three days, as near as I could guess.

Q. 954. What witnesses were examined after you returned on Monday morning?

A. 954. Myself, Levi Baldwin, Mrs. Hillmon, a Mr. Judson, several others, I don't know their names.

Q. 955. Had not you, Levi Baldwin and Mrs. Hillmon been examined as witnesses at the inquest in Lawrence, before you left on the Sunday night?

A. 955. I think they were; I wouldn't be positive.

Q. 956. Were they examined after your return the next Monday?

A. 956. To the best of my recollection, I think they were called up a time or two.

Q. 957. State what witnesses beside yourself, Levi Baldwin, Mrs. Hillmon and Mr. Judson were examined at that inquest, after your return on Monday.

A. 957. I couldn't call any of their names.

Q. 958. Were there a number of persons, besides those you have named, examined as witnesses at that inquest.

A. 958. Yes, sir, there was a number of them.

Q. 959. How do you know there was a number of other persons, besides those you have named, examined as witnesses at that inquest? A. 959. By seeing them on the stand.

Q. 960. Can you tell who the next person was who was examined as a witness at that inquest after Mr. Judson?

A. 960. No, sir.

Q. 961. Was he a doctor by the name of Fuller or Miller?

A. 961. Couldn't say whether he was or not.
Q. 962. Do you say that no person known as Doctor Fuller was examined as a witness at that inquest?
A. 962. I don't know anything about whether there was or not.
Q. 963. Do you say that no doctor known as Doctor Miller was examined at that inquest?
A. 963. I couldn't say whether there was or not, not knowing.
Q. 964. Who were these several witnesses whom you have mentioned as having been examined at that inquest, whose names you say you do not know, were they lawyers, merchants or doctors; that is, what were they called in that respect?
A. 964. Some of them were called doctors; the others, I don't know what they were called.
Q. 965. From your return on Monday until you finally left Lawrence, were you in attendance upon this inquest each day?
A. 965. Yes, sir.
Q. 966. Except to attend on this inquest what other business did you have in Lawrence, if any?
A. 966. No other business at all.
Q. 967. During the time this inquest was being held in Lawrence did you see Mrs. Hillmon? A. 967. Yes, sir.
Q. 968. You left Lawrence finally before the inquest was over did you not?
A. 968. I don't know whether it was over with or not.
Q. 969. On what day of the week did you leave Lawrence permanently?
A. 969. I don't recollect the day of the week.
Q. 970. State the day of the month?
A. 970. I couldn't state the day of the month.
Q. 971. State as definitely as you [—] the day of the month?
A. 971. About the 10th of the month of April, as near as I can guess at it, of 1879.
Q. 972. Before leaving this last time did you get permission of the coroner to go?
A. 972. Not that I recollect of; I asked Mr. Barker if he was through with me and he said he was, and I lit out.
Q. 973. Had you not been notified by the coroner, and told by myself (Barker) that you must not leave, that your testimony was being written out and you would have to sign it?
A. 973. I don't recollect anything about it.
Q. 974. Who was with you when you left Lawrence the last time while the inquest was being held?
A. 974. No one.
Q. 975. Where did you start from on that occasion?

A. 975. From Mr. Sampson's hotel.

Q. 976. What time did you leave the hotel?

A. 976. About 7 o'clock in the morning.

Q. 977. Was Levi Baldwin at that hotel during the night previous to your leaving? A. 977. Yes, sir.

Q. 978. He stayed there that night did he not?

A. 978. Not that I know of, he didn't.

535 Q. 979. What time in the night was it that you saw him at the hotel?

A. 979. Seven or eight o'clock.

Q. 980. Did you not see him (Baldwin) at or in front of that hotel much later than that on that night?

A. 980. Yes, sir, as late as 9 o'clock, as near as I can guess at it.

Q. 981. Did you not see Baldwin much later than 9 o'clock on that night?

A. 981. No, sir, not to the best of my recollection, I didn't.

Q. 982. Did you not see him the next morning?

A. 982. No, sir.

Q. 983. Did you stay at that hotel during all of the night before you left the next morning?

A. 983. Yes, sir, except what little walking around I did after supper.

Q. 984. Who was with you when you were walking around after supper?

A. 984. Levi Baldwin was with me part of the time.

Q. 985. Who else was with you?

A. 985. No one else, that I recollect of.

Q. 986. Where did you and Baldwin go?

A. 986. Walked down the street from the hotel and back up to a saloon, close by the hotel, went in and stayed there awhile.

Q. 986. How long did you and Baldwin remain there in that saloon?

A. 986. About an hour, as well as I remember.

Q. 987. Were there any other persons with you and Levi Baldwin in this saloon? A. 987. Several other persons.

Q. 988. Do you know any of them? A. 988. No, sir.

Q. 989. Did you and Baldwin visit any other places during that night? A. 989. No, sir, not that I know of now.

Q. 990. What time did you and Baldwin leave this saloon?

A. 990. I judge it was about 9 o'clock.

Q. 991. Where did you and he then go?

A. 991. Went to the hotel.

Q. 992 From the hotel, where did you and he go?

A. 992. I went to bed; I don't know where he went.

Q. 993. When and where did you next see Levi Baldwin?

A. 993. In Platte county, Missouri, at my brother's in the month of July, 1879, if I remember right.

Q. 994. Did you have any talk with the young man who was acting as clerk of this hotel, which you call the Sampson hotel, during the night before you left there?

A. 994. Not that I recollect of; not any more than just before I went to bed.

Q. 995. What time did you retire that night?

A. 995. About 9 o'clock, as near as I can guess.

Q. 996. Were you at the hotel to breakfast the next morning? A. 996. No, sir.

Q. 997. How did you leave Lawrence on that occasion?

A. 997. Walked from the hotel to the depot, and got on the cars and came down to Wyandotte.

Q. 998. To what depot did you go, and what railroad did you take?

A. 998. Atchinson, Topeka & Santa Fe depot, and took the Atchison, Topeka & Santa Fe railroad.

Q. 999. What time did the train leave the depot?

A. 999. Seven or eight o'clock; freight.

Q. 1000. What time did you leave the hotel in the morning? A. 1000. About 7 o'clock.

Q. 1001. What time did you arrive in Kansas City?

A. 1001. About 10 o'clock in the morning.

Q. 1002. No one accompanied you to the depot on this occasion did they? A. 1002. No, sir.

Q. 1003. Did you see Levi Baldwin at the depot?

A. 1003. No, sir.

Q. 1004. When did you pay your hotel bill at this house?

A. 1004. The last time I paid it was the last time I came back up to Lawrence from home.

Q. 1005. When, before leaving Lawrence the last time, did you pay your hotel bill; was it the evening before you left, or the morning on which you left, and to whom did you pay it?

(Objected to by plaintiff as immaterial.)

A. 1005. A day or two before I left, as near as I recollect, to the clerk of the hotel.

Q. 1006. From Kansas City where did you go?

A. 1006. Went home, north of Wyandotte about a mile or mile and a half.

536 Q. 1007. On what day of the week did you get home on this occasion?

A. 1007. I don't recollect what day of the week.

Q. 1008. Was it not on Sunday? A. 1008. I think not.

Q. 1009. From there where did you go?

A. 1009. To Missouri, in Platte county, to my brothers.

Q. 1010. How did you go from Wyandotte to Platte county to your brothers? A. 1010. Horseback.

Q. 1011. When did you arrive at your brothers, that is how long after you left Lawrence?

A. 1011. The evening of the same day I left there.

Q. 1012. Was that your brother Reuben?

A. 1012. Yes, sir.

Q. 1013. At what place did he live, and how far from your father's?

A. 1013. About 4 miles east of Parkville; about five miles to my brother's from my father's, straight across the river.

Q. 1014. About how far from your father's to your brother's by the road you did travel? A. 1014. About 13 miles.

Q. 1015. On what railroad is Parkville?

A. 1015. The Kansas City and St. Joe and Council Bluffs road.

Q. 1016. When did you next return to Lawrence?

A. 1016. I haven't been there since.

Q. 1017. From your brother Reuben's where did you go?

A. 1017. To Orrick, on the North Missouri railroad.

Q. 1018. How long did you remain at your brother Reuben's on this occasion? A. 1018. One night.

Q. 1019. In what county is Orrick?

A. 1019. In Ray county, I believe.

Q. 1020. How did you go to Orrick, and how long did you remain there?

A. 1020. Went a horseback; remained there and within five or six miles of Orrick 10 or 15 days.

Q. 1021. Where did you stop in Orrick, and where did you remain while there in Orrick?

A. 1021. Remained there about a half a day the first time. I remained right there in town and stopped at no particular place.

Q. 1022. How far is it from your brother Reuben's to Orrick in Ray county?

A. 1022. Thirty or thirty-five miles, as near as I can guess.

Q. 1023. At what time in the night did you arrive at your brother Reuben's on this occasion, and what time did you leave there the next morning for Orrick?

A. 1023. Got there in the evening a while before sundown, and left there the next morning about 8 o'clock.

Q. 1024. Did you arrive in Orrick on the same day you left your brother Reuben's?

A. 1024. No, sir, on the second day after I left there.

Q. 1025. Where did you stay the next night after leaving your brother Reuben's?

A. 1025. Stayed all night with a farmer about two miles from Missouri City.

Q. 1026. What was his name?

A. 1026. I couldn't call his name.

Q. 1027. On what road and how far from Missouri City does this farmer live?

A. 1027. On the North Missouri railroad, about a half a mile from the railroad, in a southeast direction from Missouri City.

Q. 1028. How far is Missouri City from Orrick?

A. 1028. About ten miles, as near as I remember.

Q. 1029. What time of day did you arrive in Orrick?

A. 1029. In the forenoon, a while before noon.

Q. 1030. When did you leave Orrick?

A. 1030. In the afternoon some time.

Q. 1031. And to what place did you go?

A. 1031. To about five miles east of there to a tie camp.

Q. 1032. At Orrick did you not stop at any hotel or have your horse put up at any stable?

A. 1032. I stopped at a restaurant and got my dinner and didn't put my horse up.

Q. 1033. Did you take your horse with you out to this camp?

A. 1033. Yes, sir, and keep him there all the time I was there.

Q. 1034. Where did you get that horse?

A. 1034. I traded with my brother for him.

Q. 1035. Was, it the same horse that you took when you started from your father's to go to your brother Reuben's?

537 A. 1035. Yes, sir.

Q. 1036. State in which direction this tie camp was situated from Orrick, and the name by which it was known.

A. 1036. East of Orrick; I don't know as it had any particular name, I never heard any name for it; there was a man and his wife lived there in a cabin and boarded the hands, that was all the camp there was there.

Q. 1037. What was the name of the man who lived in this cabin?

A. 1037. I couldn't call his name now; I don't remember it.

Q. 1038. With whom did you board the 10 or 15 days you say you remained at Orrick.

A. 1038. There at that cabin where the other men boarded.

Q. 1039. From this camp where did you go?

A. 1039. To Missouri City; stayed there a day or two.

Q. 1040. With whom did you stay in Missouri City?

A. 1040. I can not call the name; I put my horse in the livery stable of the man who I stayed with myself.

Q. 1041. From Missouri City where did you go?

A. 1041. Liberty, Missouri.

Q. 1042. How long did you remain in Liberty at this time.

A. 1042. About two days.

Q. 1043. With whom did you stop at Liberty?

A. 1043. Stopped at a restaurant there; I couldn't call his name; I had my horse in Reed's livery stable.

Q. 1044. From Liberty where did you go?

A. 1044. Independence, Missouri.

Q. 1045. How long did you remain at Independence, Missouri?

A. 1045. Two or three days.

Q. 1046. Where did you stay there?

A. 1046. Hotel; I don't remember the name.

Q. 1047. From Independence where did you go?

A. 1047. To Lee Summit, Missouri.

Q. 1048. How long did you remain in Lee Summit?

A. 1048. Over night and a part of a day.

Q. 1049. Then to what place did you next go?

A. 1049. To Lexington, Missouri.

Q. 1050. How did you go from Lee Summit to Lexington, Missouri?

A. 1050. By railroad.

Q. 1051. While you were at Lexington, Missouri, was W. J. Buchan there?

A. 1051. Yes, sir.

Q. 1052. Who came there with him?

A. 1052. My brother, Reuben.

Q. 1053. Had you seen or had any conversation with said Buchan, from the time you left Lawrence the last time, until you saw him at Lexington, Missouri?

A. 1053. No, sir.

Q. 1054. Had you had any conversation with said Buchan, from the time you left Lawrence for Wichita, in 1878, until you saw him in Lexington, Missouri?

A. 1054. None that I remember of.

Q. 1055. At what time did you arrive in Lexington, Missouri; that is, upon what month and what day of the month?

A. 1055. It was about the first day of May, 1879.

Q. 1056. How long had you been there when Buchan came?

A. 1056. Two or three days, as well as I remember.

Q. 1057. Did you have a conversation with Buchan about the Hillmon matter while he was at Lexington on this occasion?

A. 1057. Yes, sir.

Q. 1058. How long did Buchan remain at Lexington at this time?

A. 1058. From about 10 o'clock in the morning until towards evening.

Q. 1059. Did you not at or near Lexington, Missouri, at or about the month of May, 1879, in a conversation with said Buchan about the Hillmon matter, tell him, said Buchan, in

substance, that you did not kill Hillmon, but that Hillmon was then alive, and that Hillmon killed a stranger that got in to ride with you and Hillmon when you were a few miles from Wichita?

A. 1059. No, sir, I never told Buchan anything of the kind.

Q. 1060. Did you have more than one conversation with Buchan at Lexington, Missouri, about this Hillmon matter?

A. 1060. Yes, sir.

538 Q. 1061. When did you have the next conversation with him?

A. 1061. Before he got on the train to start back.

Q. 1062. Whereabouts was that?

A. 1062. Going from town down to the railroad depot.

Q. 1063. Where did the first conversation between you and Buchan in regard to this Hillmon matter take place at Lexington.

A. 1063. On the side of the street between up in town and down to the river.

Q. 1064. Did you talk this matter over with him while you were walking along the street?

A. 1064. No, sir, we were sitting down during the first conversation.

Q. 1065. Where abouts were you sitting when this first conversation occurred?

A. 1065. On some rocks or stones, on the side of the street, between up in town and down to the river.

Q. 1066. Was not this place near the river?

A. 1066. It was 2 or 3 hundred yards from the river.

Q. 1067. Was it near a stump or tree?

A. 1067. No, sir.

Q. 1068. In a conversation which occurred between you and Buchan near the river at or near Lexington, Mo., about the month of May, 1879, did you not tell him in substance that you had not killed Hillmon?

A. 1068. No, sir, I did not.

Q. 1069. Did you not on the same day at Lexington, Missouri, while you and Buchan were going to the depot, tell him, said Buchan, in substance, that you had not killed Hillmon?

A. 1069. No, sir, I never told him anything of the kind.

Q. 1070. Was Buchan at Lexington, Missouri, at any other time while you was there?

A. 1070. No, sir, not that I know of.

Q. 1071. How long did you remain at Lexington?

A. 1071. Altogether four or five days, as near as I recollect.

Q. 1072. Had you received a visit from your father while you were in Missouri on this occasion and before you went to Lexington?

A. 1072. No, sir.

Q. 1073. From Lexington where did you go ?

A. 1073. To Glasgow, Missouri.

Q. 1074. How far is that from Lexington?

A. 1074. About 50 or 75 miles by railroad, as near as I can guess it.

Q. 1075. How long did you stay in Glasgow?

A. 1075. I stayed within 7 or 8 miles of Glasgrow until about the middle of June, 1879.

Q. 1075. With whom did you stay there?

A. 1075. A man by the name of Harris or Harrison. I don't remember which boarded with and made ties close by.

Q. 1076. Was Buchan, your father or any other person to see you from Kansas while you were there?

A. 1076. No, sir.

Q. 1077. When did you go to Glasgaw, that is, when did you arrive there?

A. 1077. In the month of May, 1879, about the middle of the month, as near as I can recollect.

Q. 1078. State in what direction from Glasgow the man Harris lived with whom you boarded.

A. 1078. Northern direction.

Q. 1079. Upon what road?

A. 1079. I couldn't tell you the name of the road, not knowing.

Q. 1080. Did he live upon a public road running north of Glasgow?

A. 1080. Yes, sir.

Q. 1081. From Glasgow where did you go?

A. 1081. Higginsville, Missouri.

Q. 1082. How far is Higginsville from Glasgow, and in what direction?

A. 1082. About 75 miles west.

Q. 1083. With whom did you board at Higginsville?

A. 1083. First with one and then another. I was working in the harvest field out from Higginsville.

Q. 1084. State the name of the first farmer for whom you worked near Higginsville.

A. 1084. I can't call any of their names now.

Q. 1085. How long did you remain in and about Higginsville?

A. 1085. Eight or ten days.

Q. 1086. State as definitely as you can when you left Higginsville and that vicinity.

A. 1086. About the first of July, 1879.

Q. 1087. From there where did you go?

A. 1087. To Lexington, Missouri.

Thursday, February 2nd, 1882. The hour for adjournment having arrived the further taking of these depositions is hereby adjourned until tomorrow morning at 9 o'clock m.

eal] HENRY McGREW, Notary Public.

My commission expires April 21, 1883.

Friday, February 3d, 1882, 9 o'clock a. m. The further taking of this deposition is hereby resumed pursuant to adjournent.

eal] HENRY McGREW, Notary Public.

My commission expires April 21, 1883.

Q. 1088. After you saw Buchan in Lexington, Missouri, 1879, when and where did you next see him?

A. 1088. About the first of August, 1879, in Parkville, issouri.

Q. 1089. Who was with him on that occasion?

A. 1089. No one.

Q. 1090. When and where did you next see Buchan?

A. 1090. About the first of September, 1879, at Platte ounty, at my brother's.

Q. 1091. Who was with him then.

A. 1091. A man by the name of Ward from Wyandotte.

Q. 1092. Where was you, and what was you doing when hey came there?

A. 1092. I was [—] Fulton's mill, close to my brother's, oading lumber on wagons.

Q. 1093. How far is Fulton's mill from your brother's, nd in which direction?

A. 1093. About a quarter of a mile north.

Q. 1094. Did you and Buchan have a talk at that time bout this Hillmon matter? A. 1094. Yes, sir.

Q. 1095. Whereabouts did you and he go to have that conversation? A. 1095. About ten steps from the mill.

Q. 1096. To what place?

A. 1096. To a big tree that stood close by.

Q. 1097. How long were you and he then together by this big tree?

A. 1097. About half or three-quarters of an hour.

Q. 1098. During that time you and Buchan were talking about this Hillmon matter and what took place in Barber county, were you not? A. 1098. Yes, sir.

Q. 1099. Was he writing while you were talking to him there? A. 1099. No, sir.

Q. 1100. Where did you and he go from there?

A. 1100. To my brother's.

Q. 1101. Did you go in the house at your brother's?

A. 1101. Yes, sir, after we fed and put up the teams.

Q. 1102. Where did you go in the house?

Q. 1103. Whereabouts was the writing, which Mr. Buchan did on this occasion, done?

A. 1103. In the dining room.

Q. 1104. Was it in the dining room of your brother Reuben's house, situate about 4 miles from Parkville in Platte county, Missouri?

A. 1104. Yes, sir.

Q. 1105. Who were present in the dining room when this writing was being done?

A. 1105. No one; my brother passed through once or twice.

Q. 1106. You have stated this was about the first of September; is it not a fact that this conversation took place on the 4th day of September, 1879?

A. 1106. About the first of September, A. D. 1879, as near as I can remember.

Q. 1107. How long were you and Buchan in the dining room then together?

A. 1107. Two or three hours, as near as I could guess at it.

Q. 1108. Was Buchan writing during that time?

A. 1108. Yes, sir.

Q. 1109. Did you not then and there tell Buchan that your age was 30 years; that you were acquainted with John W. Hillmon, S. E. Hillmon and Levi Baldwin, of Douglas county, Kansas; that you had known John W. Hillmon for about five years?

A. 1109. I believe I did tell him; I am not positive of it.

Q. 1110. Did you not at the same time and place tell said Buchan, in substance, that you had been with him (Hillmon) a good deal for the past two years; was with him last March at Wichita and on the trip from there to and around Medicine Lodge, in Barber county, Kansas, where it is claimed [I] killed him on the 17th of March, 1879?

540 (This question is objected to by counsel for plaintiff on the following grounds: First, The inquiry is immaterial and irrelevant to the issues in this case. Second, It is calling for the contents of a written document which must be produced to the witness and identified by him, and there used as the best evidence of its contents in the case. Third, It is calling for the confidential communications between the witness and his atorney, W. J. Buchan, to contradict which, the said Buchan can not be called. Fourth, The written statement is the only evidence that is competent to show the statements of the witness referred to.)

A. 1110. I wouldn't be positive whether I told him there or not.

Q. 1111. Was it in the house or by the tree by the mill where you made the statement last referred to to Buchan?

(Objected to by plaintiff's counsel on the same grounds as made to the last preceding question 1110.)

A. 1111. I don't recollect where I stated that [—] him the last time.

Q. 1112. Did you not at said time and place tell said Buchan, in substance, "That along about the 10th of December, 1878, John W. Hillmon, Levi Baldwin and myself talked about and entered into an arrangement to cheat the New York Life Insurance Company and the Mutual Life of New York out of some money?"

(The same objection is made by plaintiff's counsel to this question as was made to the foregoing question 1110.

A. 1112. No, sir, I did not.

Q. 1113. Did you not tell him that, in substance, at the tree near the mill, at Parkville, or at Lexington, Missouri.

(The objections is made to this question by plaintiff's counsel as to the foregoing question number 1110.)

A. 1113. No, sir.

Q. 1114. Were you and Buchan talking about this Hillmon matter in the dining room at your brother's house, and at this time, to wit: the 1st of September, 1879?

A. 1114. Yes, sir.

Q. 1115. Did you not at that time tell said Buchan, in substance, "That you would get the money by means of a policy or policies on the life of John W. Hillmon; that Baldwin was to furnish the money to pay the premiums and to keep up the policies in case they had to be renewed; our first arrangement was to get Hillmon's life insured for fifteen thousand dollars, but it was afterwards changed to twenty-five thousand dollars?

(Same objection made to this question by plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1115. No, sir.

Q. 1116. Did you not make that statement to him, in substance, on that day near the mill, at Parkville, in said county, or at Lexington, Missouri, about May, 1879?

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1116. No, sir.

Q. 1117. Did you not at that time, to wit: about the 1st of September, 1879, at or near your brother's house near Parkville, in Platte county, Missouri, tell said Buchan, in substance, "That Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly for the purpose of locating a stock ranch, but in fact, to in some way find a subject to

pass off as the body of John W. Hillmon for the purpose of obtaining the insurance money?"

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1117. No, sir, but he made that statement to me.

Q. 1118. When, and where did he make that statement to you?

A. 1118. At Lexington, there by Fulton's mill and at Parkville, Missouri.

Q. 1119. Did you not at that time and place, to-wit, at your brother's house near Parkville, in Platte county, Missouri, in September, 1879, tell said Buchan, in substance, "That we had no definite plan of getting the subject, but to in some manner get one; the final termination of the matter was the last idea thought of. Our first trip out from Wichita was in the last days of December while the snow was on the ground. We expected to find a subject that would appear to be Hillmon, frozen to death, and that could not be identified only by the clothes and papers found upon it, and so I could pass it off as Hillmon. We went from Wichita to Medicine Lodge, and then direct to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, then to Larned and then on to Wichita by the way of Hutchinson?"

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1119. No, sir, I didn't tell him that, but I told him of our trip going there.

Q. 1120. Did you not at the same time and place tell said Buchan, in substance, "That Hillmon and yourself were entirely alone on this trip. Iliff of Medicine Lodge saw Hillmon on this trip; we put up at his stable. I then stayed at Wichita until the 4th of March, Hillmon in meantime went up to Lawrence to see his wife and get some more money; he returned about the first of March, and on the fifth of
541 March we left on our second trip. We went due west to Cow Skin creek, then west to Harper City, then to Medicine Lodge, on by Sun City and beyond some miles, then we turned northeast down Medicine river to a camp on Elm creek, about 18 miles north of Medicine Lodge, where Hillmon is claimed to have been killed?"

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

Q. 1120. Yes, sir.

Q. 1121. Did you not at the same time and place tell said Buchan, in substance, "That we got there about an hour before sundown and stayed in camp until the next evening; we overtook a stranger on this trip the first day out from Wichi-

ta, about two or two and one-half miles from town, who Hillmon invited to get in and ride, and who, he (Hillmon) proposed to him to work for him on the ranch which he proposed to locate."

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1121. Yes, sir; told him something similar to that.

Q. 1122. Did you not at the same time and place tell said Buchan, in substance, "That this man was with us during all this trip; that Hillmon proposed to you that this man would do for a subject to pass off for him, and you told him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because Hillmon's proposition was to take the man's life, and protested and said that was going beyond what we had agreed and something I had never before thought of and was beyond my grit entirely?"

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1122. No, sir, I didn't.

Q. 1123. Did you make that statement to him, in substance, at the mill near your brother's at Parkville, or at Lexington, Missouri, about May, 1879, or at any other time?

(Same objections made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1123. No, sir.

Q. 1124. Did you not at your brother Reuben Brown's, in September, 1879, near Parkville in Platte county, Missouri, tell said Buchan, in substance, "That Hillmon seemed to get more desperate and determined in the matter; pains was taken not to have more than two of us seen together in the wagon, sometimes one and then the other would be kept back out of sight. On his trip up to Lawrence Hillmon was vaccinated, his arm was quite bad; Hillmon kept at the man until he let Hillmon vaccinate him, which he did, taking his pocket knife, and using virus from his own arm for the purpose. Hillmon also traded clothes with him, first giving him a change of underclothing, and then traded suits; the suit he was buried in was a suit Hillmon traded with Baldwin for?"

(Same objection made to this question by plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1124. Part of that I remember of telling him and a part I don't remember anything about.

Q. 1125. Did you not at said time and place tell said Buchan, in substance, "That this man appeared to be a stranger in the country, an easy going sort of a fellow, not suspi-

cious or attentive to anything; his arm became quite sore, and he became quite stupid and dull. He said his name was Berkly, Burgis or something sounding like that, we always called him Joe; he said he had been around Fort Scott awhile, and had worked about Wellington and Arkansas City. I don't know where he was from or where his home or friends were. I did not see him at Wichita that know of; I had but very little to say to the man and less to do with him; he was taken in charge by Hillmon and yielded willingly to his will. I dreaded what I thought was to be done, and kept out of having anything more to do with him than possible. I frequently remonstrated with Hillmon and tried to deter him from carrying out his intention of killing the man?"

(Same objection made to this question by plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1125. No, sir, there, nor nowhere else.

Q. 1126. Did you not at said time and place tell said Buchan, in substance, that "The next evening after we got to the camp last named, the man Joe was sitting by the fire; I was at the hind end of the wagon either putting feed in the box for the horses or taking a sack of corn out, when I heard a gun go off. I looked around and saw the man was shot, and Hillmon was pulling him around to keep him away from the fire. Hillmon changed a day-book from his own coat to Joe's, and said to me everything was all right and just as he wanted it, and that I need not be afraid but that it would be all right."

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1126. No, sir, I didn't.

Q. 1127. Did you not make the foregoing statement, in substance, to him at the mill near your brother's house, at Parkville in Platte county, Missouri, or at Lexington, Missouri?

542 (Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1127. No, sir.

Q. 1128. Did you not at said time and place, to-wit, at your brother's house in Parkville, in 1879, tell said Buchan, in substance, that "He, meaning Hillmon, told me to get on a pony and go down to a ranch about three-quarters of a mile, and get some one to come up. He took Joe's valise and started north; this was about sundown. We had no arrangements about communicating with each other; he first proposed to do so, but I told him I did not want to know where he was, that in case I should I might find out in some other way?

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1128. No, sir; there, nor anywhere else.

Q. 1129. Did you not at said time and place tell said Buchan, in substance, that "I have never heard from him since; at Lawrence Mrs. Hillmon gave me to understand that she knew where Hillmon was, and that he was all right?

(Same objection made to this question by the plaintiff's counsel as was made to the foregoing question number 1110.)

A. 1129. No, sir; there, nor nowhere else.

Q. 1130. What was the conversation between you and Buchan at that time about Mrs. Hillmon knowing where Hillmon was?

(Plaintiff's attorneys object to this question for the following reasons: First, that it calls for testimony that is immaterial and irrelevant to the issues in this action. Second, That the statements made by the witness and Buchan in any conversation between them at which the plaintiff was not present are incompetent and inadmissable as evidence against her. Third, The question is not proper as cross-examination, the plaintiff in her examination of the witness in chief not having inquired anything about the conversation referred to. Fourth, For the reasons stated in plaintiff's objection to previous question number 1110.)

A. 1130. None at all that I have any knowledge of.

Q. 1131. Did you not at said time and place have any conversation with said Buchan about your having seen Mrs. Hillmon in Lawrence at the time of the inquest?

(Same objections by plaintiff's counsel as to the last preceding question number 1130.)

A. 1131. I don't recollect now whether I did or not.

Q. 1132. State what you did say to said Buchan at said time and place about where Hillmon was then?

(Same objection made to this question by plaintiff's counsel on the same grounds and for the same reasons as stated in the objection to the preceding question number 1130.)

A. 1132. I don't recollect of saying anything.

Q. 1133. Did you not at said time and place, to-wit, at your brother's near Parkville, in Platte county, Missouri, tell said Buchan, in substance, that "The man over whom an inquest was held at camp, afterwards at Medicine Lodge and at Lawrence, Kansas, was this man Joe Burgis or Berkly, killed by Hillmon, and John W. Hillmon I believe to be still alive, at least he left our camp and went north as stated above?"

(Same objection made to this question by plaintiff's counsel on the same grounds and for the same reasons as stated in the objections to the preceding questions numbers 1110 and 1130.)

A. 1133. No, sir; I did not.

A. 1134. Did you tell him that, in substance, at any other time or place in the state of Missouri?

(Same objection made to this question by the plaintiff's counsel on the same grounds and for the same reasons as stated in the objections to the preceding questions numbers 1110 and 1130.)

A. 1134. No, sir.

Q. 1135. Did you and he ever have any conversation about the man over whom the inquest was held, at the places above mentioned, being the stranger who got in to ride with you and Hillmon near Wichita, Kansas; state where and when you and Buchan had the first conversation in regard to that matter and state what was said by each of you?

(Same objection made to this question by plaintiff's counsel on the same grounds and for the same reasons as stated in the objections to the preceding questions numbers 1110 and 1130.)

A. 1135. At Lexington, in May, 1879, I believe was the first place we had a conversation. Buchan told me that he he could arrange it so as to make it appear that he was the man over whom the inquest was held, and killed, in place of Hillmon. I told him I didn't see how he could do it. He said that he could very easy if I would sign the statements, that he could make out that this was all a fraud. I told him that I couldn't nor I wouldn't do anything of the kind. He told me that he couldn't do anything for me if I didn't do as he wanted me to do, as he was acting as my attorney and that he wouldn't have me do anything out of the way but what was right for nothing. I told him I thought that wasn't doing right. He contended that it was, and he would stand between me and all danger. That was about the substance of our conversation.

543 The hour for adjournment having arrived the further taking of these depositions is hereby adjourned until to-morrow morning at 9 o'clock, a. m.

My commission expires April 21, 1883.

HENRY McGREW,
Notary Public.

[Seal]

Saturday, February 4th, 1882, 9 o'clock a. m. The further taking of this deposition is hereby resumed, pursuant to adjournment.

My commission expires April 21, 1883.

HENRY McGREW,
Notary Public.

[Seal]

Q. 1136. Did you not at or near your brother's residence near Parkville, Missouri, tell Buchan, in substance, "That after Hillmon had killed Joe that he started off north towards the railroad, and that he said that he would assume the name of William Marshall?"

(Same objection made to this question by the plaintiff's counsel on the same grounds and for the same reasons as stated in the objections to the preceding questions, numbers 1110 and 1130.)

A. 1136. No, sir.

Q. 1137. Did you tell him that, in substance, at any other time or place in the state of Missouri, or any other place?

(Same objection made to this question by the plaintiff's counsel on the same grounds and for the same reasons as stated in the objections to the preceding questions, numbers 1110 and 1130.)

A. 1137. No, sir.

Q. 1138. Did you state at or near your brother's near Parkville, Missouri, on or about the 4th day of September, 1879, to said Buchan, that "Hillmon said he would assume the name of William Marshall?"

(Objected to by plaintiff's counsel on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1138. No, sir.

Q. 1139. Did you state that to said Buchan at any other time or place?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1139. No, sir.

Q. 1140. Did you not state, in substance, to said Buchan, at or near your brother's residence near Parkville, Missouri, that Levi Baldwin, Baldwin's wife and Mrs. Hillmon, meaning the wife of John W. Hillmon, knew all about the conspiracy entered into about the 10th day of December, 1878, between John W. Hillmon, Levi Baldwin and myself to defraud the New York Life Insurance Company, and the Mutual Life of New York out of some money, to be accomplished by securing pol-

icies on the life of John W. Hillmon; and that they knew that Baldwin was to furnish the money to pay the premiums and to keep up the policies in case they had to be renewed, and that the original arrangement was to get Hillmon insured for fifteen thousand dollars, but that it was afterward changed to twenty-five thousand dollars; and that they knew of the arrangement of Hillmon and myself to go off south from Wichita, Kansas, ostensibly to locate a stock ranch, but, in fact, in some way to find a subject to pass off as the body of Hillmon, and that we expected to find on this trip a body that would appear to be that of Hillmon, frozen to death, and that could be identified by the clothes and papers found upon it and in this way could be passed off as the body of Hillmon?"

(Objected to by plaintiff on the grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1140. No, sir; there, nor nowhere else.

Q. 1141. Did you not state, in substance, to said Buchan on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, that Levi Baldwin, Baldwin's wife and Mrs. Hillmon, referring to John W. Hillmon's wife, knew that the man killed on Spring Creek, near Medicine Lodge, Barber county, Kansas, on or about the 17th day of March, 1879, was not John W. Hillmon, but was that of some other person?"

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1141. No, sir; there, nor nowhere else.

Q. 1142. Did you not state, in substance, to said Buchan on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, that "Levi Baldwin, Baldwin's wife and Mrs. Hillmon, referring to the wife of John W. Hillmon, knew that the body over which an inquest was held on or about the 4th day of April, 1879, at Lawrence, in Douglas county, Kansas, and then and there claimed by Levi Baldwin, Mrs. Hillmon and myself to be the body of John W. Hillmon, was not the body of John W. Hillmon, but was the body of some other person?"

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1142. No, sir; there, nor nowhere else.

Q. 1143. Did you not state, in substance, to said Buchan on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, that "Levi Baldwin and Mrs. Hillmon, referring to the wife of John W. Hillmon, knew that the body over which a coroner's inquest was

held on or about the 4th day of April, 1879, at the city of Lawrence, in Douglas county, Kansas, and which was then
544 and there claimed by Levi Baldwin, Mrs. Hillmon and myself to be the body of John W. Hillmon, was not the body of John W. Hillmon, but was the body of some other person?"

(Objected to by plaintiff on same grounds as stated in objection to questions 1110 and 1130, and on the further ground that the same question was just asked of the witness and fully answered.)

A. 1143. No, sir, there, nor nowhere else.

Q. 1144. Did you not state to said Buchan on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, that in your testimony at Lawrence you stated the route taken was from Wichita to Medicine Lodge, from there to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, from there to Larned, and from there to Wichita by the way of Hutchinson; that this was our first trip?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1144. Yes, sir, I remember of stating something similar to that.

Q. 1145. Did you not state to said Buchan, in substance, on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, that in your testimony at Lawrence before a coroner's inquest held on the dead body of the man, in the month of April, 1879, that you testified that on or about the 5th day of March you and John W. Hillmon left Wichita, Kansas, on our second trip; that we went due west to Cow Skin creek, then west to Harper City, then to Medicine Lodge, on by Sun City and beyond some miles, then we turned northeast down Medicine river to a camp on Elm creek, about eighteen miles north of Medicine Lodge, where the man was killed. We overtook a stranger on this trip the first day out from Wichita, who camped with us at Cow Skin; that the man whom I described as being in that camp with us, and who I said went off with some wagoner, was Joe, the man who was killed at the camp on Elm creek?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1145. Part of that I did, and part of it don't have any recollection of ever stating to him.

Q. 1146. Did you not state to said Buchan, in substance, on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, that sometime in August I made four affidavits under great importunities from Baldwin?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1146. No, sir, not that I have any recollection of, there, nor anywhere else.

Q. 1147. When did you next see Levi Baldwin after you left Lawrence in April, 1879?

A. 1147. In the month of July, if I remember right, in 1879.

Q. 1148. Where did you see him at this time?

A. 1148. In Platte county, Missouri, at my brother's house.

Q. 1149. Is this the brother you have spoken of as living near Parkville, Missouri? A. 1149. Yes, sir.

Q. 1150. Did Baldwin come there to see your brother or was his business there with you?

A. 1150. With me, I suppose.

Q. 1151. Had you received any letters from Baldwin prior to this visit; if so, how many?

A. 1151. I don't have any recollection now of receiving any at all.

Q. 1152. Had you had any communication with him other than by letter prior to this visit?

A. 1152. None that I know anything of now.

Q. 1153. When did you next see Baldwin, after this visit you have spoken of his at your brother's in July?

A. 1153. In August, if I remember right, in 1879, at his house; it was in August or September, and since I come to think, it was in September.

Q. 1154. Had you not seen Baldwin from the time you met him at your brother's house in July until you visited him at his house in September, 1879?

A. 1154. Not that I recollect of now.

Q. 1155. How long did Baldwin stay at your brother's house on the occasion of his visit in July, 1879?

A. 1155. One day and two nights, I think; I wouldn't be positive.

Q. 1156. Did you and he visit any other place than your brother's on the occasion of his visit to you in July, 1879?

A. 1156. Not that I recollect anything of now.

Q. 1157. Did you go with him to Parkville at that time?

A. 1157. Yes, sir.

Q. 1158. Whom did you see at Parkville?

A. 1158. Seen several there that I knew.

Q. 1159. Were they all residents of Parkville?
A. 1159. Some of them were and some of them were farmers from the country, and one of them was W. J. Buchan from Wyandotte.
Q. 1160. Did any one accompany Mr. Baldwin on the occasion of this his visit to you?
A. 1160. None that I know anything of.
545 Q. 1161. Where did Baldwin live on the occasion of your visit to him in September, 1879?
A. 1161. Near Tonganoxie, in Leavenworth county, Kansas.
Q. 1162. Where did you start from to go to Baldwin's at the time of your visit to him in September?
A. 1162. From Wyandotte City.
Q. 1163. How long had you been at Wyandotte City at this time?
A. 1163. I don't remember just now; part of a day.
Q. 1164. Where did you come from to Wyandotte City?
A. 1164. From my brother's in Platte county, Missouri.
Q. 1165. How did you come; by what conveyance to Wyandotte at this time? A. 1165. Horseback.
Q. 1166. How did you go from Wyandotte City to Baldwin's?
A. 1166. Horseback, and came back a horseback.
Q. 1167. What time in the day did you arrive at Baldwin's on this occasion?
A. 1167. In the forenoon, if I remember right, or about noon.
Q. 1168. Whom did you meet at Baldwin's at this time?
A. 1168. Mrs. Baldwin and her family; I don't remember whether I met him when I got there or not, but I think I met him that evening of the same day.
Q. 1169. State what persons you saw at Baldwin's, if any, on the occasion of this visit, other than the family?
A. 1169. Mrs. Hillmon and some men working there; I don't remember their names.
Q. 1170. Did you have any communication with Baldwin by letter from the time you met him at your brother's in July up to the time you visited him at his home in September?
A. 1170. None at all that I have any recollection of now.
Q. 1171. When was the next time you saw Baldwin after your visit to him in the month of September?
A. 1171. I have never seen him since that I recollect of now.
Q. 1172. Then the only times you have seen Baldwin, since you left him that night at Lawrence on the occasion of the inquest, is the time you spoke of at your brother's in July, and at his home in September, 1879?

A. 1172. I think it is; I wouldn't be positive of it.

Q. 1173. And you have not heard from him by letter since the time you left him in Lawrence?

A. 1173. Yes, sir, I got a letter from him about a month or two ago.

Q. 1174. Have you never had any other letters from him except the one last mentioned, since the time you left him in Lawrence? A. 1174. Not that I recollect of now.

Q. 1175. Did you not state to said W. J. Buchan at or near your brother's residence near Parkville, Missouri, on or about the 4th day of September, 1879, that Baldwin came after you three different times and importuned me to make affidavits in the matter of the Hillmon insurance, or words to that effect?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1175. No, sir.

Q. 1176. Did you state that in substance to said W. J. Buchan at any other time or place?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1176. Not that I recollect anything of.

Q. 1177. Did you state to said Buchan, in substance, on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, that the last time Baldwin came to see about these affidavits, he persuaded me to go with him to Kansas City where Honorable Samuel Riggs insisted on my signing them?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1177. I don't recollect whether I told him so or not.

Q. 1178. Did you make any statements to said Buchan about Baldwin's urging you to make affidavits in the matter of the Hillmon insurance case, and if so, where did you make the statements.

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1178. I don't recollect now of telling him anything about it.

Q. 1179. As a matter of fact you did make affidavits in the Hillmon case did you not?

A. 1179. Yes, sir; I don't know whether they were affidavits or not, I don't know what you would call them.

Q. 1180. Did you not sign and swear to some papers in the matter of the Hillmon insurance? A. 1180. Yes, sir.

Q. 1181. And you don't know whether they were affidavits or not?

A. 1181. I don't remember now positively whether they were or not?

Q. 1182. Where, and when was it that you signed and swore to these papers in the Hillmon insurance matter?

A. 1182. At Kansas City; I don't remember now what month it was in.

546 Q. 1183. Was it prior to the time you and Buchan visited the office of Francis M. McDonald at Parkville, Missouri?

A. 1183. I couldn't say now whether it was or not; I couldn't be positive of it.

Q. 1184. Did you not state to said Buchan, in substance, on or about the 4th day of September, 1879, at or near your brother's residence near Parkville, Missouri, "I don't think Mr. Riggs is aware of the facts in this case, nor do the other attorneys in the case know them?"

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1184. I don't recollect of telling him anything about it.

Q. 1185. Did you state that, in substance, to said Buchan at any other time and place?

(Objected to on same grounds as last preceding question.)

A. 1185. Not that I know anything about I didn't.

Q. 1186. Did you not state to said Buchan, on or about the 4th day of September, 1879, at your brother's residence near Parkville, Missouri, referring to a statement or statements of your's, which you had made to him, as a true version of the killing of a man on Spring creek near Medicine Lodge, in Barber county, Kansas, and of the subsequent holding of a coroner's inquest over his dead body, and of a conspiracy to defraud the New York Life Insurance Company, and the Mutual Life Insurance Company of New York, and the Connecticut Mutual Life Insurance Company of Hartford, out of some money by affecting policies on the life of one John W. Hillmon, and after securing those policies to in some way procure a body to be passed off as the body of John W. Hillmon, and the facts and circumstances connected with such conspiracy. (I make the above statements in the Hillmon case as the full and true facts in the case, regretting the part I have taken in the affair.)?

(Objected to by plaintiff on same grounds as stated in objections to questions numbers 1110 and 1130.)

A. 1186. No, sir, I never told him anything of the kind.

Q. 1187. W. J. Buchan was at your brother's residence, situate near Parkville, Missouri, on the 4th day of September, 1879, was he not?

A. 1187. Yes, sir, he was there about that time.

Q. 1188. You and he had a conversation did you not in reference to the killing of a man on Spring creek near Medicine Lodge, in Barber county, Kansas, on or about the 17th day of March, 1879? A. 1188. Yes, sir.

Q. 1189. You also had a conversation did you not, in regard to one John W. Hillmon having had his life insured in the New York Life Insurance Company, in the Mutual Life Insurance Company of New York and Connecticut Mutual Life Insurance Company?

A. 1189. We had a conversation about Hillmon's life being insured, by what companies I didn't know.

Q. 1190. You also told him did you not about two different trips which Hillmon and you made into southwestern Kansas, giving him a description of the trips, the route you took and the places where you camped? A. 1190. Yes, sir.

Q. 1191. You also mentioned to him the fact that you overtook a stranger on the last trip the first day out from Wichita, the circumstances accompanying your meeting him, giving a description of the person and the circumstances accompanying your acquaintance with him, and what became of him?

(Objected to by plaintiff because the question is leading, the question is not a cross-examination upon any matter inquired into by plaintiff, it is calling for evidence in chief for defendant, and the witness should be asked distinct what was said.)

A. 1191. Yes, sir, I told him something similar to that.

Q. 1192. During this conversation did Mr. Buchan prepare a statement in writing in reference to these matters?

A. 1192. Yes, sir; partly.

Q. 1193. Was this statement in writing made at your brother's house? A. 1193. Yes, sir

Q. 1194. Did you sign this statement?

A. 1194. I am not positive whether I did or not; I think I did?

Q. 1195. What was this statement written with, pen and ink or pencil? A. 1195. A pen and ink.

Q. 1196. If you signed this statement, at what place did you sign it?

A. 1196. At my brother's house or at McDonald's office at Parkville.

Q. 1197. Did you swear to the contents of this statement?

(Objected to by plaintiff on the grounds and for the reasons following: First, That the instrument carries with itself the best evidence of the fact as to whether it was sworn to or not,

and the jurat or certificate of the officer thereto attached, if any, should be produced; counsel for plaintiff here demands the production of the instrument. Second, The question has been repeatedly asked before and repeatedly answered.)

A. 1197. I wouldn't be positive now whether I did or not.

Q. 1198. After this statement was prepared you and
547 Buchan went to the office of Francis M. McDonald located at Parkville, Missouri, did you not?

(Objected to by plaintiff because the same question has been several times asked before and answered, and plaintiff protests against any further waste of time by the repetition of such question.)

(The defendant moves to strike from the records the last statement of the plaintiff from the and including the words "and plaintiff protests.")

A. 1198. Yes, sir.

Q. 1199. Did you see this statement while at the office of Francis M. McDonald? A. 1199. Yes, sir.

Q. 1200. What was done with the statement there?

A. 1200. Buchan took it out of his pocket and layed it on the table and was looking for a name that was in it; that was all that was done with it that I know anything of more than he put it back in his pocket.

Q. 1201. What object did Buchan have in looking at this name in the statement?

(Objected to by plaintiff because it is immaterial what object Buchan had, it is not cross-examination, it is incompetent to prove Buchan's objects.)

A. 1201. I suppose to find out whether he had the name of a town or county right or not.

The hour for adjournment having arrived the further taking of these depositions is hereby adjourned until Monday morning at 9 o'clock, a. m.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.

February 4th, 1882.

Monday, February 6th, 1882, 9 o'clock a. m. The further taking of these depositors is hereby resumed pursuant to adjournment.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.

Q. 1202. After Buchan had finished his examination of this statement, what was done with it?

A. 1202. He put it in his pocket.

Q. 1203. Who was present at the office of McDonald at the time Buchan had the statement out?

A. 1203. McDonald, Buchan and myself was all.

Q. 1204. Did any one accompany Buchan and yourself to Parkville from your brother's on this occasion?

A. 1204. No one but Ward; he was on horseback and we were in a buggy.

Q. 1205. Who is this man Ward, and where did he live?

A. 1205. He was deputy sheriff of Wyandotte county then, and lived in Wyandotte.

Q. 1206. What became of him when you got to Parkville at this time?

A. 1206. He was there in Parkville all the time we were, and left there at the same time.

Q. 1207. Was he in company with you and Buchan all the time at Parkville?

A. 1207. No, sir; he was part of the time.

Q. 1208. Where was he during the time that you and Buchan were at McDonald's office?

A. 1208. I don't know where he was then.

Q. 1209. Was he at McDonald's office during any of the time that you and Buchan were there? A. 1209. No, sir.

Q. 1210. Was McDonald's attention called to this statement while you and Buchan was at his office?

A. 1210. Yes, sir.

Q. 1211. What, if anything, did he (McDonald) do to this statement?

(Objected to by plaintiff as immaterial, and because it is not competent to prove in this way what McDonald did in an official capacity.)

A. 1211. Nothing that I know of.

Q. 1212. How was his attention called to the statement?

A. 1212. I think by Buchan telling him he wanted me to sign or swear to it.

Q. 1213. For what purpose did you and Buchan go to McDonald's office at this time?

A. 1213. For the purpose of my signing or swearing to that, and to see whether he had the name of a town or county on the paper right or not.

Q. 1214. What do you refer to by the word "that" in your last answer? A. 1214. That paper he had with him.

Q. 1215. By that paper do you mean the statement which Buchan had prepared at your brother's house during your conversation with Buchan in regard to the Hillmon case?

A. 1215. Yes, sir.

Q. 1216. Will you state what was said in McDonald's office in Parkville by yourself, Buchan and McDonald, and each of you, about that statement and about your signing and swearing to the same?

(Objected to by plaintiff as hearsay and incompetent, and as immaterial.)

548 A. 1216. I don't recollect just now what was said, any more than McDonald wanted to look at it and Buchan told him he needn't to, or didn't have to; he asked Buchan what it was and he told him it was a little business of his and mine; that was all I remember of now.

Q. 1217. Was McDonald asked to swear you to the statement?

(Objected to as incompetent, as hearsay and immaterial.)

A. 1217. I don't recollect whether he was or not.

Q. 1218. Had you signed and sworn to this statement before Buchan returned to his pocket?

A. 1218. I don't recollect now whether I did or not.

Q. 1219. Have you seen the statement which Buchan prepared at your brother's house, and which he had at McDonald's office at that time? A. 1219. Yes, sir.

Q. 1220. When, and where did you see it for the first time after that?

A. 1220. About a week after that time in 1879, in Buchan's office at Wyandotte.

Q. 1221. What was done with it at that time?

A. 1221. Buchan handed it to me and I tore it up, and put it in the stove.

Q. 1222. Have you ever seen it since? A. 1222. No, sir.

Q. 1223. At whose request, or by whose directions, was it destroyed?

A. 1223. By Buchan's and myself both, that I should destroy it; that was his promise to me when I made the statement out.

Q. 1224. What was his promise to you when you made the statement out; what was said about the destruction of it at that time?

A. 1224. He said that he would insure me that this statement would never be again me in law anywhere, and to convince me that it wasn't lawful and if I would allow him, for us, to make this statement he would give it back to me and I could destroy it; that to convince me that it would never be used again me, there would not be a scratch of a pen contrary to the two testimonies that I had testified before, and as he was acting as my attorney that he would stand between me and all danger. He told me that it would be better to allow him to do that than it would be to be arrested and put in jail and probably go to the penitentiary, and that if the insurance men once got me in jail that they would make me out a liar and murderer; and if I didn't, he couldn't do any more for me, that he had been trying to do all he could for me and that

he was only advising me for the best, and that I would have to do something now or never, that Ward, the deputy sheriff of Wyandotte county, would probably take me now.

Q. 1216. The defendant's attorney here repeats the question: What was his promise to you when you made the statement out; what was said about the destruction of it at that time?

(Plaintiff objects to the repetition of this question for the reason that it has been fully answered.)

A. 1216. He said that he would hand it back to me and that I could destroy it myself.

Q. 1217. Was anything said about when he would hand it back to you, and if so, what?

A. 1217. Yes, sir; that any time I would come over to Wyandotte.

Q. 1218. Then if you had come over to Wyandotte the next day, you was to have the right to destroy it was you?

(Objected to by plaintiff as incompetent, being an argument of counsel as to the effect of what was said, and not designed to prove what was said.)

A. 1218. I suppose so.

Q. 1219. Who was present at Buchan's office at the time this statement was destroyed?

(Objected to by plaintiff because it assumes that the witness has testified to that which he has not testified, to wit, that the statement was destroyed.)

A. 1219. Buchan, myself and Mrs. Hillmon, I believe, was all.

Q. 1220. Will you fix the date of the destruction of this statement; fix it precisely if you can?

(Objected to by plaintiff on same ground as question last preceding.)

A. 1220. In September, 1879, the 10th or 12th of the month, as near as I remember.

Q. 1221. What was said at this time about the destruction of this statement by the parties present, or either of them?

A. 1221. Buchan said I could tear the paper up, to my own satisfaction, and that would forever be the end of it.

Q. 1222. Was that all that was said by either of the parties? A. 1222. All that I recollect of just now.

Q. 1223. What did Mrs. Hillmon say on this occasion about the destruction of this statement?

A. 1223. I don't recollect just now what she did say.

Q. 1224. Did she say anything in regard thereto?

A. 1224. Yes, sir, I believe she did, but I don't remember what it was.

Q. 1225. Will you reflect on what was said about the destruction of this statement at that time, and recall if possible, what Mrs. Hillmon said in regard to its destruction?

549 A. 1225. I don't recollect just now what was said.

Q. 1226. Did you read this statement at that time?

A. 1226. Yes, sir, I read part of it.

Q. 1227. Did you notice whether your name was signed to it at that time?

A. 1227. I never noticed whether it was or no.

Q. 1228. Did you notice whether McDonald's name was signed to it or not? A. 1228. No, sir.

Q. 1229. What portion of it did you read?

A. 1229. When Hillmon and I had started out from Wichita, that was all I noticed of it in reading.

Q. 1230. Where did you begin to read it, at the beginning, in the middle or towards the end?

A. 1230. I don't remember now where I did commence.

Q. 1231. And all you remember of reading in it was about your and Hillmon starting out from Wichita?

A. 1231. Yes, sir.

Q. 1232. You examined it did you, to see if it was the same paper that Buchan had written out at your brother's?

A. 1232. Yes, sir.

Q. 1233. You found it to be the same paper, did you?

A. 1233. Yes, sir.

Q. 1234. Did you read this statement over at the time it was written, out at your brother's near Parkville?

A. 1234. No, sir.

Q. 1235. Did you read it over at any time, after Buchan prepared it at your brother's house, and before Buchan put it in his pocket after examining it at McDonald's office?

A. 1235. No, sir.

Q. 1236. Did you read it over, or was it read over to you by any person, at any time before Buchan put it in his pocket after examining it at McDonald's office?

A. 1236. It was read over to me by Buchan when he was writing it out, was the only time.

Q. 1237. How did you recognize this statement which you tore up and put in the stove at Buchan's office, as being the same statement which Buchan prepared at your brother's house near Parkville?

A. 1237. By the looks of the paper, and the hand writing and by what I read in it.

Q. 1238. Did you know at the time you tore this statement up and put it in the stove at Buchan's office, that a copy of it had been taken and was then in existence?

A. 1238. No, sir.

Q. 1239. Have you had any conversation since the adjournment for dinner, with Mr. Riggs, plaintiff's attorney, in regard to the testimony you gave this morning in this case?

A. 1239. No, sir, none in particular.

Q. 1240. Did you have any conversation with him in regard to the testimony you have given, or which you may be called upon to give, in this case? A. 1240. No, sir.

Q. 1241. Have you had any conversation with said attorney in regard to the testimony in this case since the adjournment for noon to-day? A. 1241. No, sir.

Q. 1242. Have you had any conversation with said attorney since the adjournment for noon in regard to this case?

(Objected to as immaterial.)

A. 1242. Yes, sir.

Q. 1243. Have you seen a copy of the statement made and prepared on or about the 4th day of September, 1879, at your brother's house near Parkville, Missouri, since the beginning of the taking of this deposition of yours? A. 1243. No, sir.

Q. 1244. State if the following is the statement made and prepared on the 4th day of September, 1879, at your brother's residence, situate near Parkville, Missouri, and which you afterwards saw at the office of Francis M. McDonald at Parkville, Missouri, and which you afterwards tore up and put in the stove at the office of W. J. Buchan in Wyandotte, Kansas:

"State of Missouri,
County of Platte—ss.

"John H. Brown, of lawful age, being first duly sworn according to law, deposes and says: 'My name is John H. Brown, my age thirty years, I am acquainted with John W. Hillmon, also Mrs. S. E. Hillmon and Levi Baldwin of Douglas county, Kansas; have known John W. Hillmon for about five years, have been with him a good deal for the past two years, was with him last March at Wichita, and on the trip from there to and around Medicine Lodge in Barber county, Kansas,
550 where it is claimed that I killed him on the 17th of March, 1879. Along about the 10th of December, 1878, John W. Hillmon, Levi Baldwin talked about and entered into a conspiracy to defraud the New York Life Insurance Company and the Mutual Life of New York out of some money, to be obtained by means of effecting a policy or policies on the life of said John W. Hillmon; Baldwin was to furnish the money to pay the premiums and to keep up the policies in case they had to be renewed. Our original arrangement was to get Hillmon's life insured for fifteen thousand, but it was afterwards changed to twenty-five thousand dollars. Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact, to in some way

find a subject to pass off as the body of John W. Hillmon for the purpose of obtaining the insurance money aforesaid. We had no definite plan of getting a subject, but to in some manner get one, the final termination of the matter was the last idea thought of. Our first trip out from Wichita the last days of December while the snow was on the ground we expected to find a subject that would appear to be Hillmon, frozen to death, and that could not be identified only by the clothes and papers found on it, and so I could pass off as Hillmon. We went from Wichita to Medicine Lodge, then direct to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, then to Larned, and on to Wichita via Hutchinson. Hillmon and myself were entirely alone on this trip. Hiff of Medicine Lodge saw Hillmon on this trip; we put up at his stable. I then stayed at Wichita until the 4th of March, Hillmon in the meantime went up to Lawrence to see his wife and to get some more money; he returned about the first of March, and on the fifth we left on our second trip. We went due west to Cow Skin creek, then west to Harper City, then to Medicine Lodge, on by Sun City and beyond some miles, then we turned northeast down Medicine river to a camp on Elm creek, about eighteen miles north of Medicine Lodge, where Hillmon is claimed to have been killed. We got there about an hour before sundown and stayed in camp until the next evening. We overtook a stranger on this trip the first day out from Wichita, about two or two and one-half miles from town, who Hillmon invited to get in and ride and who he (Hillmon) proposed to hire and work for him on the ranch as proposed to be located; this man was with us during all this trip. Hillmon proposed to me that this man would do for a subject to pass for him. I told him and contended with him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because his proposition was to take the man's life, and I protested and said that was going beyond what we had agreed and something I had never before thought of, and was beyond my grit entirely. But Hillmon seemed to get more deeply determined, and more and more desperate in the matter; pains were taken not to have more than two of us seen together in the wagon, sometimes one and then the other would be kept back out of sight. On this trip up to Lawrence Hillmon was vaccinated; his arm was quite bad. Hillmon kept at that man until he let him vaccinate him, which he did, taking his pocket knife and using virus from his own arm for the purpose. He also traded clothes with him, Hillmon first giving him a change of underclothing, then traded suits, the one he was killed in; the suit he was buried in was a suit Hillmon traded with Baldwin for. This

man appeared to be a stranger in the country, a sort of [an] easy-go-long fellow and not suspicious or very attentive to anything; his arm became very sore and he got quite stupid and dull. He said his name was either Berkley or Burgis or something sounding like that; we always called him Joe. He said he had been around Fort Scott awhile, and also had worked about Wellington or Arkansas City. I don't know where he was from nor where his home nor friends were. I did not see him at Wichita that I know of. I had but very little to say to the man and less to do with him; he was taken in charge by Hillmon and yielded willingly to his will. I dreaded what I thought was to be done, and kept out of having any more to do with him than possible. I frequently remonstrated with Hillmon, and tried to deter him from carrying out his intentions of killing the man. The next evening after we got to the camp last named, the man Joe was sitting by the fire, I was at the hind end of the wagon either putting feed in the box for the horses or taking a sack of corn out, when I heard a gun go off; I looked around and saw the man was shot, and Hillmon was pulling him away around to keep him out of the fire. Hillmon changed a day-book from his own coat to Joe's, and said to me everything was all right and in shape just as he wanted it, and that I need not be afraid but it would be all right. He told me to get on a pony and go down to a ranch about three-quarters of a mile and get some one to come up. He took Joe's valise and started north; this was about sundown. We had no arrangements about communicating with each other; he first proposed to do so, but I told him I did not want to know where he was, that in case I should I might find out in some other way. I have never heard a word from him since; at Lawrence Mrs. Hillmon gave me to understand that she knew where Hillmon was and that he was all right. The man over whom an inquest was held at camp, afterward at Medicine Lodge, and at Lawrence, Kansas, was the man Joe Burgis or Berkley, killed by Hillmon, as related above, and John W. Hillmon I believe to be still alive, at least he left our camp and went north as stated above after killing Joe. Hillmon said he would assume the name of William Marshall. Baldwin's wife and Mrs. Hillmon know all about this. In my testimony at Lawrence I stated the route taken as above described, but the man who I described as being in camp with us, and who I said went off with some wagons, was Joe the man killed. I afterwards, sometime in August, 1879, made four affidavits, under great importunities from Baldwin who came after me three different times, the last time persuading me to go with [—] to Kansas City, where Honorable Samuel Riggs insisted on my signing them. I

don't think Mr. Riggs is aware of the facts in this case,
551 nor the other counsel in the case. I make the above statement in this Hillmon case, as the full and true facts in the case, regretting the part that I have taken in the affair."

(The last question is objected to by the counsel for the plaintiff for the follow reasons: First, Because it calls for testimony which is immaterial and irrelevant to the issues in this case. Second, Because it is not a cross-examination concerning any matter inquired about by the plaintiff in the examination in chief. Third, Because no conversations or statements held or made by the witness and by W. J. Buchan, or either of them, when the plaintiff was not present or to which she has not given her assent, are competent or admissible against her. Fourth, Because it is sought by the question and answer to prove the contents of a written document which is now in existence and within the control of the defendant in this action, which document must be produced to the witness and identified by him and then offered as the best evidence of its contents. Fifth, Because it is not competent to prove in this way that the statement was made under oath, the original statement being in existence and under the control of the defendant. Sixth, Because the question calls for confidential communications between the witness and his attorney, W. J. Buchan, which are privileged, and to contradict which the said W. J. Buchan can not be called as a witness. Seventh, Because the evidence called for is otherwise incompetent.)

A. 1244. Part of that I remember of stating, and part I don't remember any thing about.

Q. 1245. Did you not sign this statement in the presence of and swear to it before Francis M. McDonald at his office in Parkville, Missouri, on the 4th day of September, 1879?

(Objected to on same grounds as question last preceding.)

A. 1245. I wouldn't be positive now whether I did or not.

Q. 1246. Did you or did you not sign this statement in the presence of and swear to it before Francis M. McDonald at his office in Parkville, Missouri, on the 4th day of September, 1879, or at any other time?

(Objected to by plaintiff on same ground as question number 1244, and for the further reason that the question has been repeatedly asked of this witness and fairly answered.)

A. 1246. I wouldn't be positive whether I did or not at McDonald's office, and if I didn't, I don't do it anywhere else.

Q. 1247. Did you sign this statement in the presence of Francis M. McDonald and W. J. Buchan at the office of McDonald at Parkville, Missouri, on the 4th day of September, 1879, or at any other time?

(Objected to by plaintiff on same grounds as question last preceding.)

A. 1247. I wouldn't be positive now whether I did or not.

Q. 1248. Did Mrs. Sallie E. Hillmon, W. J. Buchan and yourself meet in the city of Leavenworth, Kansas in the month of September, 1879? A. 1248. Yes, sir.

Q. 1249. Did you tear up this statement and put it in the stove at W. J. Buchan's office at Wyandotte prior to, or after this meeting at Leavenworth? A. 1249. Afterwards.

Q. 1250. When did you first become acquainted with this man Ward, who accompanied Buchan to Parkville about the first of September, 1879?

A. 1250. Seven or eight years ago, as near as I can remember.

Q. 1251. When had you seen him last prior to meeting him at your brother's house on this occasion?

A. 1251. I don't recollect now when.

Q. 1252. Had you seen him since your return from Wichita? A. 1252. Not that I know of now.

Q. 1253. Did not this statement, the statement referred to in question number 1244, have attached to it the following words, at the time you tore it up and put it in the stove at Buchan's office: "Subscribed in my presence and sworn to before me this 4th day of September, A. D. 1879. My term expires on the 2nd day of April, 1883. Francis M. McDonald, Notary Public?"

(Objected to by plaintiff on grounds stated in objections to question number 1244.)

A. 1253. Not that I know anything of.

Q. 1254. Did the statement that you tore up and put in the stove at Buchan's office, in the presence of Buchan and Mrs. Hillmon, have attached to it the words quoted in question number 1253?

(Objected to by plaintiff on same grounds as stated in objections to question number 1244, and for the further reason that the same question has just been asked and fairly answered.)

A. 1254. Not that I know of now.

Q. 1255. Did you examine it to see whether these words were attached to it? A. 1225. No, sir.

Q. 1256. Did the statement which you tore up and put in the stove at Buchan's office, in the presence of Mrs. Hillmon, have the impression of a seal of any kind on it?

(Objected to by plaintiff as incompetent for the reasons stated in objections to question number 1244.)

. 1256. I don't know whether it did or not.
. 1257. Did you not say to Francis M. McDonald at the
e he proposed to read this statement at his office at Park-
ville, and Buchan said, that it was not necessary, for
him (McDonald) to read it, that you knew what there
was in the paper, that it was not necessary to have it
l to you, or words to that effect?
bjected to by plaintiff for the reason that the testimony
ed for is immaterial and irrelevant. Second, That it is
a proper cross-examination. Third, Because no conver-
ons between the witness and McDonald, or statements
le by either of them, when the plaintiff was not present
competent or admissible against her.)
. 1257. There was some words to that effect; I don't know
what they were now.
he further taking of this deposition is hereby adjourned
il tomorrow morning at 9 o'clock a. m.
Seal] HENRY McGREW,
Notary Public.
ly commission expires April 21, 1883.
uesday, February 7th, 1882, 9 o'clock a. m. The further
ing of these depositions is hereby resumed pursuant to
ournment.
Seal] HENRY McGREW,
Notary Public.
ly commission expires April 21, 1883.
. 1258. Did you not on or about the 4th day of Septem-
, 1879, at the office of Francis M. McDonald in Parkville,
tte county, Missouri, say, in substance, in the presence of
l McDonald and of W. J. Buchan of Wyandotte, Kansas,
t you knew what there was in the paper you then and
re signed or swore to?

Objected to by plaintiff for the reasons that the testimony
led for is immaterial and irrelevant. Second, That it is
a proper cross-examination. Third, Because no statement
de by the witness when the plaintiff was not present is
mpetent or admissible against her. Fourth, Because it
not competent in this way to prove the contents of a writ-
statement or that such statement was made under oath.)
A. 1258. Not that I have any recollection of.
. 1259. Do you recollect what you did say on that occa-
n in the presence of said McDonald and Buchan?

Objected to by plaintiff on the same grounds as the ques-
n last preceding.)

A. 1259. I don't recollect just now.

Q. 1260. Did not said McDonald propose or offer to read the paper, which you and Buchan then and there had, to you?

(Objected to by plaintiff on the same grounds as the question last preceding.)

A. 1260. If I remember right, McDonald asked to see or read the paper, or something to that effect.

Q. 1261. Where was this paper at that time?

A. 1261. I don't know where it was at just now.

Q. 1262. What was said by you or Buchan there at McDonald's office which lead McDonald to make the offer to read the paper to you?

(Objected to by plaintiff on same grounds as stated in objection to the question number 1257.)

A. 1262. I don't recollect now what was said.

Q. 1263. Did you, or Buchan in your presence, say anything at that time to said McDonald about your signing or swearing to the paper which you and Buchan then and there had?

(Objected to by plaintiff on the same grounds as stated in objections to the question number 1257.)

A. 1263. I don't recollect now whether he did or not.

Q. 1264. How long were you and Buchan in the office of said McDonald at that time?

A. 1264. Fifteen or twenty minutes, as near as I can guess at it.

Q. 1265. Was any other person except said McDonald in his office during the time you and Buchan were there?

A. 1265. No, sir.

Q. 1266. Do you now recollect anything which was said between Buchan and McDonald, or between yourself and McDonald at that time?

(Objected to by plaintiff on the same grounds as stated in objections to question number 1258, and for the further reason that no statements made by either Buchan or McDonald when the plaintiff was not present is competent or admissible against her.)

A. 1266. I remember of Buchan telling McDonald where he was from and the business he was following, and McDonald asked me if I was a brother of Reub. Brown's, and Buchan asked McDonald if he had the map of the state of Kansas; that was about all I remember of hearing said.

Q. 1267. Do you remember of anything else being said there at that time?

(Objected to by plaintiff on same grounds as the question last preceding.)

A. 1267. Not that I remember of now.

Q. 1268. Does question number 1244 of this deposition contain a correct statement of the contents of the paper or statement written by Buchan in your brother's house near Parkville, Missouri, on or about the 4th day of September, 1879, which was present on the same day in the office of Francis M. McDonald in Parkville, Platte county, Missouri, at the same time you and W. J. Buchan were there, which paper or statement you afterwards tore up and threw into the stove
553 in the office of said Buchan in the city of Wyandotte, Kansas; if not, state wherein the statement contained in said question differs from the statement above referred to, which you say you tore up in Buchan's office? Here the Notary is requested to read to the witness the statement contained in the quoted part of said question, which he here does.

(Objected to by plaintiff on same grounds as stated in objection to question number 1244.)

A. 1268. I could not say whether that is the statement or not, I never read the statement in my life.

Q. 1269. Did you say on yesterday that you remembered a part of the statement contained in said question number 1244, and do you now remember any part of the statement contained in said question?

(Objected to by plaintiff on the same grounds as stated in objection to question number 1244 and on the further ground that the testimony of the witness on yesterday speaks for itself.)

A. 1269. I remember of stating yesterday that I remembered part. I remember that part now and don't remember any other part now.

Q. 1270. What part of the contents of the paper which you tore up in Buchan's office do you now remember?

(Objected to by plaintiff on the same grounds as stated in objection to question number 1244.)

A. 1270. The time Hillmon and I started from Wichita to Medicine Lodge is all I remember.

Q. 1271. State fully and definitely now all of the contents of that paper which you now remember.

(Objected to by plaintiff on the same grounds as stated in objection to question number 1244.)

A. 1271. That's about all I remember now.

Q. 1272. Was there anything in that statement about your being acquainted with John W. Hillmon, Mrs. S. E. Hillmon and Levi Baldwin?

(Objected to by plaintiff on same ground as stated in objection to question number 1244, and on the further ground that the witness has been several times fully interrogated as to this same subject matter and has fully and fairly answered.)

A. 1272. Yes, sir, I suppose there was. If I remember right Buchan read that to me.

Q. 1273. Was there anything in that statement about your having known John W. Hillmon for about five years and about your having been with him for the past two years and about your being with him last March, to wit: March, 1879, at Wichita, and on the trip from there to and around Medicine Lodge in Barbour county, Kansas?

(Objected to by plaintiff on same ground as question last preceding.)

A. 1273. Yes sir, I believe there was, that was my understanding.

Q. 1274. Was there anything in that statement about you, John W. Hillmon and Levi Baldwin having a talk along about the 10th of December, 1878, about defrauding the New York Life Insurance Company and the Mutual Life of New York out of some money by means of effecting a policy or policies on the life of John W. Hillmon, or about Baldwin agreeing to furnish the money to pay the premiums and keep up the policies in case they had to be renewed or about the original agreement being to get Hillmon's life insured for fifteen thousand and about its afterwards being changed to twenty-five thousand dollars.

(Objected to by plaintiff on the same ground as the question last preceding.)

A. 1274. Not that I know anything about.

Q. 1275. Was there anything in that statement or paper about you and Hillmon going off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find a subject to pass off as the body of John W. Hillmon for the purpose of obtaining the insurance money, or about you having no definite plan of geting the subject but to in some way get one, or about the final termination of the matter being the last idea thought of?

(Objected to by plaintiff on the same grounds as stated in objections to question number 1244, and on the further ground that the witness has been several times fully interrogated as to this same subject-matter and has fully and fairly answered, and because it is not competent as a basis for impeaching the witness.)

A. 1275. Not that I know anything of.

Q. 1276. Was there anything in that statement and paper about your first trip out from Wichita being in the last days of December while the snow was on the ground?

(Objected to by plaintiff on same ground as the question last preceding.)

A. 1276. Not that I recollect of.

Q. 1277. Was there anything in that statement about your expecting to find a subject that would appear to be Hillmon frozen to death and that could not be identified only by the clothes and papers found upon it, and so you could pass it off as Hillmon?

(Counsel for the plaintiff objects to this question and all other and further questions that may be asked of this witness touching the contents of the paper or written statement mentioned for the following reasons: 1st. That they call for testimony which is immaterial and irrelevant. 2nd. Because they are not a cross-examination concerning any matter inquired about by the plaintiff in the examination in chief. 3rd. Because the same subject-matter has been fully inquired about of this witness and he has given full and fair answers. 4th. Because such inquiries do not constitute a sufficient foundation for the impeachment of the witness. 5th. Because no statement made by the witness and W. J. Buchan, or
554 either of them, when the plaintiff was not present or to which she has not given her assent, [or] competent or admissible against her. 6th. Because it is sought by such questions and the answers thereto to prove the contents of a written document which is now in existence and within the control of the defendant to this action, which document should be produced to the witness and identified by him or in some other way, and then introduced as the best evidence of its contents. 7th. Because the questions called for confidential communications between the witness and his attorney, W. J. Buchan, which are privileged and to contradict which the said W. J. Buchan can not be called as a witness. 8th. Because the evidence is otherwise incompetent.)

A. 1277. Not that I know anything of.

Q. 1278. Did not that statement contain anything upon or in regard to the matters and subjects to which your attention has been called in questions Nos. 1274, 1275, 1276, and 1277, of this deposition, which questions were here read to the witness by the notary?

A. 1278. Not that I know anything of.

Q. 1279. Did that paper contain the following statement in substance: We went from Wichita to Medicine Lodge, then

direct to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, then to Larned, and on to Wichita by the way of Hutchinson. Hillmon and myself were entirely alone on this trip. Iliff, of Medicine Lodge, saw Hillmon on this trip. I then stayed at Wichita until the 4th of March, Hillmon, in the meantime, went up to Lawrence to see his wife and get some more money. He returned about the 1st of March, and on the 5th we left on our second trip. We went due west to Cow Skin creek, then west to Harper City, then to Medicine Lodge, on by Sun City and beyond some miles, then we turned northeast down Medicine river to a camp on Elm creek, about eighteen miles north of Medicine Lodge?

(Objected to by plaintiff on same grounds as stated in objections to question No. 1277.)

A. 1279. I know of the fore part of that being in that statement; the other I don't recollect anything about.

Q. 1280. State what there was in that paper about Hillmon shooting a stranger whom you and Hillmon overtook on the first day of your second trip out from Wichita, about two and one-half miles from the town.

(Objected to by plaintiff on the same grounds as stated in objection to question No. 1277.)

A. 1280. I don't know what there was.

Q. 1281. Did not that statement implicate Hillmon as the murderer of that stranger?

(Objected to by plaintiff on same grounds as stated in objection to question No. 1277.)

A. 1281. Not that I know of.

Q. 1282. Do you say there was nothing in that paper about Hillmon shooting that stranger?

(Objected to by plaintiff on same ground as stated in objection to question 1277.)

A. 1282. Not that I know anything of.

Q. 1283. Do you know whether there was or was not anything in that paper in regard to Hillmon shooting that stranger?

(Objected to by plaintiff on same ground as stated in objection to question number 1277.)

A. 1283. I don't know whether there was or not.

Q. 1284. Do you know whether there was or was not any thing in that statement about you and John Hillmon and Levi Baldwin having a talk along about the 10th of December, 1878, about defrauding certain insurance companies.

(Objected to by plaintiff on same grounds as stated in objection to question number 1277.)

A. 1284. No, sir.

Q. 1285. Do you know whether there was or was not any thing in that statement about you and John W. Hillmon going off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find a subject to pass off as the body of John W. Hillmon?

(Objected to by plaintiff on same ground as stated in objection to question number 1277.)

A. 1285. I don't know whether there was or not.

Q. 1286. Do you know whether there was or was not anything in that statement about your expecting to find a subject that would appear to be Hillmon frozen to death, and that could not be identified only by the clothes and papers found upon it and so I could pass it off as Hillmon?

(Objected to by plaintiff on same grounds as stated in objection to question number 1277.)

A. 1286. Not that I know of.

(The defendant moved to strike out the last answer of the witness because it is not responsive to the question and repeats the same question.

Q. 1287. Do you know whether there was or was not anything in that statement about your expedition to find a subject that would appear to be Hillmon frozen to death, and that could not be identified only by the clothes and papers found upon it, and so I could pass it off as Hillmon?

A. 1287. I don't know whether it was or not.

555 Q. 1288. Was there anything in that statement about this man being with you and Hillmon during all this trip, or about Hillmon proposing to you that this man would do for a subject to pass off for him.

(Objected to by plaintiff on same ground as stated in objection to question number 1277.)

A. 1288. I don't know whether there was or not.

The hour of adjournment having arrived the further taking of this deposition is hereby adjourned until to-morrow morning at 9 o'clock [to-morrow morning.]

My commission expires April 21, 1883.

[Seal] HENRY McGREW, Notary Public.

February 7, 1882.

Wednesday, February 8th, 1882, 9 o'clock a. m. The further taking of this deposition is hereby resumed pursuant to adjournment.

My commission expires April 21, 1883.

[Seal] HENRY McGREW, Notary Public.

Q. 1289. Do you remember whether you did or did not sign or swear to a statement in the office of Francis M. McDonald, in Parkville, Platte county, Missouri, on or about the 4th day of September, 1879, which, in substance, charged John W. Hillmon with murder?

(Objected to by plaintiff on same ground as stated in objection to question number 1277.)

A. 1289. Don't remember whether I did or not.

Q. 1290. Do you remember whether you signed or swore to a true or false statement at said time and place?

(Objected to by plaintiff on same ground as stated in question number 1277.)

A. 1290. I don't know what it was I signed or swore to.

Q. 1291. In what part of the statement was the portion which you say you read in Buchan's office, on the occasion when you say you destroyed that statement?

A. 1291. Right where Hillmon and I had started out from Wichita to Medicine Lodge on our trip; I don't recollect in what part it was.

Q. 1292. Have you stated fully all that you recollect of the contents of that statement; if you have not, proceed now to give in detail all that you recollect of the contents of that statement, to wit, the statement destroyed in Buchan's office by you?

(Objected to by plaintiff on same ground as stated in objection to question number 1277.)

A. 1292. That's all that I recollect of now.

Q. 1293. Have you stated all that was said to you by Buchan at your brother's house near Parkville, Missouri, on or about the 4th day of September, 1879, about your making or signing a statement, and all that was said by Buchan at all other times and places about your making and signing that statement?

A. 1293. About all that I remember of now, I believe.

Q. 1294. State anything else which was said to you by Buchan relative to your making or signing that statement, giving the time and place where the conversation occurred?

A. 1294. He told me if I would submit to that statement, or allow him to make that statement, it would be the best

thing that I could do, and that they then would let me alone; and if I didn't, they never would. And as for that statement, the insurance men would have to pay him dam- big money for it; and that he would give my brother Reub. $100.00 for a horse that he had over there, and for me to ride it over the next time I came over and that he would buy the horse from him and give him to me; that's about all I remember of now.

Q. 1295. State anything else in regard to that matter, which you remember?

A. 1295. And that he would pay me about forty dollars that his brother had owed me, and more too, because I had befriended his brother when he wasn't able to; and that he wouldn't persuade me to do anything wrong for all the money the insurance had got, and only advised me as my lawyer and a friend, and insured me that I wasn't doing anything wrong at all; and as to the statement not being true, it didn't make any difference at all, that I wasn't throwing myself liable and that it couldn't be used in law, and to convince me of that he would return me the paper and I could tear it up; and that he was satisfied and everyone else he knew, except the insurance men, that my true statements was so, and that everybody believed them; but the insurance men would break it down, as they had the money to do it with, but if they got this statement they would be satisfied, and there would be no more of it; I don't recollect of anything else just now.

Q. 1296. When and where did this conversation between you and Buchan, which you have mentioned in your last two answers, first occur or take place?

A. 1296. The conversation in general took place at Fulton's mill in Platte county, Missouri, and on the way to my brother's and about his stable and house. That's as near as I can tell you where it occurred.

Q. 1297. When did Buchan first speak to you about making a statement in this matter?

(Objected to by plaintiff because the defendant has once examined the witness on the same subject-matter.)

556 A. 1297. At Lexington, Missouri, in May, 1879.

Q. 1298. State what Buchan said to you at that time about making a statement.

(Objected to by plaintiff on same ground as the question last preceding.)

A. 1298. He first said he had come down here to see me, that my father and brother Thorn had employed him to act as my lawyer or attorney in this Hillmon trouble, between her and the insurance men; he asked me how it was, and I told him just as near as I could, and he said he knew that and had

heard of it before, and told me that wasn't the point he wanted to get at, and that I stood in a rather dangerous place, that the insurance men would never pay any attention to what I said, and that his object was to satisfy them, and then they would let me alone; and that they would not until he did satisfy them, and that all this difficulty and trouble was left with him and no one else, and whatever compromise was made would be satisfactory with them, and what he wanted to get a statement from me to make it appear that it wasn't Hillmon who was killed, but someone else. And I told him that that was something that couldn't be done, that I had done what I had and couldn't help it, and told him I didn't see how I could do it. He said he could in several different ways; that he could find somebody froze to death or find somebody killed and that all that would be changed in the testimony would be by making out that there was someone else killed besides Hillmon. I told [——] that [——] couldn't be done; says I, Bill, you know that can not be done. Says he, John, you know that I am a lawyer and could plan out anything of that kind a good deal easier that I can. I told him that I couldn't help that, that I had done what I did and to help it I couldn't. He told me that if I didn't do something of that kind the insurance men would hunt me down and make me out a murderer and a liar. He told me that he couldn't do anything for me unless I would [believed] and paid attention to him, and that it was the only way I could ever keep the insurance men away from me or off of me, and that they was hunting for me and had been, and that it was himself keeping them off the track, and that if I didn't do anything now, to keep away from Parkville or Wyandotte. I then wanted to go up to my brother's and drive team for him, he wanted me to. Says he, John, for God's sake don't do that; for to get away from Lexington. He says, I have got a hundred dollars here and I will give you fifteen dollars; that will take you away from here and find you a job somewhere else, and that he wanted to know where I was all of the time. I told him he could find out through Reub., that I was writing backwards and farwards to him once and a while; that was about the substance of the conversation there at Lexington at that time.

Q. 1299. Was there anything else said by Buchan at that time about your making a statement?

A. 1299. He said that he had it all pictured out and he could make it appear very easy in a statement, that this fellow, that got into the wagon to ride with us, was the man killed and not Hillmon; I don't remember of anything else just now.

Q. 1300. Where did this conversation take place?

A. 1300. In Lexington, Missouri, on the side of the street on some rocks leading from the river up in town, and from the

hotel down to that place, and in a beer saloon up in town, and from where we was sitting on the street to the depot, is about where all the conversation took place.

Q. 1301. Was said Buchan ever with you and Hillmon in Barber county, Kansas? A. 1301. No, sir.

Q. 1302. Did you and Buchan have any conversation about Mrs. S. E. Hillmon there at Lexington.

A. 1302. Some, yes, sir.

Q. 1303. Did you and Buchan have any conversation about Levi Baldwin there at Lexington? A. 1303. Yes, sir.

Q. 1304. State what the conversation was between you and Buchan at Lexington about Levi Baldwin?

A. 1304. Was that the insurance men claimed that this was a fraud and that Levi Baldwin knew all about it.

Q. 1305. Have you stated all that was said at that time between you and Buchan about Levi Baldwin?

A. 1305. That's about all I remember of just now.

Q. 1306. State all that was said between you and Buchan about Levi Baldwin at that time?

A. 1306. Buchan said that the insurance men claimed that he had put up the money to bear expenses; I don't recollect anything else now, that was said in regard to him.

Q. 1307. What was said between you and Buchan about Mrs. S. E. Hillmon at Lexington at that time?

A. 1307. He said that they claimed that she knew all about this and that it was a fraud and nothing of it; nothing else said about her that I remember of.

Q. 1308. Did you tell Buchan at that time that you was present when Hillmon was buried in Medicine Lodge?

A. 1308. Yes, sir.

Q. 1309. What had you done with the money which you had with you, or took with you, when you left Wyandotte for Lawrence, to go with Hillmon to Wichita?

A. 1309. I gave it to Hillmon.

Q. 1310. When and where did you give it to Hill-
557 mon?

A. 1310. When I first got up to Lawrence; don't remember where, but I think it was in some of those stores on the street.

Q. 1311. Was that before you started upon this trip to Wichita? A. 1311. Yes, sir.

Q. 1312. How much money did you let him have in all?

A. 1312. Three or four hundred dollars, as near as I remember now.

Q. 1313. Did you let him have it all at one time?

A. 1313. About all; yes, sir.

Q. 1314. At what other time besides the one you have mentioned as as being in one of the stores did you let him have money?

A. 1314. I don't remember now of ever letting him have any more money.

Q. 1315. How long was it before you and Hillmon started on that trip to Wichita in December, 1878, that you let him have this money in Lawrence?

A. 1315. A few days before.

Q. 1316. Did you take his note, due bill, or any evidence of indebtedness from him?

A. 1316. No, sir; the money belonged to him.

Q. 1317. Then you had no money of your own when you started upon this trip, had you? A. 1317. Yes, sir.

Q. 1318. From whom did you get this money which you say you let Hillmon have a few days before you started upon your trip to Wichita?

A. 1318. From the packing house over here where I sold some hogs for him.

Q. 1319. State the name of the proprietor of that packing house at that time?

A. 1319. I couldent call the name now, it was the stone packing house down here in West Kansas City.

Q. 1320. Who was present when you let him have that money?

A. 1320. I don't remember now who was present.

Q. 1321. Was Levi Baldwin present?

A. 1321. I don't recollect now, whether he was or not.

Q. 1322. Was it in the day time or in the evening that you paid this money to Hillmon?

A. 1322. I don't remember just now.

Q. 1323. Do you remember a shooting gallery there in Lawrence at that time?

A. 1323. I don't remember just now of one.

Q. 1324. Did Hillmon let Baldwin have the money which you gave him, at or about the time you gave it to him?

(Objected to by plaintiff as irrelevant and immaterial.)

A. 1324. Not that I know of.

Q. 1325. Did you not pay this money to Hillmon in a shooting gallery in Lawrence, then kept by a man by the name of Jack, in the presence of Levi Baldwin, and did not said Hillmon, then and there give the identical money which you paid him to Baldwin?

(Objected to by plaintiff as irrelevant and immaterial.)

A. 1325. Not that I recollect, not that I know anything of.

Q. 1326. Now you may state when you paid him the rest of that money.

A. 1326. I don't remember just now of paying him any more, only that one time.

Q. 1327. Did you pay him all the money at one time?
A. 1327. All that I remember of now, I did.
Q. 1328. Who else did you let have any money besides Hillmon before you went away on that trip?

(Objected to as irrelevant and immaterial.)

A. 1328. No one, that I recollect of.
Q. 1329. Was you present when the body of the man who was killed near Medicine Lodge, Barber county, on or about the 17th day of March, 1879, was first examined?

(Objected to by plaintiff as incompetent, being vague, indefinite and misleading.)

A. 1329. Yes, sir; Hillmon's body.
Q. 1330. State how much money, if any, was found upon this person.
A. 1330. Twenty-five or thirty dollars, as near as I can recollect.
Q. 1331. Was that all the money that was found then, either upon his person or among his effects?
A. 1331. All that I know of.
Q. 1332. State what part of the conversation between you and Buchan, on or about the 4th day of September, 1879, took place at or near Fulton's mill, what portion between there and your brother's house and what portion at or near the stable on your brother's farm?

(Objected to by plaintiff as incompetent, as calling for hearsay testimony and as leading and not being a cross-examination of any subject inquired of by the plaintiff, as irrelevant and immaterial.)

A. 1332. His conversation with me at the mill the first
558 time was in regard to me and him making out a statement, and that it had to be now or never, as he had kept them fellows off just as long as he could and that he was only trying to get me to do just what any one else would, and if I would consent to let him do it it wouldn't take him a great while and that I wouldn't have any more trouble about it. And the conversation was that (talked about in general), from there all the way to my brother's stable and the house.
Q. 1333. Did you and Buchan have more than one conversation at Fulton's mill in regard to this matter?
A. 1333. One conversation was all.
Q. 1334. Did you have more than one conversation with him in regard to this matter at the barn?
A. 1334. I had one before we left the barn for dinner and one after dinner.

Q. 1335. State what was said between you and Buchan at the barn before dinner.

A. 1335. I couldn't state. It was a general conversation before dinner and after, and during all the time he was over there.

Q. 1336. Had this statement been prepared by you and Buchan before dinner? A. 1336. After dinner.

Q. 1337. About what time in the day did you and Buchan finish preparing this statement?

A. 1337. About an hour or an hour and one-half, by sun, as near as I can guess.

Q. 1338. Was there any one present when you [—] Buchan had this conversation at the barn before and after dinner?

A. 1338. No one but my brother, and part of the time he was.

Q. 1339. In what part of the barn were you and Buchan when you had your conversation in regard to this matter before dinner?

A. 1339. I don't remember just now. It was inside the barn lot and a shed, I think.

Q. 1340. Can you state definitely anything that was said between yourself and Buchan at that time?

A. 1340. No, sir.

Q. 1341. Was Ward or any other person present with you and Buchan at that time?

A. 1341. Part of the time Ward was and part of the time my brother was.

Q. 1342. In what part of the barn were you and Buchan when you had your conversation in regard to that matter after dinner that day?

A. 1342. In the shed and out in the barn lot.

Q. 1343. State definitely what was said between you and Buchan at that time?

A. 1343. I can't state definitely what was said. It was part of the general conversation we had all the time.

Q. 1344. State what part of the general conversation took place there, at or about the shed after dinner.

A. 1344. I don't remember just now what part.

Q. 1345. Was Mr. Ward or your brother present during that part of the conversation?

A. 1345. My brother was part of the time. Ward wasn't.

Q. 1346. State what was said between you and Buchan in regard to this matter at or near the barn after dinner, when you say your brother was present.

A. 1346. Buchan asked my brother if he didn't think he had offered fair with me; if he didn't think he could smooth this all over and make it look plain and satisfactory without a doubt; whether it wouldn't be the best to consent to it, and

if I did he could go to the house and do it up in a little of no time, and that he had paper, pen and ink with him, and I told him that I would.

Q. 1347. Was there anything else said at that time between your brother and Buchan or yourself and Buchan?

A. 1347. My brother asked him if he didn't think I would be a laying myself liable by doing anything of that kind. He told him no, and that it wasn't lawful and couldn't be used in law, and that he would stand between me and all danger; that it was only to please the insurance men. I told Buchan if he thought it was right I would just leave it with him. He told me he wouldn't advise me to do anything but what was all satisfactory and would back me in it.

Q. 1348. Have you stated fully now all that was said about that matter when your brother was present?

A. 1349. All that I recollect of now.

Q. 1350. What did you and Buchan then do?

A. 1350. Went to the house, pulled out the table to commence writing.

Q. 1351. In what business was that brother engaged at that time? A. 1351. He was farming.

Q. 1352. Where did your brother go when you and Buchan went into the house?

A. 1352. I left him out in the barn lot with Ward.

The further taking of this deposition is hereby adjourned until to-morrow morning at 9 o'clock a. m.

[Seal] HENRY McGREW,
Notary Public.

My commission expires April 21, 1883.

February 8th, 1882.

559 Thursday, February 9th, 1882, 9 o'clock a. m. The further taking of this deposition is hereby resumed pursuant to adjournment.

[Seal] HENRY McGREW,
Notary Public.

My commission expires April 21, 1883.

Q. 1353. Did Ward and your brother return to the house, while you and Buchan were preparing that statement?

A. 1353. Ward didn't; my brother came in the house a time or two, while we were in there.

Q. 1354. What was your brother doing in there?

A. 1354. He just passed through the room; I don't know what he was doing.

Q. 1355. After you and Buchan had prepared this statement, what was done with it then?

A. 1355. Buchan read it and put it in his pocket.
Q. 1356. What did you and he then do?
A. 1356. Went to Parkville.
Q. 1357. Is it not a fact that you went to Parkville, with Buchan on that day, for the purpose of swearing to that statement?

(Objected to by plaintiff as immaterial.)

A. 1357. I wouldn't be positive whether I did or not.
Q. 1358. Do you know what you went to Parkville with Buchan on that day for?

(Objected to by plaintiff as immaterial, and because the same question has been several times asked of the witness and by the witness answered.)

A. 1358. Not positively, I don't.
Q. 1359. Did you have any purpose in going to Parkville with Buchan on that day?
A. 1359. One purpose was to see McDonald, and to see whether Buchan had the name of a town or county down on that paper right or not.
Q. 1360. What other purpose did you have in going there?
A. 1360. No other purpose that I know of.
Q. 1361. Could not Buchan have ascertained whether he had a name right without your presence?
A. 1361. I don't know whether he could or not.
Q. 1362. Did you go to Parkville with him then only to assist him in that matter?
A. 1362. Partly for that purpose, and partly because I wanted to go.
Q. 1363. Did you have other business there at that time?
A. 1363. No other business that I know of, but to go to the postoffice and get some chewing tobacco.
Q. 1364. You went to the postoffice and got some chewing tobacco that day, did you? A. 1364. Yes, sir.
Q. 1364. Did you swear to the statement which Buchan had prepared at your brother's house, at Parkville on that day?
A. 1364. I wouldn't be positive whether I did or not.
Q. 1365. Do you remember whether you did or did not swear to that statement at Parkville on that day?
A. 1365. I don't remember whether I did or did not.
Q. 1366. How long did you and Buchan remain in Parkville on that day?
A. 1366. About a half or three-quarters of an hour, as near as I can guess at it.
Q. 1367. From Parkville, where did you and Buchan go?

A. 1367. I went home to my brother's after I left him; I don't know where he went.

Q. 1368. Did you not on or about the 19th day of March, 1879, from or near Medicine Lodge, Kansas, write the following letter to the plaintiff:

"Medicine Lodge, Kansas, March the 19th, 1879.—Mrs. S. E. Hillmon: I am sorrow to state the news that I have to state to you. John was shot and killed, accidentally, by a gun as I went to take it out of the wagon, about fifteen miles north of this place. I had him dressed in his best clothes and buried in Medicine Lodge grave yard. I shall wait here until Mr. Paddock hears from you. Write to me to take charge of the team; I will dispose of them the best advantage, and take the proceeds to you; and when I get back to Lawrence I will relate the sad news to you. Probably you have heard of it before you get this letter. Yours truly, John H. Brown."

(Objected to by plaintiff because the letter is the best evidence as to what it contains and should be produced and shown to the witness, and by him identified, and because no sufficient foundation has been laid for the introduction of [of] secondary evidence.)

A. 1368. I don't recollect now whether I did or not. Mr. Paddock was writing at the same time and I don't know whether it was him or myself that wrote it.

Q. 1369. Attorneys for the defendant here present to the Notary a letter, which they ask to have the Notary mark with the letter "A" and attach his official signature and seal thereto, for the purposes of identification, which the Notary does.

Here said letter, so identified as aforesaid, is presented
560 to the witness and the witness asked to read said letter and state whether the same is, or is not, in his hand writing, and has his signature thereto?

A. 1369. Yes, sir; I would say that is my writing, and the signature is mine.

Q. 1370. Did you then write the letter just exhibited to you, to the plaintiff in this case, from Medicine Lodge about the 19th of March, 1879? A. 1370. Yes, sir.

Q. 1371. Had you written any letters or notes to her before you wrote this one?

A. 1371. None that I have any recollection of at all.

Q. 1372. Have you ever written any letter, letters, note, or notes, to her since you wrote this one exhibited to you?

A 1372. None that I know of.

Q. 1373. Do you know whether you have or have not written to her since that time?

A. 1373. I don't know that I have.

Q. 1374. Is that the only letter which you ever wrote to her before you returned to Lawrence in April, 1879?

A. 1374. All that I have any recollection of.

Q. 1375. Have you ever written her any note or letter since you left Lawrence in April, 1879?

A. 1375. None that I know anything of, unless it was a little note that I wrote from Lexington, or that Buchan wanted me to write. He wanted me to, but I wouldn't be positive whether I did or not.

Q. 1376. Have you since the 19th of March, 1879, ever made any inquiry of Mrs. Hillmon by letter or otherwise as to his—Hillmon's—whereabouts? A. 1376. No, sir.

Q. 1377. (Here attorneys for the defendant here present to the notary another letter which they ask to have the notary mark with the letter "B." and [attack] his official signature and seal thereto for the purpose of identification, which the notary does.) Look at the letter marked "B" by the notary as aforesaid and state whether the same is in your handwriting and has your signature thereto?

(Objected to by the plaintiff as incompetent, because it is not authenticated either by envelope or post-mark as a letter sent to the plaintiff, and because it does not appear that it ever was or was intended to be sent to the plaintiff, or that it was ever received by her, and as otherwise incompetent, irrelevant and immaterial.)

A. 1377. It is in my handwriting and has my signature attached.

Q. 1378. Did you not, in May, 1879, write the following note or letter to plaintiff, Mrs. Hillmon: "I would like to now where John is, and how that business is, and what shall I do, if anything. Let me know through my father." (Signed) John H. Brown.

(Objected to by the plaintiff on the same ground as stated in the objection to the question last preceding.)

A. 1378. No, sir, I never wrote that to her. I wrote that to Buchan, or for him, rather.

Q. 1379. Did you write the letter referred to in question No. 1378?

(Objected to by the plaintiff on the same ground as the question last preceding.)

A. 1379. Yes, sir.

Q. 1380. Did you write it at Lexington, Missouri, in the Month of May, 1879?

(Objected to by the plaintiff on the same ground as the question last preceding.)

A. 1380. If I recollect right it was at Lexington, Mo., in May, 1879.

Q. 1381. Was this letter written at Lexington the first time said Buchan was there when you was there?

(Objected to by the plaintiff on the same ground as the ques- last preceding question.)

A. 1381. Yes, sir.

Q. 1382. (Here the attorneys for the defendant present to the witness the letter or note marked with the letter "B" by the notary.) Will you please read to the notary the letter or note written by you at Lexington, Missouri, in May, 1879.

(Objected to by the plaintiff for the following reasons. First, Because it is not competent in this way to prove the contents of a letter. Second, Because he paper shown the witness is not authenticated either by envelope or postmark as a letter or as having been sent to the plaintiff, nor does it otherwise appear in the evidence that it ever was, or was intended to be sent either by mail or otherwise to the plaintiff, or that it had ever been set to her. Third, Because the testimony is otherwise incompetent, irrelevant and immaterial.)

A. 1382. Here the witness read the paper as follows: "Mrs. Hillmon, I would like to know where John is, and how that business is, and what shall I do, if anything. Let we know through my father." John H. Brown.

Q. 1383. Where was that note written, and who was present when it was written?

A. 1383. Close by the depot at Lexington. My brother Reub was present.

Q. 1384. In what building was it written?

561 A. 1384. It wasn't written in any building at all.

Q. 1385. Was it written upon the street?

A. 1385. Yes, sir.

Q. 1386. To what person did you refer in that portion of the letter in which you say, "I would like to know where John is?"

(Objected to by plaintiff on same ground as stated in objection to question No. 1382.)

A. 1386. I referred to Hillmon.

Q. 1387. To what business did you refer in that portion of the letter, "and how that business is?"

(Objected to by the plaintiff on grounds stated in objections to question No. 1382.)

A. 1387. I didn't refer to any business.

Q. 1388. To what business did you refer by the expression in that letter, "that business?"

(Objected to by the plaintiff on same grounds as stated in objection to question No. 1382.)

A. 1388. To no business at all.

Q. 1389. What did you mean by the expression in that letter, "what shall I do, if anything?"

(Objected to by plaintiff on same grounds as stated in objection No. 1382.)

A. 1389. I didn't have any meaning for it.

Q. 1390. Where did you get the paper on which that note is written? A. 1390. Of Buchan?

Q. 1391. What information did you seek to obtain from Mrs. Hillmon through your father?

(Objected to by the plaintiff on same ground as stated in objection to question No. 1382.)

A. 1391. I didn't seek to obtain any.

Q. 1392. What was it you desired Mrs. Hillmon to let you know through your father?

(Objected to by plaintiff on same ground as stated in objection to question No. 1382.)

A. 1392. It wasn't anything at all.

Q. 1393. What did you mean by the expression in that letter, "let me know through my father?"

(Objected to by plaintiff on same grounds as stated in objection to question No. 1382.)

A. 1393. I didn't have any meaning for it at all.

Q. 1394. How long was this letter written before Buchan left on the train that day?

A. 1394. Fifteen or twenty minutes, as near as I can guess at it.

Q. 1395. After you had written the note what did you do with it? A. 1395. I gave it to Buchan.

Q. 1396. After writing this note, when and where did you first see Mrs. Hillmon?

A. 1396. At Levi Baldwin's in September, 1879.

Q. 1397. How long was that after you and Buchan had prepared that statement at your brother's house?

A. 1397. Five or six days, as near as I can recollect.

Q. 1398. After seeing her at Levi Baldwin's where did you next see her? A. 1398. Leavenworth City, Kansas.

Q. 1399. After seeing her in Leavenworth, Kansas, have you seen her since that time at other places?

A. 1399. Yes, sir.

Q. 1400. When and where did you last see her?

A. 1400. In the month of January, 1881, in Kansas City.

Q. 1401. Who was present at that time?
A. 1401. Myself, Mrs. Hillmon, a Mr. Riggs, Mr. Hutchings and my father.
Q. 1402. Where did this meeting take place?
A 1402. At the Metropolitan hotel.
Q. 1403. Where were you stayng then?
A. 1403. I was staying at my father's, close to Wyandotte.
Q. 1404. How long had you been living there then?
A. 1404. Three or four or five days, as well as I recollect.
Q. 1405. Where had you come from to your father's?
A. 1405. From Platte county, Missouri.
Q. 1406. With whom did you make the arrangement to meet Mrs Hillmon and her attorneys at the Metropolitan hotel at that time?
A. 1406. I didn't make the arrangements with anybody.
Q. 1407. How did you happen to go over to the Metropolitan hotel at this time?
A. 1407. I was on the way back to my brother's and stopped there to take dinner with Mr. Riggs and Mr. Hutchings.
Q. 1408. Where had you met Mr. Riggs and Hutchings first on that occasion?
A. 1408. At Alden & McGrew's office in Wyandotte.
Q. 1409. With whom was the arrangement made for you to meet these attorneys here at Wyandotte?
A. 1409. Notary Public Henry McGrew.
562 Q. 1410. Had you come over from Platte county, Missouri, for the purpose of meeting those attorneys here at that time?
A. 1410. Come over for the purpose of them taking my deposition here in Wyandotte.
Q. 1411. At whose request did you come?

(Objected to by the plaintiff as immaterial.)

A. 1411. Mr. Riggs and Mr. Hadley.
Q. 1412. How was that request made, by letter or by a messenger?
A. 1412. By a messenger.
Q. 1413. Who was that messenger?

(Objected to by plaintiff as immaterial.)

A. 1413. My father.
Q. 1414. Where did your father find you?

(Objected to by the plaintiff as immaterial.)

A. 1414. At McOmas' mill in Platte county Missouri.
Q. 1415. When you met Mrs. Hillmon and her attorneys at the Metropolitan hotel in Kansas City, what part, if any, of your deposition had then been taken?

A. 1415. I don't remember now what part.

Q. 1416. Did you have any conversation with her at that time relative to this case, in the presence of her attorneys, Messrs. Hutchings and Riggs?

(Objected to by plaintiff as immaterial.)

A. 1416. None that I remember of.

Q. 1417. Did you have any conversation with her attorneys at that time relative to this case?

(Objected to by the plaintiff as immaterial.)

A. 1417. None that I recollect of.

Q. 1418. Did you meet Mrs. Hillmon and her attorneys before or after the testimony, which had been taken in this case at Medicine Lodge, Barber county, Kansas, had been read to you at said hotel?

A. 1418. I don't recollect whether it was before or after. I wish to correct the date of the year in my statement where I said January, 1881; I meant January, 1882.

Q. 1419. When prior to January, 1882, had you seen Mrs. Hillmon, or either of her attorneys?

A. 1419. I wouldn't be positive but I saw Mrs. Hillmon in Kansas City before that; I don't recollect now just what month it was in. It was in Kansas City I saw her attorneys; I don't remember what date of the month or year.

Q. 1420. When you saw Mrs. Hillmon on the occasion last referred to by who was with her?

A. 1420. Mr. Clark was all I know of.

Q. 1421. Do you know Mr. Clark's first name?

A. 1421. No, sir.

Q. 1422. Is he the same gentleman who was acting as Sheriff in Douglas county, Kansas, at the time of the coroner's inquest in 1879?

A. 1422. Yes, sir.

Q. 1423. Where did you meet Mrs. Hillmon and Clark on that occasion?

A. 1423. At a hotel on Fifth street in Kansas City, I [couldent] call the name of the house.

Q. 1424. From what place did you come to meet them there?

A. 1424. From my brother's in Platte county, Mo.

Q. 1425. At whose request did you come at that time?

A. 1425. At Mr. Clark's.

Q. 1426. How was that request made, by letter?

A. 1426. Yes sir.

Q. 1426. At what place was this letter addressed to you?

A. 1426. Parkville, Missouri.

Q. 1427. Have you that letter A. 1427. No sir.

Q. 1428. How long did you remain in Kansas City on this occasion?

A. 1428. From noon until the six o'clock train in the evening.

Q. 1429. What did you do with that letter which you received from Clark?

A. 1429. I don't know now what I done with it.

Q. 1430. Have you the letter which you received from Baldwin a short time since?

A. 1430. No sir.

Q. 1431. What have you done with that letter?

A. 1431. I don't know now what I done with it.

Q. 1432. Did you have any talk with either Mrs. Hillmon or Mr. Clark, at the time you met them in Kansas City, about this case?

563 A. 1432. Yes sir, some, but I don't recollect now just what it was.

Q. 1433. Had you met either Mrs. Hillmon or Mr. Clark in Missouri before this time?

A. 1433. I never met her before this time, and I don't recollect whether I ever met him before then or not.

Q. 1434. Did you ever see Mr. Clark in Parkville, Missouri? A. 1434. No sir.

Q. 1435. Did you never meet him or see him at any other place in Missouri except Kansas City, Missouri?

A. 1435. I seen him at my brother's once.

Q. 1436. Was that at your brother's near Parkville in Platte county, Missouri? A. 1436. Yes sir.

Q. 1437. Who was with Clark at that time?

A. 1437. My father was the only one that was with him.

Q. 1438. Did you ever meet either of the attorneys of Mrs. Hillmon at any place in Missouri, except at Kansas City?

A. 1438. No sir.

Q. 1439. Did you afterwards meet said Clark at Wyandotte or in the vicinity? A. 1439. No sir.

Q. 1440. Have you never met Mr. Clark at or near Wyandotte except at Kansas City on the occasion which you have mentioned? A. 1440. No sir.

Q. 1441. Have you ever met the attorneys of Mrs. Hillmon or either of them in Wyandotte prior to January, 1882, if so, state when and where?

A. 1441. No sir, I never met them.

Q. 1442. Do you include in that statement D. B. Hadley of Wyandotte?

A. 1442. I was not thinking anything about Hadley, but I had never met him.

Q. 1443. Were you in Wyandotte in December, 1881?

A. 1443. I don't recollect just now whether I was or not.

Q. 1444. Were you in Wyandotte about December, 1881?

A. 1444. I don't recollect now whether I was or not.

Q. 1445. When were you in Wyandotte last, prior to January, 1882? A. 1445. I don't recollect now just when.

Q. 1446. State as definitely as you can.

A. 1446. If I remember right it had been about two years since I had been in Wyandotte.

Q. 1447. Was the last time you were in Wyandotte prior to January, 1882, the time you left Lawrence and came to Wyandotte, when the coroner's inquest was in session, and on the same day went to your brother's in Missouri?

A. 1447. No sir, it was since that time.

Q. 1448. When was it?

A. 1448. It was in September, 1879, as near as I can recollect now.

Q. 1449. Then from September, 1879, until January, 1882, you were not in Wyandotte, were you?

A. 1449. No sir, I think not, to the best of my recollection.

Q. 1450. Where were you in December, 1881?

A. 1450. I was in Parkville, Mo., to the best of my recollection.

Q. 1451. Did you receive a visit from your father at that place during the month of December, 1881?

A. 1451. No sir.

Q. 1452. Was your father not in Parkville either in November or December, 1881?

(Objected to by plaintiff as immaterial.)

A. 1452. Not that I remember of now, he [wasent].

Q. 1453. Were you at any other place during those two months?

A. 1453. I was at Smithville and west of Smithville.

Q. 1453. Was your father at either of those places in November or December, 1881?

(Objected to by plaintiff as immaterial.

Q. 1454. Did not your father come after you in the months of November or December, 1881, at the request of Mr. Hadley, an attorney of this place, and with his team?

(Objected to by the plaintiff as immaterial.)

A. 1454. No sir, if I remember right, it was about the first of January he came.

Q. 1455. Are you positive that that was in January instead of December, 1881?

A. 1455. No sir, I am not positive about it.

Q. 1456. Did you return with your father to Wyandotte on that occasion?

(Objected to by the plaintiff as immaterial.)

564 A. 1456. No, sir.

Q. 1457. When did you come, how long after he was there? A. 1457. The next day after he was there.

Q. 1458. When did you arrive in Wyandotte, what month and what day of the month?

(Objected to by plaintiff as immaterial.)

A. 1458. The first of January, about as nearly as I recollect.

Q. 1459. Were you in Wyandotte at all during the month of December, 1881?

(Objected to by the plaintiff as immaterial, because the same question has been several times asked and several times answered.)

A. 1459. I don't remember just now but it was about the first of January when I came over.

The hour for adjournment having arrived the further taking of this deposition is hereby adjourned until to-morrow morning at 9 o'clock a. m., February 9th, 1882.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.

Friday, February 10th, 1882, 9 o'clock a. m. The further taking of this deposition is hereby resumed pursuant to adjournment.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.

Q. 1460. When did you change your residence from Kansas to the State of Missouri?

A. 1460. In the spring of '79.

Q. 1461. What time in the spring and in what month did you change your residence?

A. 1461. About April.

Q. 1462. Was it about the 10th of April?

A. 1462. It was in the month of April as near as I recollect now.

Q. 1463. Where was the deceased standing with reference to yourself when the gun was discharged?

(Objected to by the plaintiff on the ground that the defendant has several times before inquired about the same subject-matter and the witness has fully and fairly responded to such questions.)

A. 1463. Standing behind me.

Q. 1464. Before leaving Wichita upon your second trip Hillmon's arm was quite sore from his vacinnation, was it not?

(Objected to by the plaintiff on the ground that it is not cross-examination upon any subject inquired about the plaintiff, and because it is leading.)

A. 1464. Yes, sir, it was sore.

Q. 1465. He complained to you some about it at that time, [time,] did he not?

(Objected to by plaintiff on same ground as question last preceding.)

A. 1465. Yes, sir.

Q. 1466. On the evening of the accident did you and Hillmon have ham and bacon for your supper?

A. 1466. I wouldn't be positive but I think we did.

Q. 1467. Do you remember in regard to the health of the deceased on the day of the accident? Was he complaining on that day, and if so, state the nature of his complaint, if you remember?

A. 1467. I remember of his complaining some but as to the nature of it I don't recollect.

Q. 1468. I will ask you if you didn't state before the coroner's inquest at Lawrence in April, 1879, in answer to the following question: "He was complaining then on the day on which the accident occurred?" Answered and testified as follows: "I don't remember, if he did, I don't remember it now."

(Objected to by the plaintiff as incompetent, because it is not the best evidence, the testimony taken before the coroner being a public record, should be offered to show all that the witness testified on the point inquired about, and because it is immaterial.)

A. 1468. I don't recollect now whether I did or not.

Q. 1469. Did you not at said time and place in answer to the following question, "On the day of the accident, you don't remember anything in regard to his health?" testify and answer, "No, sir?"

(Objected to by the plaintiff on the same ground as the question last preceding.)

A. 1469. I don't remember just now whether I did or not.

Q. 1470. Did you not at said time and place in answer to the following question in regard to the supper there, "Did he eat a hearty supper, or did he eat anything?" testify and answer, "I don't remember?"

(Objected to by the plaintiff on the same ground as the question last preceding.)

A. 1470. I don't recollect now whether I did or not.

Q. 1471. Did you not testify at said time and place in answer to the following question: "You don't remember whether he ate heartily or not?" testify and answer: "No, I don't remember?"

(Objected to by the plaintiff on the same ground as stated in the last preceding question.)

A. 1471. I don't recollect now whether I testified to that or not.

565 Q. 1472. Did you not at said time and place in answer to the question: "What would you say in regard to his being dainty or eating a good hearty meal at that time?" testify and answer: "I don't recollect."

(Objected to by the plaintiff on the same grounds as stated in the last preceding question.)

A. 1472. I don't remember just now whether I stated that or not.

Q. 1473. Did you examine the contents of the trunk in which the deceased's things were, at Hutchinson on your way to Lawrence in April, '79? A. 1473. No, sir.

Q. 1474. When did you examine the contents of that trunk on that trip?

A. 1474. I don't recollect of examining the contents of it on that trip.

Q. 1475. Did you not at said coroner's inquest at Lawrence, in reply to the question: "Where did you turn them over to Baldwin?" answer and reply: "In Hutchinson?"

(Objected to by the plaintiff on the same ground as stated in objection to question number 1468.)

A. 1475. I don't remember whether I did or not.

Q. 1476. Did you not at said time and place, in answer to the following question: "Did you examine the contents of said trunk at that time?" testify as follows: "Yes, sir, I did; I used the trunk and took out some of my clothing that I had in there."

(Objected to by the plaintiff on the same ground as stated in objection to question number 1468.)

A. 1476. I don't recollect now of stating that I examined the contents of the trunk, but I believe I remember of stating I took out some of my clothes there.

Q. 1477. Did you not at said time and place, in answer to the following question: "Were the shoes in there at that time?" testify and answer: "Yes, sir."

(Objected to by the plaintiff on the same ground as stated in objection to question number 1468.)

A. 1477. Not that I recollect of now.

Q. 1478. Did you not at said time and place, in answer to the following question: "You are sure the coroner gave you back the deceased's shoes?" answer: "Yes, sir, I am sure that he gave them back to me?"

(Objected to by the plaintiff on the same ground as stated in objection to question number 1468.)

A. 1478. I wouldn't be positive that I did, but I think I did.

Q. 1479. Did you not at said time and place, in answer to the question: "What did you do with them?" answer: "They were put back in the trunk?"

(Objected to by the plaintiff on the same ground as stated in objection to question number 1468.)

A. 1479. I think I did.

Q. 1480. After the shoes which the deceased had on at the time of his death were turned over to you by the coroner in Barber county and put in the trunk, where did you next see them?

A. 1480. I wouldn't be positive but I think I seen them next at Kingman.

Q. 1481. Was that while you were returning to Lawrence in March or April, 1879? A. 1481. Yes, sir.

Q. 1482. Was that the last time you ever saw them?

A. 1482. I wouldn't be positive whether it was or not.

Q. 1483. State the last time you ever saw them?

A. 1483. I couldn't state positive where I seen them last, but I think at Kingman.

Q. 1484. When did you become a resident of Platte county, Missouri? A. 1484. In July, 1879.

Q. 1485. Where did you reside from April, 1879, until July, 1879?

(Objected to by the plaintiff because the same subject-matter has been fully inquired into by the defendant on cross-examination, and the answers of the witness has been full and explicit, and because the question is otherwise incompetent, irrelevant and immaterial.)

A. 1485. In the neighborhood of Orrick, in Ray county, Missouri, and close to Glascow, Missouri, in the neighborhood of Higginsville awhile, and several other places a short time.

Q. 1486. Did you ever get any reply to the inquiry which ou made at Lexington as to the whereabouts of Hillmon?
A. 1486. No, sir, I didn't need any reply from knowing here a dead man was.
Q. 1486. Have you been subpoenaed to attend and give our evidence as a witness before the Notary in this case?

(Objected to by the plaintiff as immaterial.)

A. 1487. No, sir.
Q. 1488. You have been subpoenaed as a witness in this ase before the court in which the case is now pending, have ou not?

(Objected to by the plaintiff as immaterial.)

A. 1488. Yes, sir.
Q. 1489. Will you obey that subpoena?

(Objected to by the plaintiff as irrelevant and immaterial.)

A. 1489. Yes, sir, if it is possible so I can.

566 Q. 1490. Where was Levi Baldwin when you last heard from him?
A. 1490. In New Mexico. I can't call his post office address or what part of New Mexico now.

Re-Examination by the Council for the Plaintiff.

Q. 1. You were asked in your cross-examination about the paper marked "B," a note addressed to Mrs. Hillmon. State who were present besides yourself when you wrote that note.
A. 1. My brother Reub, Buchan and myself was all.
Q. 2. Who, if anybody first suggested the writing of that note?

(The defendant objects to the foregoing question for the reasons: First, That [is] is not a re-examination upon any matter drawn out upon the cross-examination. Second, Because it is leading and calls for the conclusions of the witness. Third, Because it calls for incompetent, irrelevant and immaterial testimony.)

A. 2. Bill Buchan begged of me to write it for him; that it didn't amount to anything anyway.

(The defendant moves to strike out all of that portion of the last answer of the witness after the word that, because the same is not responsive to any question.)

Q. 3. You have testified to a conversation between yourself and Buchan at Lexington, Missouri, in which conversation he proposed to you that you should make a certain state-

ment in relation to the person who was killed near Medicine Lodge. Now state whether it was before or after his request to you to make such statment that he suggested your writing the note to Mrs. Hillmon.

(Objected to by the defendant on all the grounds stated to question No. 2 of the re-examination, and on the additional reason that the recitals and assumption of fact in said question are not correct; and the defendant also objects to the recitals preceding said last question and moves to strike the same out, because they form no part of the question and are incompetent as evidence.)

A. 3. It was after that that he suggested to me write the note.

Q. 4. Now state all the circumstances attending the writing of that note marked "B," stating specifically what was said and done by each of you?

(Objected to by defendant on the same ground as stated in objection to question No. 2.)

A. 4. He told me that he had come way down here for my benefit, and that I hadn't given him any satisfaction at all, and asked me if I wouldn't write this for him, asking Mrs. Hillmon where John was and what I must do, and to let me know through my father. I told him that it was the funniest question I ever heard a man ask, and that I didn't see what he meant by it. He told me that it didn't amount to anything if I was to ask where a dozen Hillmons was at; that there was no stamp or envelope about it. I told him if it was any satisfaction to him I would write it for him. He told me then that he was employed as my attorney, and that if I didn't take some steps towards giving him any satisfaction on his trip down here he couldn't do anything for me. That was about the substance of the conversation there about that.

Q. 5. State what you did, if anything.

(The defendant makes the same objection to the above question as stated in objection to question No. 2, of re-examination.)

A. 5. He pulled a book and piece of pencil out of his pocket and I wrote it. During the conversation he told me he had a hundred dollars and that he would give me fifteen dollars, that would be enough for me to get away from there and find a job of work, and he got on the train and left.

(The defendant moves to strike out all of the last answer of the witness after the words, "I wrote it," for the reason that said portion of his answer is not responsive to the question and otherwise incompetent.)

Q. 6. After you wrote the paper what did you do with it?
A. 6. I gave it to Buchan.
Q. 7. What, if anything, was said by either you or Buchan as to what he was to do with the paper?

(Objected to by the defendant because it is not a cross-examination, because it calls for incompetent, immaterial and irrelevant testimony.)

A. 7. He said he would give it to my father; that he only wanted it to show to the insurance men.
Q. 8. Have you been asked in your cross-examination about a coroner's inquest held at Lawrence in April, 1879. State what attorneys, if any, conducted the examination of the witnesses at that inquest.
A. 8. Mr. Barker and Mr. Green.
Q. 9. Do you mean the same Mr. Barker and Mr. Green who are present here at the taking of this deposition, representing the defendant?
A. 9. Yes sir, the same two men.
Q. 10. Your attention was directed, in your cross-examination, to a conversation between you and Buchan at Lexington about Levi Baldwin and Mrs. Hillmon, and you gave certain statements made by Buchan as to what the insurance men claimed as to Baldwin and Mrs. Hillmon, now state what Buchan said in relation to Levi Baldwin, and what you replied to it, if anything.

(The defendant moved to strike out the preamble to said question because the same is not correct, but is improper and incompetent as evidence, and objects to said question because it is not a re-examination of any new matter drawn out upon the cross-examination, is leading, and calls for incompetent, irrelevant and immaterial testimony.)

567 (Withdrawn by plaintiff's counsel.)

Q. 11. You have stated on your cross-examination that shortly after you and Buchan had prepared the statement at your brother's house near Parkville you saw Mrs. Hillmon at Levi Baldwin's, state now the circumstances, under which you went to Levi Baldwin's at that time; stating who, if anybody, suggested your going and giving all the circumstances and conversations in detail.

(The defendant moves to strike out the preamble to said question to wit, all which precedes the words "state now," for the reason that the same is an improper statement to make to the witness and is incompetent as evidence, and the defendant objects to said question for the following reasons, because it is not a re-examination upon any new matter called out by

the cross-examination, is leading, and calls for incompetent, irrelevant and immaterial and hearsay testimony.)

A. 11. Bill Buchan sent me there to tell her what we had done. I went there and seen her and told her that Buchan wanted me to come up here and see her. She wanted to know what business Buchan wanted with her. I told her that we had made out a statement in regard to her case. She wanted to know what it was. I told her that Buchan could tell her better than I could, and she said if Buchan wanted to know anything about that business or trial that he could go and see her lawyers, and she wanted to know what I meant about that statement, and I told her if she carried on that suit I couldn't appear for her as a witness. I told her that I couldn't now and wouldn't, and that if she would see Buchan he could explain it to her better than I could as he wanted to see her anyway and would meet her anywhere, at Leavenworth, Wyandotte, except at Lawrence, and he could explain to her all about it; that was about the substance of our conversation there, as well as I can remember now.

Q. 12. Now state what Buchan said to you when he sent you there, state all that he said.

(The defendant objects to the above question for the reason that it is not re-examination upon any new matter drawn out upon the cross-examination and calls for incompetent and hearsay testimony.)

A. 12. Says he, John you go up there and see Mrs. Hillmon, and while I am up there I needn't be alarmed or afraid, that he would go to Lawrence while I was up there, and would keep them from arresting me while I was gone and see that I wasn't arrested or molested at all, and asked me if I had the money to go on and I told him yes, and he pulled out five dollars and gave me, and said that would bear my expenses, and for me not to fail to see her and persuade her, if I could, to give him the policies which she held against the insurance companies, and to tell her that this was all a fraud of Hillmon's being dead, and to tell her I had made that in the statement, and be sure and have her promise to meet him some where soon, as near as I can recollect that was about the substance of the conversation.

Q. 13. Where did you go from Baldwin's house at that time? A. 13. Back to Wyandotte.

Q. 14. Did you see Buchan there, if so, state what you said to him?

(Objected to by the defendant for the reason that it is not a re-examination of any matter inquired of or called out by defendant on its cross-examination of the witness; second, Be-

cause it calls for incompetent, immaterial and hearsay testimony.)

A. 14. I seen Buchan and told him what I had done and that Mrs. Hillmon had promised to meet him in Leavenworth the next day, and I told him she would never give him up the policies or believe any of this stuff we had made up, I didn't think. He told me he wanted me to go up with him, and to not be uneasy any time I was over there for they wouldn't bother me as long as he said for them not, and so we went up to Leavenworth the next morning.

(The defendant moves to strike out all of that part of the witness' statement, he told me, as not being responsive to the question, being a voluntary statement on the part of the witness.)

Q. 15. State what, if anything, he said to you at that time about his having been at Lawrence while you were at Baldwin's, and about his business there.

(Objected to by the defendant on the same ground as the question last preceding, and as being suggestive and leading.)

A. 15. He told me he had been up to Lawrence, and had told them fellows that I was up there and that he didn't want them to bother me or arrest me, and to not arrest me while I was over here.

Q. 16. When you went to Baldwin's at this time did you take with you the statement which you and Buchan had prepared at your brother's?

(Objected to by the defendant on the same ground as the objection made to question 14.)

A. 16. No, sir.

Q. 17. From Wyandotte at this time where did you go next?

(Objected to by the defendant on same grounds as offered to question number 14.)

A. 17. Went to Leavenworth with Buchan.

Q. 18. How long was it after you returned from Baldwin's that you went to Leavenworth?

(Objected to by the defendant on same ground as offered to question number 14.)

A. 18. The next after I got back from Baldwin's.

Q. 19. Did you and Buchan meet Mrs. Hillmon there?
A. 19. Yes, sir.
568 Q. 20. If you know, state which of you first met Mrs. Hillmon, and where she was met?
A. 20. Buchan met her at the depot and took her up to the hotel.
Q. 21. To what hotel?
A. 21. I can't call the name of the hotel just now.
Q. 22. What kind of a building is it, and where is it situated?
A. 22. A large brick building close to the river, the Planters or Continental, one or the two.
Q. 23. What time in the day did you and Buchan arrive in Leavenworth? A. 23. About 10 o'clock.
Q. 24. About what time did Mrs. Hillmon arrive?
A. 24. About the same time.
Q. 25. By the same train that you went in on or another?
A. 25. She came in on a different train.
Q. 26. What time in the day or night did you leave Leavenworth, and for what place?
A. 26. I left about 5 o'clock in the afternoon of the same day, for Wyandotte.
A. 27. Did Buchan or Mrs. Hillmon leave at the same time you did?
A. 27. No, sir; I left them there at the hotel.

The hour for adjournment having arrived the further taking of this deposition is hereby adjourned until to-morrow morning at 9 o'clock a. m.
My commission expires April 21, 1883.
[Seal] HENRY McGREW,
Notary Public.

February 10th, 1882.

Saturday, February 11th, 1882, 9 o'clock a. m. The further taking of this deposition is hereby resumed, pursuant to adjournment.

My commission expires April 21, 1883.
[Seal] HENRY McGREW,
Notary Public.

Q. 28. Who went to the hotel in Leavenworth with Mrs. Hillmon?

(Objected to by the defendant as immaterial, as calling for immaterial testimony.)

A. 28. Bill Buchan went with her.
Q. 29. Did you go to the hotel while they were there?

A. 29. Yes, sir.
Q. 30. How long after they went to the hotel did you go?
A. 30. About a half an hour, as near as I can guess.
A. 31. Were you present at any interview, held at that hotel in Leavenworth, between William J. Buchan and Mrs. Hillmon at that time?

(Objected to by the defendant on the same ground as stated in question number 14.)

A. 31. Yes, sir.
Q. 32. State who were present at that interview?

(Objected to by defendant for the same reasons as stated in question number 14.)

A. 32. Mrs. Hillmon and Buchan and myself.
Q. 33. Where was that interview held, in what part of that hotel?

(Objected to by the defendant for the same reasons as stated in question number 14.)

A. 33. In the same floor of the office of the hotel; in the southeast corner, if I recollect right.
Q. 34. Was the room a public or private one in that hotel?
A. 34. I would take it to be a private room.
Q. 35. State fully all that was said by each of the parties present at that interview?

(Objected to by the defendant on the same grounds as those offered to question 14.)

A. 35. Buchan called me into the room where they were and Mrs. Hillmon asked me if this was the kind of business Mr. Buchan wanted to see her about, and Mrs. Hillmon asked me to explain myself, and I asked her if Buchan hadn't expla[—] his business to her, and she, Mrs. Hillmon, said that she didn't understand this at all and wanted to know what I meant, and I told her that I meant what I had said and what Buchan had told her and would be compelled to stand by it. Then Mrs. Hillmon asked Mr. Buchan if he thought he was doing just to her and everybody else, and he told her that he was and wouldn't do otherwise, and Buchan asked her if she didn't believe what he had been telling her and what I had told her, and whether now she wouldn't consent to give him an order for them policies on the insurance companies, and she told him that she had no right to do that, and he told her that she was the only one that had any right to do it, and Mrs. Hillmon told him that if she did give him an order for them she didn't believe he could get them, and Buchan told her that he would

make that all right whether he got them or not, and he wrote out an order for them, and if I am not mistaken he had me sign my name to it as a witness. That was about the substance of the conversation had there.

Q. 36. What, if anything, was said by Buchan at that time and place to Mrs. Hillmon about her being able to recover against the insurance companies the amount of her pol-
569 icies?

(Objected to by the defendant for the same reasons as those offered to question 14, and for the further reason that the question is suggestive and leading.)

A. 36. Buchan told her that they wouldn't and didn't intend to ever pay her a nickle, and that the insurance men had plenty of money and could beat her with that, as she was a poor woman.

Q. 37. Which left the hotel first of the parties you have named?

(Objected to by the defendant for the same reasons as those offered to question 14.)

A. 37. I left the hotel first, and left Buchan and Mrs. Hillmon there.

Q. 38. How long were Buchan and Mrs. Hillmon engaged in their interview while you were at that hotel on that day?

(Objected to by the defendant for the same reasons as those offered to question number 14.)

A. 38. They were there together all the time from the time they met until I left there; I was only with them a short time.

Q. 39. About what time did Buchan meet Mrs. Hillmon and take her to the hotel on that day?

(Objected to by the defendant for the same reasons as those offered to question number 14.)

A. 39. About 10 o'clock in the forenoon, and I left there about 5 o'clock in the afternoon.

Q. 40. About how long were you present in the room during that interview?

(Objected to by the defendant for the same reasons as those offered to question number 14.)

A. 40. About an hour and a half, as near as I can guess.

Q. 41. At what time in the day did Buchan call you into the room?

(Objected to by the defendant for the same reasons as those offered to question number 14.)

A. 41. Between eleven and twelve o'clock, as near as I can recollect.

Q. 42. How many times were you in the room during that interview?

(Objected to by the defendant on the same ground as the question last preceding.)

A. 42. Three or four different times.

Q. 43. About what time in the day were you in the room last?

(Objected to by the defendant on the same ground as the question last preceding.)

A. 43. About five o'clock in the afternoon.

Q. 44. About what time in the day was it that Mrs. Hillmon gave the order for the insurance policies?

(Objected to by the defendant on the same ground as the question last preceding.)

A. 44. It was just before I left, about five o'clock.

Q. 45. Who was that order to?

(Same objection as to the last preceding question, and further objection its calling for the contents of a written instrument which should be produced or accounted for.)

A. 45. To a lawyer there in Leavenworth, a Mr. Wheat, I believe.

Q. 46. Where did you go from Leavenworth on that occasion?

A. 46. To Wyandotte.

Q. 47. When and where did you next see Mrs. Hillmon?

A. 47. The next day after, I saw her in Buchan's office in Wyandotte.

Q. 48. Who was present in that office on that occasion?

A. 48. Buchan, Mrs. Hillmon and myself.

Q. 49. What time in the day was it?

A. 49. About ten o'clock in the morning, if I remember right.

Q. 50. State what was said at that interview by each of the parties andwhat was done by each.

A. 50. I went up in the office and found Buchan and Mrs. Hillmon there and spoke to them. She told Buchan she wanted to see that statement he was talking about, and he showed her the paper and she looked at it, and turned around to me and asked me how I dared to make such a statement as that, and wanted to know my reasons for it and why I had done it, and I told her that I had done that and would stand by it, and Buchan pulled out a piece of paper and showed it to

her, or he read it first rather, then handed it to her and she handed it back to him and told him that she had no use for that; then Buchan handed me the statement that we had made out, and said, here, John, is that paper that I promised to return back to you, and he said I could take it and destroy it or tear it up, or do as I pleased with it, and I tore it up and put it in the stove, and then Buchan told me that, that now was forever settled and that there wouldn't be any more trouble about this matter at all, and that, that was the end of it, and, says he, John, there ain't the scratch of a pen against you about this difficulty anywhere, only my true statement that I had made at Lawrence, and that I was free to go anywhere, was about the substance of the conversation as well as I can recollect now.

Q. 51. Which left Buchan's office first on that day, you or Mrs. Hillmon? A. 51. I left there first.

Q. 52. When after that did you first see Mrs. Hillmon?

A. 52. About the first of January, 1882.

Q. 53. How long did the man who rode with Hillmon and yourself in the wagon from a point two or three miles out from Wichita on your second trip from Wichita southwest remain with you?

570 A. 53. About two days and one-half.

Q. 54. Had you ever seen him before he got into the wagon to ride with you? A. 54. No sir.

Q. 55. When and where did he leave Hillmon and yourself?

A. 55. He left us the first day out from camp about noon, on the creek where we camped on the Medicine river.

Q. 56. Have you ever seen him since? A. 56. No sir.

Q. 57. How long did the person who stayed in the camp with Hillmon and yourself near Sun City the night you camped there on your second trip from Wichita southwest remain with you?

A. 57. Came to camp late in the evening and went away early the next morning.

Q. 58. Where did he go?

A. 58. Started toward Sun City, I don't know where he went.

Q. 59. Had you ever seen him before that time?

A. 59. No sir.

Q. 60. Have you ever seen him since that time?

A. 60. No sir.

Q. 61. Do you remember the location of the church and school house in Medicine Lodge at the time you passed through there on your second trip? A. 61. Yes sir.

Q. 62. In what direction were they from the main street in the village and from the post office at that time?

A. 62. They were well to the north end of the main street and on the east side of the street.

Q. 63. As you drove out of Medicine Lodge on that trip, on which side of the school house did you pass?

(Objected to by the defendant as suggesting a state of facts which the witness has not testified to; second, the question is leading.)

A. 63. On the west side.

Q. 64. How close to the school house was the track of the road at the point where it passed it?

A. 64. Right close to the school house.

Q. 65. As you drove out of the town on which side of the post office did you pass?

A. 65. We passed the [passed the] post office on the east side, I went kind of around it.

Q. 66. On which side of the main street was the post office?

A. 66. On the east side.

Q. 67. What direction was the school house from the post office? A. 67. Northeast from the post office.

The hour of adjournment having arrived the further taking of this deposition is hereby adjourned until Monday, February 13th, 1882, at 9 o'clock a. m.

My commission expires April 21, 1883.

[Seal] HENRY McGREW, Notary Public.

Monday, February 13th, 1882, 9 o'clock a. m. The further taking of this deposition is hereby resumed pursuant to adjournment.

My commission expires April 21, 1883.

[Seal] HENRY McGREW, Notary Public.

Q. 68. Was John W. Hillmon vaccinated at any time after you left Lawrence to go to Wichita and the southwest?

A. 68. Yes, sir.

Q. 69. Where and when was he vaccinated; state as nearly as you can?

A. 69. He was vaccinated in the month of February, when he went up home to Lawrence from Wichita to see his wife.

Q. 70. State whether or not John W. Hillmon vaccinated any other person, at any time or place on your trip, to your knowledge?

A. 70. No, sir, not that I ever knew anything of.

Q. 71. State whether or not he vaccinated the stranger you took into your wagon, about 2 or 3 miles out from Wichita, and who as you say remained with you some two or three days?

(Objected to by defendant on the ground that it is not a re-examination of any subject-matter drawn out by the defendant on its cross-examination of the witness.)

A. 71. No, sir.

Q. 72. Did you ever at any time or place tell W. J. Buchan that Hillmon vaccinated this stranger with virus taken from his, Hillmon's own arm. A. 72. No, sir.

571 Q. 73. Who first suggested this idea of the vaccination of the stranger by Hillmon?

(Objected to by the defendant for the reason that assumes a fact which has not been testified to; second, because it calls for a conclusion of the witness.)

A. 73. Bill Buchan.

Q. 74. What other persons, if any, than the two you have spoken of were with you, either in camp at night or traveling with you in your wagon during the day during your trip from Wichita southwest.

A. 74. No one at all.

Q. 75. Did John W. Hillmon trade clothing or any article of clothing with any person during your said trip to your knowledge?

(Objected to by the defendant as leading.)

A. 75. Not that I know anything of.

Q. 76. Did you ever state to Buchan that Hillmon traded clothes with the stranger you took into your wagon two or three miles out from Wichita on your trip?

A. 76. No sir.

Q. 77. Who first suggested putting such a statement into the paper you and Buchan prepared at your brother's house?

(Objected to by the defendant as it calls for the conclusion of the witness.)

A. 77. Buchan first proposed it, as it was a very easy matter done.

Q. 78. You have stated in your cross-examination that Levi Baldwin came to see you at your brother's house in July, 1879, state if you know what he came for.

(The defendant moved to strike out all that portion of the foregoing question preceding the words, what he came for, for the reason that it is an improper method of examining the witness; second, It is not a re-examination of any subject-matter brought out by the defendant on the cross-examination; third, It calls for incompetent, immaterial and irrelevant testimony.)

A. 78. He came to see me in regard to Mrs. Hillmon's law suit against the insurance companies, and that she had sued the insurance companies for her money and that her attorneys wanted to see me.

Q. 79. What if any conversation did you ever have with John W. Hillmon and Levi Baldwin, or either of them, or with any other person or persons prior to the time you and Hillmon started in December, 1878, on your trip into southwestern Kansas, about the matter of insurance on the life of the said John W. Hillmon?

(Objected to by the defendant for the same reasons as those given to question 14.)

A. 79. I never had any conversation at all.

Q. 80. Prior to the time mentioned in the last question, what if any conversation did you ever hear between John W. Hillmon and Levi Baldwin, or any other person or persons, about the matter of insurance on the life of said John W. Hillmon?

(Objected to by the defendant's counsel for the same reasons as those offered to question 14.)

A. 80. I never heard them nor any one else say anything about it.

Q. 81. When did you first become acquainted with the fact that there was any insurance upon the life of the said John W. Hillmon?

(Objected to by the defendant for the same reasons as those offered to question 14.)

A. 81. At Medicine Lodge on our first trip.

Q. 82. How did you become acquainted with that fact at that time?

(Objected to by defendant on same ground as question last preceding.)

A. 82. Through a large letter that Hillmon received out of the post office from Lawrence.

Q. 83. State, if you know, who that letter was from.

(Same objection as to question last preceding.)

A. 83. I don't know who it was from for certain. From the remark he made I judge it was from the insurance agent.

Q. 84. Did you at that time learn the amount of insurance upon Hillmon's life, or the companies in which he was insured?

(Objected to by the defendant on same ground as question last preceding.)

A. 84. No, sir, I didn't learn.

Q. 85. When did you first learn the amount of insurance upon Hillmon's life, and from whom or how did you learn it?

(Same objection as to last preceding question.)

A. 85. After Hillmon was dead, and when Walker and the insurance agent and Baldwin came down from Lawrence Walker first told me that his life was insured for twenty-five thousand dollars. Baldwin told me first there that Hillmon's life was insured, but hadn't said how much.

Q. 86. Where did you first meet or become acquainted with Ezra W. Iliff, of Medicine Lodge, Kansas?

A. 86. The first trip we made out to Medicine Lodge in the latter part of December, 1878, or January, 1879.

Q. 87. State, if you know, when John W. Hillmon first become acquainted with said Iliff?

572 (Objected to by the defendant for the same reasons as those offered to question 14.)

A. 87. At the same time.

Q. 88. Who accompanied the body of John W. Hillmon from Medicine Lodge to Lawrence?

A. 88. Levi Baldwin, Alvah Baldwin and myself to Hutchison, and from there Levi Baldwin and myself.

Q. 89. Were you present at the cemetery at Medicine Lodge when the body was taken up?

A. 89. Yes, sir.

Q. 90. Who else was present?

A. 90. Col. Walker, Levi Baldwin, Alvah Baldwin, myself, the insurance agent and a negro, was all I recollect of now. There were two or three others, but I couldn't call their names.

Q. 91. Besides Col. Walker how many representatives of the insurance companies were present, if you know?

A. 91. Two.

Q. 92. Do you know their names, if so state them?

A. 92. Wiseman was one of them. The other I don't know.

Q. 93. From the cemetery where was Hillmon's body first taken and who accompanied it?

A. 93. It was first taken to Medicine Lodge and the two Mr. Baldwins and myself were with it.

Q. 94. Was any examination made by Col. Walker and the insurance men of the body before it was taken from the cemetery?

A. 94. Yes, sir.

Q. 95. What kind of an examination was made there; what was done?

(Objected to by the defendant for the reason that it is not a re-examination of any new matter brought out by the defendant on its cross-examination. Second, Because it is a re-examination of the witness upon the matter inquired of by the plaintiff on her direct examination, and because it calls for incompetent and immaterial testimony.)

Q. 95. They took the lid off of the coffin and looked at the body, and then they ripped the coat sleeve and shirt sleeve [—] of his arm and examined his arm where he was vaccinated, and they examined his mouth and the place where he was shot; that's all I noticed they particularly examined.

Q. 96. Who made this examination?

(Objected to by the defendant on same ground as the question last preceding.)

A. 96. Mr. Walker and Mr. Wiseman and a man there at Medicine Lodge they called Doctor, I don't recollect his name.

Q. 97. What was said and done by each of the parties last named by you at the grave on that occasion?

(Objected to by the defendant on the same grounds as those stated to question 14.)

Q. 97. Mr. Wiseman made the remark after he had cut his sleeve off, that there was the vaccinate on his arm sure enough, and the doctor made the remark after he had examined his mouth, why, said he, he hasn't any false teeth. Levi Baldwin made the remark, he hasn't any false teeth; the doctor made the remark after he had examined his teeth, that his teeth were sound.

Q. 98. State if you know whether Hillmon had any teeth missing?

(Same objection as to question last preceding.)

A. 98. No, sir, he didn't have any missing.

Q. 99. State if you know whether Hillmon was taller or shorter than yourself?

(The defendant objects because the same is not a re-examination of any new matter called out by the defendant on cross-examination, and because it is incompetent, immaterial.)

A. 99. Hillmon was taller than I am; an inch or an inch and one-half taller.

Q. 100. What is your height?

A. 100. Five feet nine inches and one-half.

Q. 101. What time in the day did you leave Medicine Lodge with the body of John W. Hillmon, when you started to Lawrence with it?

A. 101. In the morning.

Q. 102. How long after the body had been taken up from the grave was it that you started from Medicine Lodge with it?

A. 102. Took it up from the grave about 2 o'clock the day before.

Q. 103. Did Col. Walker and the insurance men you have spoken of, leave Medicine Lodge before or after you left with the body?

A. 103. They left before.

Q. 104. How long before, and how did they travel?

A. 104. I don't know how long, it was the same morning; they traveled with a two-horse spring wagon.

Q. 105. How did you and the two Baldwins travel to Hutchinson with the body?

A. 105. With Hillmon's spring wagon and team; I wouldn't be positive whether Alvah Baldwin rode with us from Medicine Lodge to Kingman or not; he talked of riding with the other fellows.

573 Q. 106. Was the wagon in which you rode the same you and Hillman had on the two trips you have spoken of?

A. 106. Yes, sir, the same wagon.

Q. 107. What was the distance from Medicine Lodge to Hutchinson by the route you traveled?

A. 107. About eighty miles.

Q. 108. How long were you in making the trip from Medicine Lodge to Hutchinson with the body of Hillmon?

A. 108. About two days.

Q. 109. How did you take the body of Hillmon from Hutchison to Lawrence?

A. 109. On the cars.

Q. 110. At the time of Levi Baldwin's visit to you, at your brother's in July, 1879, did you see W. J. Buchan; if so, where did you see him?

A. 110. Yes, sir, I saw him at Parkville.

Q. 111. Did you have conversation with said Buchan on that occasion about this Hillmon matter; if so, state what he said to you?

(Objected to by the defendant on same ground as those made to question 14, and further the question is leading.)

A 111. Yes, sir; he wanted to know if I had seen Mrs. Hillmon or any of her lawyers, or whether I had done anything in regard to her trial, and wanted to know of me if I wouldn't consent to do what he wanted me to do down at Lexington, and whether I intended to or not; and then he wanted to know how I expected him to act as my attorney without I would take his advice. I told him as to his advice I didn't know that he

ight be right about it; and then he told me there would ever be anything wrong in it, and as he was a lawyer he ught to know, and then he wanted to know what Levi Bald- in wanted. I told him he had come down here to see me in gard to Mrs. Hillmon's trial or suit, and that her lawyers anted to see me. Then Buchan told me to not go near them, nd to not sign any statements or anything whatever and to eep away from them and to not do anything until he seen e, and that he would tell me when to do anything of that ind. This was about the substance of his statement to me.

Recross-Examination by the defendants counsel.

Q. 1. Was the time that you saw Buchan at Parkville, of hich you have just been inquired of, the same time that this tatement was prepared?

A. 1. No, sir, it was after that it was prepared.

Q. 2. Baldwin was down there at this time to see you in egard to the suit Mrs. Hillmon had brought against the com- anies and wanted you to see her attorneys, did he?

A. 2. He said that they wanted to see me.

Q. 3. Did he want you to see him?

A. 3. He didn't say.

Q. 4. Did he not ask you at that time if you would not see hem? A. 4. He asked me if I would go and see them.

Q. 5. Where did he wish you to go to meet them?

A. 5. To Kansas City.

Q. 6. Buchan, as your legal adviser, didn't think it best for you to go, did he?

A. 6. No, sir, he didn't want me to go.

Q. 7. Had you at this time made up your mind to go be- fore you saw Buchan? A. 7. No, sir.

Q. 8. And you had made no arrangements to go?

A. 8. No, sir.

Q. 9. Do you know Mr. Borgalthaus, a lawyer of Lawrence?

A. 9. Yes, sir; I am slightly acquainted with him.

Q. 10. Did you see him present at the coroner's inquest at Lawrence in April, 1879?

A. 10. Yes, sir.

Q. 11. State whether he was there as the legal adviser of Mrs. Hillmon if you know.

A. 11. I couldn't say whether he was or not; not knowing.

Q. 12. State, if you know, whether he was her legal ad- viser at this time.

A. 12. I don't know whether he was or not.

Q. 13. When did you first become acquainted with him?

A. 13. The same or next day after I came up from Med- icine Lodge?

Q. 14. Who introduced you?

A. 14. I don't recollect now who.

Q. 15. Did you not see him consulting and advising with Mrs. Hillmon at that time?

A. 15. She was up in his office at the same time I was; I don't know whether he was consulting with or advising her or not.

574 Q. 16. Who requested you to go up into his office?

A. 16. I don't recollect who it was, it might of been himself.

Q. 17. For what purpose did you go up there?

A. 17. I think it was he, himself, that told me to come up in his office that he wanted to see me, and then he wanted me to relate to him how this accident happened, the killing of Hillmon.

Q. 18. And still you do not know whether he was acting as Mrs. Hillmon's attorney or not?

A. 18. I couldn't say for certain whether I knew or not.

Q. 19. Did John W. Hillmon and Levi Baldwin ever trade clothes with each other to your knowledge?

A. 19. I knew only by them telling me.

Q. 20. Did Hillmon ever tell you they traded clothes?

A. 20. Yes, sir; he told me when he came from Lawrence that he had traded with Baldwin.

Q. 21. Did he show you the suit which he had secured in the trade? A. 21. Yes, sir.

Q. 22. What became of that suit do you know?

A. 21. He wore it part of the time, and afterwards he was buried in it.

Q. 22. How much taller do you say that Hillmon was than you?

A. 22. He was an inch or an inch and one-half taller.

Q. 23. Do you arrive at that by judgment or actual measurement? A. 23. Only by judgment.

Q. 24. How tall a man do you say he was?

A. 24. I guess he was five feet and between ten and eleven inches.

Q. 25. Is that estimate with his boots on?

A. 25. Yes, sir.

Q. 26. In the height you have given of yourself, you was measured with your boots on were you not?

A. 26. Yes, sir.

Q. 27. When were you measured, and with whose rule?

A. 27. Measured to-day; Mr. Riggs had the rule, I don't know whether it belonged to him or not.

Q. 28. And you had your boots on when measured?

A. 28. Yes, sir.

Q. 29. Will you now allow yourself to be measured in your stocking feet? A. 29. Yes, sir.

Q. 30. You may state how much you measure in your stocking feet?

A. 30. Five feet, eight and one-half inches.

Q. 31. Are you positive that Hillmon was taller than you?

A. 31. Yes, sir.

Q. 32. Did you ever stand up with him to measure with him? A. 32. Yes, sir.

Q. 33. And you found that he was taller than you?

A. 33. Yes, sir.

Q. 34. When do you say you first learned that Hillmon had an insurance on his life?

A. 34. On our first trip, at Medicine Lodge.

Q. 35. Had you ever heard Hillmon talking about getting his life insured before that time at Medicine Lodge?

A. 35. No, sir.

Q. 36. Did you not hear him talk in regard to insurance before you and he went to Wichita in December?

A. 36. No, sir.

Q. 37. Did you not state at the law office of George J. Barker, at Lawrence, Kansas, in the fore part of April, 1879, in the presence of said Barker, Mr. Tillinghast and others, as follows: "I first knew about his insurance when Mr. Baldwin came to Medicine Lodge after Hillmon's death. Mr. Levi Baldwin stated that he was insured for a small amount. I heard Hillmon talking in regard to insurance before we went to Wichita in December."

A. 37. I don't recollect now whether I stated that or not.

Q. 38. Referring now to the time you went to Baldwin's after you had made the statement at Parkville, please state how long it was after this statement had been prepared that you went to Baldwin's?

A. 38. A few days afterwards. I don't think it was over three or four days at the outside.

Q. 39. Where were you when Buchan, as you say, asked you to go and see her at Mr. Baldwin's?

A. 39. I was at Buchan's office.

Q. 39. How did you happen to be at Buchan's office at this time?

A. 40. He told me after he had made out the statement to come over in two or three days, or sent for me, I wouldn't be positive which.

Q. 41. If he sent for you, how did he send?

575 A. 41. I don't know, unless it would be by my father.

Q. 42. What did he want you for at this time?

A. 42. He wanted me to go up to Baldwin's and see Mrs. Hillmon.

Q. 43. For what purpose did he want you to see Mrs. Hillmon.

A. 43. To see if she wouldn't give him the policies she held against the insurance companies.

Q. 44. How did he propose to obtain these policies from her?

(Objected to by plaintiff as incompetent, as calling for the opinion of the witness as to Buchan's plans, and not calling for what was said by Buchan.)

A. 44. For me to go up there and tell her that we had made out a statement that would injure her, and it wouldn't do for me to go on the stand to appear again her, and that Buchan wanted to see her. Buchan wanted me to see her and have her meet him somewhere and he would convince her that she couldn't gain the suit, and to tell her that we had made out a statement contrary to the two statements I had made and that this was all a fraud, that this wasn't John W. Hillmon's body but was someone else's.

Q. 45. Then Buchan directed you to go up and see Mrs. Hillmon and tell her that you and he had prepared a statement together, did he? A. 45. Yes, sir.

Q. 46. And that that statement was a different statement than the true one which you had heretofore given?

A. 46. Yes, sir.

Q. 47. Were you directed to tell her what was in this statement that you had prepared?

A. 47. Partly. Yes, sir.

Q. 48. What part was you to inform her of?

A. 48. That it wasn't John W Hillmon, but some other man that was killed.

Q. 49. Was that the only portion of the statement that you was to tell her?

A. 49. The only portion that I recollect of that I was to tell her.

Q. 50. How long was you at Baldwin's at this time?

A. 50. About a day and a half, if I remember right.

Q. 51. You had an interview with Mrs. Hillmon at this time, did you? A. 51. Yes, sir.

Q. 52. Now please state all that was said during that interview?

A. 52. I told Mrs. Hillmon that I had come up here to see her about this suit she had again the insurance companies, and I told her that Bill Buchan had sent me up for that purpose, and Mrs. Hillmon wanted to know what business Buchan had with her, and I told her Buchan said that she never would recover her money against the insurance companies if she brought suit against them, and that Buchan and I had made out a statement contrary to the statement I had made at Lawrence, and that it would compel me to testify again her if I went on the stand. Mrs. Hillmon told me she didn't un-

derstand me and wanted me to explain myself, what I meant, and I told her I meant about what I said, and that if she would go and see Buchan that he would explain it to her better than I could. She said she had no business with Mr. Buchan and that if he wanted to see anything about her law suit that he could go to Lawrence and see her lawyers; and I told her that Buchan was anxious to see her and would meet her anywhere except Lawrence, and that he could explain matters to her better than I could. That was about the substance of our conversation there.

Q. 53. Did you tell her at this time that the dead body which was brought to Lawrence was not the body of her husband, but that of some other person? A. 53. No, sir.

Q. 54. Where was she first told that that body was not the body of her husband? A. 54. At Leavenworth.

Q. 55. Did you tell her at this time anything that is contained in that statement?

A 55. I told her that we had made out a statement—Buchan and I—that it was some one else besides Hillmon.

Q. 56. What did she say to that?

A. 56. I don't recollect now what she did say.

Q. 57. Did you tell her that in this statement which you had prepared, that you had stated this man came to his death at the hands of her husband? A. 57. No, sir.

Q. 58. Then all you stated to her of those things which are contained in this statement was that the body was some other person than Hillmon?

A. 58. All that I recollect of now.

Q. 59. Who was present during this conversation?

A. 59. Mrs Hillmon and myself was all.

Q. 60. Where was Baldwin at this time?

A. 60. About the house somewhere, I don't know where now.

576 The hour for adjournment having arrived the further taking of this deposition is hereby adjourned until tomorrow morning at 9 o'clock a. m.

[Seal] HENRY McGREW,
Notary Public.

My commission expires April 21, 1883.

February 13th, 1882.

Tuesday, February 14th, 1882, 9 o'clock a. m. The further taking of these depositions is hereby resumed pursuant to adjournment.

[Seal] HENRY McGREW,
Notary Public.

My commission expires April 21, 1883.

Q. 61. Did you have more than one interview with Mrs. Hillmon at Baldwin's at this time, about her insurance matter?

A. 61. I had two, one in the evening and one the next morning, about the same conversation.

Q. 62. Was that the evening of the day on which you arrived?

A. 62. If I am not mistaken, it was the second day after I got there, I am not positive.

Q. 63. What time in the day did you leave there to return home?

A. 63. Sometime in the forenoon, I don't know just what time.

Q. 64. State as nearly as you can.

A. 64. About nine or ten o'clock, if I remember right.

Q. 65. Was Baldwin present at either of these interviews?

A. 65. No, sir.

Q. 66. Did Baldwin know what your business was at his place at his time?

A. 66. Not only by what I told him that I know of.

Q. 67. What did you tell him?

(Objected to by plaintiff as incompetent and immaterial.)

A. 77. I told him that I wanted to see Mrs. Hillmon about her suit against the insurance companies, and that Bill Buchan from Wyandotte had sent me up there to see her, that was about the substance of it that I recollect now.

Q. 78. If there was anything further please state.

A. 78. I don't recollect just now of anything that was said.

Q. 79. Did you not state to him for what particular purpose you came up? A. 79. No, sir.

Q. 80. Did you at any time while you were there?

A. 80. I think not, if I recollect right.

Q. 81. Was it talked over in his presence by you and Mrs. Hillmon? A. 81. No, sir.

Q. 82. Did he ask you why you wanted to see Mrs. Hillmon about her insurance matter? A. 82. Yes, sir.

Q. 83. What answer did you give him?

A. 83. I told him that if she would go and see Mr. Buchan that he would tell her the reasons.

Q. 84. Did he want to know why Buchan wanted to see her?

A. 84. He didn't ask why he wanted to see her, he said he didn't know what business Buchan wanted with her.

Q. 85. Did you tell him at this time that you had made this statement?

(Objected to by plaintiff as incompetent, as calling for statements made by the witness to Baldwin when the plaintiff

was not present, and as otherwise incompetent, irrelevant and immaterial.)

A. 85. No, sir.

Q. 86. State the exact conversation had between you and Mrs. Hillmon at your first interview at Baldwin's.

A. 86. I told her that Bill Buchan wanted me to come up there to see her in regard to her suit again the insurance companies. Mrs. Hillmon wanted to know what business Mr. Buchan had with her suit. I told her that Buchan and I had made out a statement and that if she did bring suit again the companies that I would be compelled to testify again her, and she wanted to know what I meant by talking that way. I told her I had and would be compelled to stick to it and would stick to it, and that if she would go and see Buchan he could explain it to her better than I could. That is about the substance of our conversation that I recollect now.

Q. 87. Was that all that was said at this time?

A. 87. All that I remember of now.

Q. 88. Did she ask you at this time why you would have to testify against her if called as a witness?

A. 88. I don't remember now whether she asked me that or not.

Q. 89. What do you mean by the expression, "I told her I had and would be compelled to stick to it."

(Objected to by plaintiff as incompetent, the language speaking for itself, and as immaterial.)

577 A. 89. I meant that I had made out that statement.

Q. 90. Did you tell her at this time anything that was contained in that statement?

A. 90. Not that I recollect of now.

Q. 91. Did she ask you what that statement contained at this time?

A. 91. Yes, sir, I told her that Buchan could tell her.

Q. 92. What did she say to that?

A. 92. She told me that she didn't understand me, nor Mr. Buchan either.

Q. 93. Was it at this interview you told her that the body which was brought to Lawrence, and over which an inquest was held, was not the body of Hillmon? A. 93. No, sir.

Q. 94. When did you tell her that?

A. 94. I think it was the next morning I told her the statement Buchan and I had made out was that it was the body of someone else and not Hillmon.

Q. 95. Did you inform her of the character of the evidence which you would be compelled to give if called as a witness?

(Objected to by plaintiff as incompetent as calling for the opinion of the witness as to the character or effect of his evidence, and because it does not call for the conversations between the parties upon that subject.)

A. 95. No, sir.

Q. 96. Did she ask of you at this time why you would be compelled to testify against her?

A. 96. Yes, sir, I think she did.

Q. 97. What answer did you give?

A. 97. I told her if she could go and see Buchan, he could give her the reasons why.

Q. 98. Did she ask what you would testify to if called as a witness? A. 98. No, sir, not that I recollect of.

Q. 99. Did you tell her at this time that Buchan wanted to get [up] the policies which she had against the insurance companies, or words to that effect?

A. 99. I told her that Buchan wanted to get the policies that she had against the insurance companies.

Q. 100. What answer did she give to that?

A. 100. She said that Buchan had no right to them policies.

Q. 101. Was it at this interview that you told her that Buchan would meet her at Wyandote, Leavenworth or any place except Lawrence? A. 101. Yes, sir.

Q. 102. What reason did Buchan give [of] not wanting to meet her at Lawrence?

A. 102. I don't know as he gave any.

Q. 103. Did he not say to you why he did not wish to meet her at Lawrence, but would meet her at either of these other places? A. 103. Not that I recollect of.

Q. 104. Your second interview was the next morning, I believe? A. 104. Yes, sir.

Q. 105. Now will you state all that was said by each of you at that interview?

A. 105. I have just been stating what was said the next morning, the same conversation about.

Q. 106. State if you please the conversation had between you and Mrs. Hillmon at this interview the next morning?

A. 106. I told Mrs. Hillmon that if she brought suit that Buchan and I had made out a statement and that I would have to testify again her, and in that statement it stated that it was the body of someone else and not the body of Hillmon. Mrs. Hillmon made the remark that she knew her husband when she see- him and that she knew that that was him, and that she didn't understand Mr. Buchan or me either; and I told her that Buchan wanted to see her at Leavenworth or Wyandotte, any place except Lawrence, and would explain the matter a good deal better than I could, and what I done I

would have to swear to; that was about the substance of the conversation, as well as I can recollect of now.

Q. 107. Did you state to her at this time that you would be compelled to swear to the statement contained in this paper which had been made out, if you were called as a witness?

A. 107. I told her I would do it, or be compelled to do it, I don't know which I used.

Q. 108. And you informed her at this time that this statement contained the statement that this body which was brought to Lawrence was not the body of her husband, Mr. Hillmon?

A. 108. I informed her that in that statement it stated that it was not the body of Hillmon but of some one else, as Buchan told me to tell her that rather than to have her miss to come to see him.

Q. 109. Did you have any conversation with Baldwin this morning about this matter?

A. 109. None in particular, that I recollect of.

Q. 110. Did you prevail upon Mrs. Hillmon to meet Buchan? A. 110. Yes, sir.

578 Q. 111. At which of these interviews did she consent? A. 111. The next morning before I left.

Q. 112. Did you inform her at either of these interviews that this statement was prepared and was now in the hands of Buchan? A. 112. Yes, sir, I told her that Buchan had it.

Q. 113. The next morning after you left Baldwin's you three met at Leavenworth, did you?

A. 113. No, sir, the second morning after.

Q. 114. Did she inform you while you were at Baldwin's where these policies were that she held against the companies?

A. 114. I don't recollect just now whether she did or not.

Q. 115. What was the first conversation you had with her at Leavenworth at this time?

A. 115. I asked her if Buchan didn't explain things to her satisfactory. She says no, he hasn't, nor didn't. Buchan then asked her if she didn't believe that was [—] one else besides her husband, and [—] says, Mr. Buchan don't you think I know my husband when I see him. She said that was him there at Lawrence, and that he was buried there and that she didn't want him to talk to her in that kind of a style and try to make her believe that that wasn't her husband; and he said to her, of course I know that and believe that as far as that is concerned. He told her that if she brought suit against the companies that I would testify again her; and I told her that I would. I told her that she had better take Mr. Buchan's advice; that he said that the insurance companies never would and never calculated to pay her the money. That was about

the substance of the conversation as far as I recollect. I wasn't in the room with them much.

Q. 116. How long was you in the room with them at this time?

A. 116. I was in the room an hour or an hour and a half. I was out of the room a time or two during that time, for the reason that I wanted to have as little to say to her as I could.

(The defendant moves to strike out all that part of the answer commencing with the words, "for the reason." First, Because the same is not responsive to the question. Second, Because it is incompetent and immaterial.)

Q. 117. Did you have any further conversation with her that day?

A. 117. Not that I recollect of, particular just now.

Q. 118. What did she say to you the next time you met that day about this business?

A. 118. I don't recollect just now what was said.

Q. 119. When she said, I know that's my husband and he is buried there at Lawrence, what did you say in reply thereto? A. 119. I don't recollect of saying anything.

Q. 120. Were you in the room with them again that day?

A. 120. Yes, sir.

Q. 121. Did you have any further conversation with them about this matter at that time?

A. 121. They were talking of the policies being in the hands of a lawyer there at Leavenworth. I didn't have any conversation particular with them myself.

Q. 122. How many times were you in the room with those parties that day?

A. 122. Two or three different times.

Q. 123. Was she told in your presence that day what is contained in this statement, further than it stated that this was not the body of Hillmon but of some other person?

A. 123. No, sir.

Q. 124. Did you tell her at that time, or any other, that you would have to testify that there was a conspiracy formed between Hillmon, Baldwin and yourself to defraud the insurance companies out of some money? A. 124. No, sir.

Q. 125. Did you inform her that the statement contained that? A. 125. No, sir.

Q. 126. Did you inform her at Baldwin's or at Leavenworth that this statement had been, or was, to be shown to the companies or their lawyers? A. 126. No, sir.

Q. 127. Was she so informed to your knowledge either at Baldwin's or at Leavenworth? A. 127. No sir.

Q. 128. Then, if I understand you correctly, all you did state to her was that if you should be called as a witness in

any suit that she might bring against the companies on the policies which she held against them you would be compelled to or would testify that the body brought to Lawrence was not the body of Hillmon but that of some other person?

A. 128. That is about all I recollect now of telling her.

Q. 129. And you so stated to her, did you not, to induce her to surrender up the policies which she had against the companies to Mr. Buchan? A. 129. Yes sir.

579 Q. 130. You knew at the time that this statement was false and that if you should so testify it would be false testimony, did you?

A. 130. Yes sir, I knew it was a false statement.

Q. 131. And you did all this to please Buchan?

A. 131. Yes, sir.

Q. 132. Was Hillmon usually in good health while you knew him?

A. 132. As far as I knew, I thought he was a pretty healthy man, I never knew of his having any spells of sickness.

Q. 133. Was he ever sick in bed while you knew him?

(Objected to by the plaintiff as irrelevant and immaterial.)

A. 133. Not that I recollect of now.

Q. 134. Did you, Buchan and Mrs. Hillmon meet by appointment after you came from Leavenworth?

A. 134. No sir. Buchan told me to come up in his office next morning.

Q. 135. Was it the next morning after you had met at Leavenworth that you three met at Buchan's office, at which time he handed you the statement and you destroyed it?

A. 135. Yes sir, the next morning.

Q. 136. Are you positive that it was the next morning that you destroyed that paper?

A. 136. Yes sir, I feel positive that it was the next day, I may possibly be mistaken, but I don't think so now.

Q. 137. What did he wish you to come up in his office for?

A. 137. That he would give me that statement as he had promised.

Q. 138. When you went up there he handed you the paper, did he?

A. 138. Yes sir, he handed it to me after I went up there.

Q. 139. Did Mrs. Hillmon read the paper at that time?

A. 139. She was looking at it, I suppose she read it.

[A.] 140. What did she say as to the contents of the paper?

A. 140. She didn't say anything in regard to the contents of it that I know of, only she wanted to know how I dared to do anything of that kind, that I knew that that was her husband as well as she did.

Q. 141. What did you say in answer to that?

A. 141. I don't recollect just what I did say.

Q. 142. You say that Buchan showed her a paper, what paper was that, if you know?

A. 142. I don't know what paper it was, he read it and handed it to her. I wasn't paying attention when he read it.

Q. 143. Did he read it aloud?

A. 143. He didn't read it very loud.

Q. 144. Did he read it so you could hear it if you desired to? A. 144. Yes sir.

Q. 145. After Mrs. Hillmon had finished that paper, that is the statement, what did she do with it?

A. 145. She handed it back to Buchan.

Q. 146. Buchan then handed it to you, did he?

A. 146. Yes sir.

Q. 147. And you tore it up and put it in the stove in the presence of Buchan and Mrs. Hillmon?

A. 147. Yes sir, I tore it up and put it in the stove.

JOHN H. BROWN.

State of Kansas,

County of Wyandotte—ss.

I, Henry McGrew, a Notary Public in and for the County of Wyandotte, in the State of Kansas, do hereby certify that John H. Brown was by me first carefully examined and duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by myself in the presence of the said witness and was subscribed by the said witness in my presence, and that the same was taken at the time and place in the annexed notice specified. That it was commenced at the time in said annexed notice specified, and continued by adjournments from day to day as above stated. That I am not counsel, attorney or relative of either party or otherwise interested in the event of this suit. That the reason for taking this deposition is that the said John H. Brown is about to go out of the District of Kansas, in which this cause is pending and is to be tried, and to a greater distance than one hundred miles from the city of Leavenworth and the city of Topeka in the State of Kansas, before the time of trial of this cause.

My commission expires April 21, 1883.

[Seal] HENRY McGREW,
Notary Public.

Costs of deposition: Fees of Notary, 675 folios, @ 20c, $135.00
Fees of witness, John H. Brown, 20 days, 30.00

$165.00

Paid by the plaintiff.
My commission expires April 21, 1883.
[Seal] HENRY McGREW,
Notary Public.

580 The plaintiff next read in evidence the testimony of Dr. J. W. Fugate given upon the trial of the cause in 1885.

It is admitted that Dr. J. W. Fugate is dead.

Said testimony was thereupon read to the court and jury and is in words and figures as follows, to wit:

Dr. J. W. Fugate called for the plaintiff, and after being duly sworn testified as follows:

Questions by Mr. Hutchings:

Q. What are your initials? A. J. W.
Q. Where do you reside? A. In Lawrence, Kansas.
Q. How long have you lived in Lawrence? A. Ten years.
Q. What is your occupation?
A. I am a veterinary surgeon.
Q. Were you acquainted with John W. Hillmon?
A. Yes sir.
Q. How long were you acquainted with him?
A. During the winter, one winter.
Q. How long before that coroner's inquest that was held at Lawrence was that?
A. I knew him during that winter.
Q. Previous?
A. Previous to that time—along in the fall I got acquainted with him.
Q. The fall before? A. Yes sir.
Q. State if you saw the dead body that was brought there and kept at Bailey & Smith's undertaking establishment?
A. I did.
Q. State whose body you recognized that to be?
A. Hillmon's.
Q. State whose body was it—who was it, the dead body?
A. Hillmon.
Q. John W. Hillmon? A. (No answer—Rep.)
Q. What do you say as to his height; about what was his height? How tall was he?
A. Five feet ten, or six feet; somewhere in there close. Nearly six feet I would suppose.

581 Q. Nearly six feet?

A. Six feet. I should say five feet eleven and one half inches, or six feet.

Cross-examination.

Questions by Mr. Barker:

Q. You state you are a veterinary surgeon?

A. Yes sir.

Q. Practice your profession in Lawrence, do you?

A. I do.

Q. How long have you lived in Lawrence?

A. Ten years.

Q. Where did you come from there?

A. Bloomington, Illinois.

Q. You stated that you knew John W. Hillmon? When did you become acquainted with him?

A. I think it was in the fall of 1879.

Q. You are mistaken in regard to that evidently.

A. I don't know. I don't say positively 1879; somewhere near that.

Q. Your best recollection was that you became acquainted with him in 1879?

A. Yes sir, somewhere along there.

Q. Then you only knew him a short time?

A. One winter; along in the fall and winter, during that time.

Q. What was he doing when you knew him?

A. He was not doing anything that I know of—no business that I knew of.

Q. Your acquaintance with him was confined to Lawrence—what you saw of him there? A. Yes sir.

Q. Are you intimately acquainted with him, or did you only have a casual acquaintance with him, see him occasionally? A. I saw him quite often.

Q. Was he not away from there during the winter of 1878 and 1879?

A. I could not tell you sir. I would see him occasionally—well, quite often you might say. We both lived on the same street for awhile; we walked together quite often going home of an evening.

582 Q. What do you state in regard to his height?

A. I suppose he was nearly six feet, sir.

Q. That is a mere supposition, is it not?

A. I am guessing at his height just the same as I would yours or anybody's else.

Q. You are just guessing at his height? A. Yes sir.

Q. And you estimate him at six feet?

A. Yes sir, five feet eleven and a half inches or six feet.

Q. Do you remember the color of his hair, his mustache, and his whiskers? A. Yes sir.

Q. Do you remember how he wore his hair and whiskers at that time? Look at that and see if that is the manner in which he wore his mustache and whiskers at that time?

A. I didn't know him when that was taken.

Q. How do you know when that was taken?

A. I don't.

[—] Well, then, I asked you if he wore his mustache and whiskers in that manner.

A. He wore a mustache a little longer than mine and chin whiskers.

Q. I am asking you if he wore them as in that picture?

A. They seem to be larger and more of them; they were longer when I knew him.

Q. Are you able to recognize that picture?

A. Some parts of it—yes sir.

Q. What is that a picture of?

A. I should say it resembled him.

Q. You think it was a picture of Hillmon, do you?

A. It resembles him.

Q. Do you recognize that picture? I just ask if you recognize it, not to state who it is. (Picture handed to witness—Rep.) What do you say in regard to that? (Witness
583 turned picture over and looked at the back.) You don't have to look at the back of it to recognize it, do you?

A. No sir, not at all.

Q. Do you recognize that picture at all?

A. No sir, I don't think I do.

Q. Do you recognize this one (Handing witness another picture—Rep.)

A. Something from there above (illustrating by placing his hand on lower part of picture.) I don't see anything to them below.

Q. The lower part don't look like Hillmon?

A. Not to me.

Q. The upper part does. A. Somewhat.

Q. Is it a close resemblance at all?

A. Not very. Yes, you can tell.

Q. Do you know whether that is a picture of Hillmon at all or not? A. I do not.

Q. Then you can't tell whether that is a picture of Hillmon or not? A. The upper portion resembles Hillmon.

Q. I want to know whether or not you recognize that as a picture of Hillmon, and swear that it is a picture of Hillmon? A. I would not do it, sir.

Q. Do you remember the color of Hillmon's hair?

A. Yes sir, I think I do.

Q. You think you recollect that? A. Yes sir.

Q. Now, how were you enabled to recognize these remains which were brought there as the remains of Hillmon?—By what mark, what peculiarity, what feature?

A. By the general appearance, size of the man, the high cheek bones. I examined his hands—picked them up. I didn't stay very long. His head was to the east and feet to the west.

584 Q. I was asking you if there was any peculiar or particular mark by which you recognized those remains? A. No sir.

Q. Simply by the general appearance?

A. Yes sir, by the general appearance.

Q. You didn't recognize him by his hand, did you?

A. No sir, not particularly.

Q. You only gave that as an incident? A. Yes sir.

Q. Were those remains well preserved when you saw them? A. Not very well preserved—no sir.

Q. What day did you see the remains, do you remember?

A. I don't sir.

Q. Do you remember whether they had been interred at the burying ground when you saw them?

A. They had not, no sir.

Witness dismissed.

585 Plaintiff next read in evidence the testimony of Arthur Judson given upon the trial of the case in 1885.

It is admitted that Arthur Judson is dead.

Said testimony was thereupon read to the court and jury and is in words and figures as follows, to wit:

Arthur Judson called for the plaintiff, and after being duly sworn testified as follows:

Questions by Mr. Hutchings:

Q. Mr. Judson, where do you live? A. In Lawrence.

Q. How long have you lived in Lawrence?

A. Off and on for fifteen, sixteen or seventeen years.

Q. Where were you living in 1878—the years 1878 and 1879? A. In Lawrence.

Q. What is your business, your occupation?

A. I am at work now in Mr. Beal's store, in Lawrence.

Q. What was your occupation in 1878 and 1879?

A. I was running a team at that time to an express wagon.

Q. State if you are acquainted with the plaintiff, Mrs. Sallie E. Hillmon, and her husband, John W. Hillmon?

A. I was.

Q. When did you become acquainted with John W. Hillmon?

A. I think sometime in the year 1878. It might have been 1877.

Q. How long had you been acquainted with Mrs. Hillman at that time? A. I don't remember just exactly.

Q. Well, about?

A. It might have been two or three years.

Q. Where did Mrs. and Mr. Hillmon reside in 1878 and 1879, up to the time of his death? A. At my house.

Q. They resided at your house? A. Yes sir.

Q. That is, they boarded with you?

A. They rented one room. They were keeping house. After they were married they did board a few weeks with
586 us. They also boarded with us a few weeks before they were married, and then afterwards.

Q. How often did you see Mr. Hillmon during these times?

A. Before they were married he boarded at my house. I met him at the table three times a day part of the time.

Q. When was the last time that you saw Mr. Hillmon alive?

A. Along in the latter part of the winter of 1879. I could not give the dates.

Q. After that when did you see him and what condition was he in?

A. After that I saw him at Messrs. Bailey & Smith's, the undertakers.

Q. Was he alive or dead? A. Dead.

Q. You may state now if you remember anything about his teeth—the appearance of his teeth?

A. I never noticed any deficiencies.

Q. Did you observe his teeth at any time?

A. Not to remember. I never noticed any deficiency in the teeth at all.

Q. Did you notice any teeth out? A. No, sir.

Q. When the body came to Lawrence, you may state what was done with it, if you have any knowledge.

A. I was sent down to the depot to meet it at Lawrence.

Q. Who sent you? A. Mrs. Hillmon.

Q. Well.

A. I was down there I guess fifteen or twenty minutes, and Mr. Bailey & Smith's undertaker's wagon came down. They met the corpse there and took it to their rooms.

Q. What was done with it there?

A. It stayed there, and I believe he took it there to see in what——

587 Q. Where did you first see the body?

A. At Mr. Bailey & Smith's.

Q. Who was with you when you saw it?

A. I believe the first time, Mr. Baldwin.

Q. When did you next see it?

A. The next time I believe Mrs. Hillmon and I and Mr. Baldwin—

By the Court:

Who was with you?

A. Mrs. Hillmon and Mr. Baldwin.

Q. Do you remember anything about Hillmon's height? What do you know about his h-ight?

A. Along in the winter we got in [—] argument there with some young ladies there, in measuring, and we just stepped to the door and measured, three of four of us, and the marks were on the door. And after this came up I measured the marks on the door again.

Q. What was his h-ight on that measure?

A. There was one measure visible that was five feet eleven and one-half inches, one five feet nine inches, and one five feet four inches.

588 Q. Which was the mark that was the measure of Hillmon?

A. Five feet eleven and a half.

Q. Look at picture marked Exhibit "C." What person is that a photograph of? A. Mr. John W. Hillmon.

Q. Did you at any time go down there to Bailey & Smith's after the body? A. I did.

589 Cross-Examination.

Questions by Mr. Barker:

Q. Are you related to the plaintiff in any way, Mr. Judson?

A. No, sir.

Q. You said that she was living at your house before she was married? A. Yes, sir.

Q. How long had she been living there before she was married? A. I couldn't give the exact time.

Q. State as near as you can?

A. It might have been six months and it might have been less. I could not say. It might have been more.

Q. That is as definite an answer as you can give to that question, is it? Do you know when she was married?

A. She was married in the winter.

Q. State when she was married, giving the date definitely.

A. I couldn't give you the date.

Q. She was married in the winter of what year?

A. She might have been married in 1878, and it might have been in 1879.

Q. Do you remember?

A. I don't remember; no, sir. I don't remember the dates —whether it was before the holidays or not.

Q. She was married at your house, was she?
A. Yes, sir.
Q. You mean by your house, your mother's house?
A. My mother's house.
Q. Where was she living at that time?
A. In a story and a half house on the corner of Henry and Alabama streets.
Q. In Lawrence? A. Yes, sir; in Lawrence.
Q. You stated, I believe, that Mr. Hillmon lived there after he was married? A. Yes, sir.
590 Q. Did he live there before he was married?
A. Yes, sir.
Q. How long?
A. Two or three weeks, or three or four; I wouldn't say positive. He was backwards and forwards. He was buying stock and boarding there.
Q. He boarded there how long after he was married?
A. It might have been two and it might have been three weeks before they went to house-keeping, and it might not have been so long.
Q. Then they went to keeping house in one room there at your house? A. Yes, sir.
Q. And they were keeping house in that manner when Mr. Hillmon went away? A. Yes, sir.
Q. Do you remember when he went away?
A. I don't,—not the date.
Q. Do you remember the season of the year?
A. It was in the winter time.
Q. Could you tell what year it was in? A. I could not.
Q. Now, at the time he went away, how long had you known him?
A. I had seen him several times off and on during the year before.
Q. Had you had any acquaintance with him until he came to board at your house? A. Yes, sir, I had.
Q. What was the extent of that acquaintance?
A. I had seen him at Mrs. Hillmon's several times, and got acquainted with him there.
Q. Now, after he went away in the winter, how long was he gone before he came back again?
A. I don't remember the time. It might have been two weeks, and it might have been longer.
591 Q. That is as definitely as you can answer, is it?
A. Yes, sir; I don't just remember exactly.
Q. Do you know John H. Brown?
A. Yes, sir; I had seen him with Mr. Hillmon. He was at my house a time or two.

Q. Were you at home on the day on which they left—Brown and Hillmon? A. I was.

Q. But you don't remember when that was?

A. No, sir, I don't—the date nor the day of the week.

Q. Now, I believe you stated that Hillmon was measured, Hillmon and two other persons. When was that,—in what year?

A. That was after they was married and keeping house up stairs. The marks is on that door yet I expect, if it has not been painted.

Q. You were present on that occasion? A. I was.

Q. And remember who else was measured? A. Yes, sir.

Q. Who else was measured?

A. Miss May Baldwin and myself.

Q. Did you do the measuring? A. Part of it.

Q. Who did the other part?

A. Mr. Hillmon, I think. I wouldn't say positive, but I think it was him.

Q. Do you remember of testifying at the coroner's inquest in regard to his height? A. No, sir.

Q. You remember of being sworn there, do you not?

A. I don't know whether I was sworn there or not.

Q. Did you not, at the coroner's inquest in Lawrence, Kansas, in 1879, testify as follows: "Do you remember how tall Mr. Hillmon was," and did you not say, "I never heard him say."

A. No, sir, I don't remember that I testified to that.

Q. Can you say whether you did or not? A. I could not.

Q. Did you not, in answer to that question, on that
592 same occasion, as to how tall you should judge him to be, say "Between five and six feet; he was not six feet, I know."

A. I don't remember whether I said that or not. I might have said it and I might not.

Q. You have no recollection in regard to it now?

A. I don't remember it, no, sir.

Q. Did you at that time testify that he was five feet eleven and one-half inches high? A. No, sir, I believe not.

Q. Did you not testify as I have stated, that he was between five and six feet?

A. I may and may not. I don't remember what I testified.

Q. Your recollection of his height would be as good in 1879 as it would now, I presume? A. I should think so.

Q. Now, when did you first discover or remember that he had been measured up there?

A. I could not remember that exactly.

Q. You testified on the trial of this case here three years ago did you not? A. I did.

Q. Didn't you testify on that occasion that you recollected the fact that he was measured there just before that trial came on?

A. I don't think I did,—not exactly in those words.

Q. Did you not state that in substance,—that you recollected the fact that he was measured just before the trial?

A. I don't know that it was just before. It may have been some time before.

Q. I am asking you if you didn't testify on the former trial of this case, that you recollected the fact that he was measured there, just before that trial came off?

593 A. I don't remember whether I did or did not.

Q. Is it not a fact that you did recollect just before that trial the fact that he was measured?

A. I don't remember.

Q. You don't remember then, when it first occurred to you that he was being measured there?

A. I remember his being measured there.

Q. And you don't remember anything about it if you testified on the coroner's inquest?

A. I don't remember. I don't believe I was asked.

Q. Then you don't believe you were asked how tall Hillmon was?

A. I don't believe I was. I know I was not asked very many questions at the coroner's inquest.

Q. Can you state now when it first occurred to you that he was measured there,—when you first remembered the fact that he was measured?

A. I remember distinctly that he was measured there.

Q. That does not answer my question. When did it first occur to you? A. I don't remember exactly.

Q. You said somebody was talking about it?

A. We were speaking about it at home.

Q. Who was speaking about it? You and Mrs. Hillmon?

A. I don't remember whether Mrs. Hillmon and I was speaking about it or not. I don't remember whether she was present at the time or not. She might have been and might not have been.

Q. Did you not, on the last trial, testify that Mrs. Hillmon called your attention to the fact that Hillmon was measured about two weeks before the trial?

A. I don't know whether I did or not.

Q. You don't recollect?

A. I don't remember whether I did or not.

594 Q. You don't recollect very definitely what you did testify to on that occasion, do you?

A. I don't remember now. I have been sick and my memory is not quite as good as it used to be. I was sick all winter.

Q. And your memory has been affected by your sickness?

A. I don't know as it has. It might and might not have been.

Q. I understood that was the reason that you gave, that you had been sick and it affected your memory. Which one of the party measured five feet nine inches?

A. Miss May Baldwin.

Q. And the other was your own measurement?

A. Yes, sir.

Q. Now, did you say that you recollected anything in regard to Mr. Hillmon's teeth?

A. I don't. I don't remember whether I—

Q. Do you recollect anything in regard to his teeth?

A. I don't.

Q. Have no recollection in regard to them at all?

A. No, sir, I never noticed them in particular.

Q. Look at that photograph. Do you recognize that?

A. I didn't recognize it before.

Q. I am not asking what you did before. Your memory may have improved.

A. It is a very poor picture. I didn't remember of knowing the person at that time.

Q. Do you know it now?

A. I have been told who it was.

Q. How did you recognize this body that came there as the body of John W. Hillmon?

A. By general appearances as near as I could see.

Q. I understand, then, that from the general appearance it was your judgment that that was the body of Hillmon?

A. Yes, sir.

595 Q. There was no special marks by which you were enabled to identify it, were there?

A. The hair and mustache, and the resemblance and features.

Q. Now, do you say that you identified it by the hair and mustache?

A. I could not say positively to that alone. By the general features.

Q. What I was trying to get at was whether there was any peculiar feature or mark by which you were able to identify it? A. None that I know of.

Q. The remains were in such a condition that you were able to identify them without any difficulty, were you—so well preserved that you were able to identify them?

A. It was pretty well preserved. But that is something I don't understand myself. I don't know whether it was well preserved or not; but the features were there. Of course it didn't look as natural as life.

Witness dismissed.

596 The plaintiff next read in evidence the deposition of Mary Judson, taken on the 23d day of May, 1883, in the city of Lawrence.

It is admitted by the parties that Mrs. Judson is dead. Said deposition was thereupon read to the jury and is in words and figures as follows, to wit:

Mrs. Mary Judson, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and says:

Q. State your name, age and present residence?

A. My name is Mary Judson; I reside in Lawrence, Kansas; my age is 60 years.

Q. State whether you are intending to change your place of residence and if so, when and to what point do you intend to remove?

A. I am intending to change my place of residence to Riverside, San Bernards Co., California and intend to start within a few days.

Q. Do you know the plaintiff, Sallie E. Hillmon, and did you know her husband John W. Hillmon during his lifetime?

A. I do know Sallie E. Hillmon and did know John W. Hillmon during his life.

Q. State how long you have known Mrs. Hillmon and when and how long you knew John W. Hillmon?

A. I have known Mrs. Hillmon nearly five years and I knew John W. Hillmon from Sept. 1878 up to February, 1879, at the time he last left Lawrence.

Q. If John W. Hillmon boarded with you at any time state when and how long?

A. He boarded with me several weeks before he was married and about a week after he was married and then he and his wife lived in the same house with me until his death.

Q. State whether you had frequent conversations with him and [eat] with the same table with him?

A. I had frequent conversations with him and ate at the same table with him.

Q. State whether or not according to your best knowledge, he had any missing front tooth?

A. He had not to the best of my knowledge.

Q. State in general terms what quality of teeth he had?

A. They were good and sound so far as I knew.

Q. Could he have had a missing upper front tooth, the absence of which was noticeable when talking or laughing, and you not know it?

The defendants object to the question as incompetent, irrelevant, immaterial and calling for the conclusion of the witness.

The Court overruled the objection to which action of the Court the defendants and each of them then and there duly excepted.

A. No, he could not.

Q. Did you ever notice his hands as to their shape
597 and characteristic marks if any? A. I have.

Q. State the shape of his hand?

A. His hand was a long straight hand, rather slim for a man of his size.

Q. State whether or not you ever noticed any scars of any kind on his hand? A. I never did.

Q. State what kind of hair Mr. Hillmon had as to color, texture and straightness?

A. His hair was dark brown and rather wavy.

Q. Do you know G. W. E. Griffith, a resident of Lawrence?

A. I have seen him several times when he was at my house twice to my certain knowledge.

Q. When was the first time you saw him with reference to the time of John W. Hillmon's reported death?

A. It was the afternoon of the day before the body was brought here.

Q. Where and under what circumstances did you see him and what if any conversation did you have with him at that time?

A. He came to the door of my house and inquired for Mrs. Hillmon. I told him she was not in, and that she had gone down town, and he says I must see her to-night.

Q. State how he came to your house at that time?

A. He came with a horse and buggy as he said to take her down town.

Q. Was any one with him at that time?

A. No, he was alone.

Q. State when you next saw him at your house, and who, if any one, was with him?

A. I can't tell just how long it was after, but it was within a day or two. I don't remember if any was with him or not.

The defendant objected to all the testimony in Mrs. Judson's deposition touching the conversation between Selig and Tillinghast and Mrs. Hillmon and Mrs. Judson.

The Court sustained the objection to which action of the Court the plaintiff then and there duly excepted.

598 The questions and answers so excluded, are shown by the word "excluded" after each question and answer so excluded.

Q. State whether or not you knew a man named Tillinghast about that time?
(Excluded.)
A. I did. (Excluded.)
Q. He stated his name to you did he? (Excluded.)
A. He did. (Excluded.)
Q. State whether or not he came to your house about this time? (Excluded.)
A. He did. (Excluded.)
Q. Fix the time as definitely as you can with reference to the time you first heard of Mr. Hillmon's death. (Excluded.)
A. It was a few days after we heard of his death. I could not tell exactly, and some days before the body was brought back. (Excluded.)
Q. Who came with him to your house? (Excluded.)
A. A Mr. Selig. (Excluded.)
Q. State what if any conversation you heard at that time between Mrs. Hillmon the plaintiff, and Mr. Tillinghast or Mr. Selig. (Excluded.)
A. The subject that was being discussed was, whether Mrs. Hillmon should see the body of her husband when it was brought to Lawrence. Mr. Tillinghast spoke and said, that he had lost a child and had had it taken up and that he wanted to see it, and was always sorry afterwards that he had had it done. Then he said to her that if he was in her place, he would rather not see the body but remember him as she had last seen him. I think Mr. Selig advised her the same as Mr. Tillinghast did. (Excluded.)
Q. Did you see the body of Mr. Hillmon after it was brought to Lawrence?
A. I did not.
Q. Why did you not see it, state the circumstances.
A. Mrs. Hillmon, her mother, Mrs. Quinn, my son and myself came down to see the body while it was at Baily Smith's, the undertakers. The undertaker, Mr. Smith, refused to let us see him. He said the body was not in a proper condition for us to see him.
Q. State whether or not you attended the funeral of Mr. Hillmon and where he was buried?
A. I did attend the funeral, and he was buried at Oak Hill cemetery.
Q. State whether or not you are in any way related to Mrs. and Mrs. Hillmon?
A. I am not.

Cross-examination.

Q. If you have stated that you attended the funeral of John W. Hillmon. Will you give the date of mo. and yr. in which he was buried?

A. I couldn't give (the) date.

Q. Will you state the day of the week on which he was buried?

A. I couldn't for certain.

Q. How long after the body of John W. Hillmon was
599 brought to Lawrence before the funeral took place?

A. I could tell exactly.

Q. Did you know of the fact of the body being brought here the day it was brought here?

A. Yes I did.

Q. Who informed you of that fact?

A. I couldn't tell you exactly who did inform me.

Q. What is your best judgment?

A. I think it was my son.

Q. Can you tell the day of the week that the body arrived in Lawrence?

A. I can not.

Q. You say you attended the funeral of John W. Hillmon. Did you see the body that was brought here at any time after it was brought here?

A. I did not.

Q. Then of your own knowledge you do not know that was the body of John?

A. I do not.

Q. What day was it that you say you went to the rooms of Mr. Smith, the undertaker, to see that body?

A. I cannot recollect what day it was.

Q. Do you recollect how many days the body had been here?

A. I do not.

Q. Do you say that Mr. Smith refused to let you see the body?

A. I do.

Q. Please state the language in which he refused to let you see the body?

A. He said the body was not in a fit state for us to see it.

Q. Did he not inform you at the time you went to see the body that the physicians were holding an examination over the body at that time?

A. I don't recollect that he said anything about the physicians.

Q. Do you recollect all that was said on that occasion?

A. I do not. I do not recollect that much else was said.

Q. What time in the day was it that you went to Mr. Smith's place of business?

A. In the morning.
Q. At what hour?
A. Sometimes between 9 and 12 o'clock as far as I can recollect.
Q. Did you inform him who you were?
A. I don't recollect that I did.
Q. Who was with you?
A. Mrs. Hillmon, Mrs. Hillmon's mother, Mrs. Quinn, my son A. W. Judson and myself.
Q. Do you know whether Mrs. Hillmon had been to see the body before the time that you went there with her?
A. She had.
Q. Had you any acquaintance with Mr. Smith at that time?
A. I had not.
Q. How long was this before the body was buried?
A. I don't recollect.
Q. At whose request did you go there?
A. I do not know as any one requested me to see him but wanted to see him.
Q. You knew did you not that there had been a question raised as to whether this was the body of John W. Hillmon or not? A. I did.
Q. Did you ever return after that time to see the body?
A. No.
Q. What was said when Mr. Smith informed you that the body was not in condition to be seen?
A. I do not recollect that anything else was said, only that we couldn't see it.
Q. What I refer to is, what was said by any of your party to Mr. Smith?
A. I don't recollect what we said in reply to him, only that we are all disappointed.
Q. Do you intend to be understood as saying or as answering that some one of your party said at that time to Mr. Smith, "Only we are all disappointed"?
A. No sir, I don't think any one said so.
Q. Do you swear that Mr. Smith did not give as a reason at that time that you could not see the body, that the physicians were holding an inquest over the body at that time or words to that effect? A. He didn't give those reasons.
Q. About what time did Mr. Hillmon begin boarding at your house? A. Some time in September.
Q. Had you known him before that time? A. I had not
Q. Were you keeping a boarding house at that time?
A. I was not.
Q. Do you know how it was brought about that he came to your house to board? A. Yes sir.

Q. How did it come about?

A. He said he would rather board at my house than at the hotel.

Q. Do you know at which hotel he had been boarding prior to coming to your house? A. I do not.

Q. Did you hear him say which hotel?

A. If I did I have forgotten.

Q. Did he have a room at your house? A. Yes.

Q. Did he have a room by himself or did he and your son room together? A. My son and he roomed together.

601 Q. Did they sleep together or was there two beds in that room? A. They slept together.

Q. How much did he pay you per week for his board?

A. I don't recollect now.

Q. About how much?

A. As near as I can recollect it was $3.50 or $4.00; I wouldn't say for certain which.

Q. How long did he board with you? A. Several weeks.

Q. Can you state definitely how many weeks?

A. I could not.

Q. Can you state in which month it was that he left boarding with you?

A. The fore part of October; I couldn't tell exactly.

Q. Can you tell what time in September it was that he came there? A. I could not.

Q. Did he return to your house again after that?

A. He never left the house. They went to keeping house in my house immediately after they were married; had rooms in my house.

Q. How many rooms did they have in your house?

A. One large room.

Q. Did they board with you after they were married or did they furnish their own meals?

A. They did for (a) few days after they were married and then went to keeping house for themselves.

Q. Was a cooking stove situated in this room which they occupied?

A. There was after they began keeping house. During the warm weather they cooked on my stove and when cold weather set in they got a stove of their own.

Q. This was the room in which they also slept?

A. Yes.

Q. How long had they been keeping house there before Mr. Hillmon went away?

A. Was some time in Oct. when they commenced keeping house, but don't recollect when he went away the first time.

Q. Do you know of his going out to Wichita?

A. I know of his saying he was going.

Q. How long after they commenced keeping house was it before he started for Wichita? A. I do not know.

Q. Can you approximate to the time? A. I could not.

Q. When he ate at your table did he sit opposite to you?

A. I don't recollect now.

602 Q. I refer to the time he was boarding with you.

A. I don't recollect.

Q. Who composed the members of your family at that time?

A. Beside Mr. Hillmon, Miss Sallie Quinn, my son, J. W. Judson and myself.

Q. Then the plaintiff in this action was boarding at your house (the) same time Mr. Hillmon was boarding there?

A. Yes.

Q. Had she been boarding there prior to the time that Hillmon came there to board? A. Yes.

Q. Can you state the kind of feet Mr. Hillmon had in reference to their size? A. I cannot.

Q. What was there about his hands that enables you to remember the shape of them?

A. We have each of us shown our hands and his was much like mine.

Q. When was this when you showed each other your hands?

A. It was some time while he was there. I couldn't state the time.

Q. Did you ever examine his hands to see if there were any scars on them?

A. I never examined his hands for that purpose. I never saw any scars on his hands.

Q. Is there any scars on the hands of your son Arthur?

A. Nothing more than slight cuts.

Q. Do you know if there are any scars on his hands from slight cuts? A. I couldn't swear that there was or wasn't.

Q. Would you swear there were no scars on Mr. Hillmon's hands from slight cuts?

A. No I would not, but there were none that I noticed.

Q. Would you swear there was no scar on his right hand caused by a cut or otherwise?

A. I couldn't swear there was or wasn't, but I never noticed any.

Q. Would you swear there were no scars on his left hand caused by cuts or otherwise?

A. I couldn't swear to that, but there was none that I ever noticed.

Q. Did you ever talk this question over as to whether he had scars on his hands or not with any one since this action was begun? A. Yes the subject has been talked over.

Q. Whom have you conversed with in regard to it?
A. My son and I have talked about it.
Q. Anybody else? A. I don't recollect it.
Q. You and the plaintiff have never talked about this matter have you? A. Yes I think we have.

Q. When was your attention first called to the fact
603 that either of his hands had scars on them?
A. I couldn't tell exactly.

Q. Tell about when if you can? A. I don't think I could.
Q. You attended the trial of this case at Leavenworth did you not? A. I did.
Q. Was the question ever raised or discussed with you as to whether he had scars on his hands or not prior to that time? A. Yes.
Q. When before? A. I couldn't tell.
Q. About how long before that?
A. I couldn't give any date and haven't any idea how long it was.
Q. Whom did you discuss it with? A. My son.
Q. How did you come to talk it over with him?
A. I don't recollect now how it was brought up.
Q. If he had no scars on his hands how would the question arise between you and your son?
A. That I could hardly tell.
Q. When did you last see Mr. Hillmon?
A. I couldn't give the date. It was a very short time before he was killed.
Q. Did you see him often after he left his home when he said he was going to Wichita for the first time?
A. I saw him every time he came home.
Q. How often was he home after that?
A. That I couldn't tell; I don't know exactly.
Q. How long was he at home at any one time after that?
A. Sometimes a week and sometimes longer.
Q. How long was he gone when he started for Wichita at that time before he returned home?
A. That I couldn't tell.
Q. His wife was living in this room at your house at that time was she not? A. She was.
Q. How long did he remain at home at that time when he returned? A. I couldn't tell you.
Q. Did he return home more than once? A. He did.
Q. Was it at this time that you and he compared hands?
A. I don't recollect; it was sometime when he was there.
Q. Was there anything unusual about the length or breadth of his hands? A. Not that I ever noticed.

Q. Was his hand a thin, bony hand or was it fleshy?
604 A. It was a good, plump hand.

Q. Did Mr. Hillmon show his teeth when he talked?
A. Yes, to some extent.
Q. To what extent?
A. Sufficient to see that his teeth were good.
Q. How many of his teeth could you see when he talked?
A. I could hardly tell. I could see all of his front teeth.
Q. Lower as well as upper?
A. I don't recollect about his lower teeth.
Q. Did you ever examine his teeth? A. I never did.
Q. When he talked did he show his upper teeth as high as the gums?
A. I don't recollect whether he did or not.
Q. Do you know whether his back teeth were good or not?
A. I do not for I never examined them.
Q. Did you ever hear him speak of his back teeth whether they were sound or not? A. I don't think I ever did.
Q. When you knew him did Mr. Hillmon allow his beard to grow on any portion of his face?
A. Part of the time he had a little goatee and a mustache.
Q. Was his mustache heavy or light?
A. It was not very heavy.
Q. It was heavy enough was it not to cover the mouth when the mouth was closed? A. Slightly.
Q. You say part of the time he wore a goatee? What portion of the time did he wear a goatee while you knew him?
A. I wasn't certain what portion of the time.
Q. Did he wear a goatee when you first became acquainted with him? A. I won't be certain but I think he did.
Q. Did he wear a goatee when he returned from Wichita?
A. I don't recollect whether he had or not.
Q. Did he have a goatee when he left your house at the time he said he was going to Wichita?
A. I don't recollect whether he had or not.
Q. When was it that you noticed that he had perfect teeth?
A. I couldn't tell any particular time.
Q. Can you recall to mind now any time when you observed his teeth? A. Not any stated time I couldn't.
Q. You can't remember any time when that subject came in question?
A. There never was any question about it that I know of.
Q. You have talked the question over I suppose since the time that body was brought as to whether Mr. Hillmon's teeth were good or not?
605 A. Yes, I have talked it over.
Q. Was your attention ever called to this subject before the trial at Leavenworth?
A. Yes, it had been a topic of conversation.
Q. When was the first time that you remember having talked it over with any one? A. I don't recollect.

Q. Can you tell about when? A. No, I have no idea.
Q. Was it a subject of frequent conversation in your family? A. No, I don't think it was.
Q. When did you first learn that it was claimed that Mr. Hillmon did not have perfect front teeth?
A. I don't recollect.
Q. How long prior to this trial at Leavenworth was it?
A. I don't recollect.
Q. Was Mr. Hillmon's front teeth of equal length?
A. I couldn't say they was or they wasn't.
Q. Were they regular in size?
A. As far as I know they were. I couldn't say positive that they were,
Q. Were they large or were they small in size?
A. I should judge they were of medium size, for a man of his size.
Q. There was nothing marked about the teeth that you noticed was there? A. There was not.
Q. He simply had an ordinary set of teeth?
A. As far as I know he had.
Q. Do you know Henry S. Clark of this town? A. Yes.
Q. How long have you known him?
A. I have known him by sight for 3 or 4 years.
Q. Have you seen him to talk with him frequently?
A. Not very frequently.
Q. Do you know whether his front teeth are perfect or not?
A. I do not.
Q. Do you know Levi Baldwin? A. I do.
Q How long have you known him?
A. Three or four years.
Q. Have you met him frequently?
A. Not very frequently.
Q. He was at your house quite frequently was he not while Mr. Hillmon was there?
A. He was but I didn't see him every time he came.
Q. Did you ever take meals at the same table with him?
A. I have a very few times, not very often.
606 Q. Did you ever see him laugh?
A. I presume I have; don't recollect any particular time.
Q. Can you tell whether he has perfect front teeth or not?
A. I could not.
Q. How long have you resided in Lawrence?
A. Most of the time since 1870.
Q. Has your son Arthur got perfect front teeth?
A. He has.
O How are his back teeth?
A. His back teeth are poor; he has lost some of them.

Q. You say Mr. Griffith came over to your house on one occasion. How long have you known Mr. Griffith?
A. It is 4 years since I first saw him.
Q. Was you acquainted with him at the time he came there? A. I was not.
Q. Did he come to your house before or after Mr. Selig did?
A. He came after Mr. Selig did.
Q. What time in the day did Mr. Griffith come up to your house? A It was towards evening.
Q. What time in the afternoon would you say it was?
A. I couldn't say positive, but it was sometime towards evening.
Q. How long was it before Mr. Griffith was at your house that Mr. Selig called there? A. I don't recollect.
Q Was any one with Mr. Selig the first time that he called at your house? A. Yes.
Q. How many days was it after the body was brought back here that Mr. Selig was at your house?
A. I don't recollect.
Q. About how many days? A. I couldn't say.
Q. What time in the day was it that Mr. Selig came to the house? A. In the forenoon sometime.
Q. Did you know him at the time he came there?
A. No.
Q. Who met him at the door; do you remember?
A. I couldn't say positive, but I generally tended the door myself.
Q. Can you state what he said his business was when he came there to the door?
A. Only that he wished to see Mrs. Hillmon.
Q. Where was Mrs. Hillmon at this time?
A. As far as I can recollect, she was in her room.
607 Q. Mr. Tillinghast was with Mr. Selig? A. Yes.
Q. Did they come into the house? A. They did.
Q. Into which room were they shown?
A. Into my front room.
Q. After they came in you called Mrs. Hillmon?
A. I did, as far as I can recollect.
Q. Were you present in the room all the time these gentlemen were there?
A. I couldn't swear I was in the room all the time. I was in and out.
Q. What was the first thing said by either of the parties after Mrs. Hillmon came into the room? (Excluded.)
A. I couldn't tell. (Excluded.)
Q. What was next said? (Excluded.)
A. I couldn't tell; I can't recollect. (Excluded.)

Q. Do you recollect anything that was said by Mr. Selig or Mr. Tillinghast other than that you have stated in your direct examination? (Excluded.)

A. Nothing more than that Mr. Tillinghast stated he had lost a child, and though he would like to see it and had the coffin opened and always wished since he had never seen it. (Excluded.)

Q. Now, that with what you stated in your direct-examination is all that you recollect of the conversation of those two gentlemen while they were at your house at this time? (Excluded.) A. Yes. (Excluded.)

Q. How long were they there? A. I don't recollect.

Q. About how long?

A. I couldn't say; they were there an hour or two hours. I was in and out of the room.

Q. The body had not at that time been brought back to Lawrence had it? A. I think not; I won't be positive.

Q. You say they were there before Mr. Griffith was did you not? A. Yes.

Q. And you testified in your direct examination that Mr. Griffith was there the day before the body reached here.

A. Yes.

Q. It must have been that they were there before the body reached Lawrence? A. Yes.

Q. Do you remember anything that Mr. Selig said on this occasion? (Excluded.)

A. Nothing but that he said with the rest of us that if he were Mrs. Hillmon he would not see the body. (Excluded.)

Q. Now what did he say on this subject, and give his exact language. (Excluded.)

608 A. That I can't do. (Excluded.)

Q. Can you give any of his language on this occasion? (Excluded.) A. I can not. (Excluded.

Q. About how long had you been in the room when this conversation took place which you have related? (Excluded.)

A. I can't tell. (Excluded.)

Q. Give your best judgment? (Excluded.)

A. I couldn't tell whether it was the first part of the time or the latter part of the time; I can't recollect. (Excluded.)

Q. How is your recollection of facts which have taken place; good or bad?

A. In some things I can recollect very well. In things which don't interest me of course I don't try to remember.

Q. Is your recollection failing any; is it as good as it has been? A. I don't know that it is failing any.

Q. You have talked with the plaintiff a good many times have you not in regard to this conversation and what was said on that occasion? (Excluded.)

A. Of course we have talked it over; she being in the house with me. (Excluded.)

Q. When did you first talk it over with her? (Excluded.)

A. I suppose we talked it over the same day the two gentlemen were there as we naturally would. (Excluded.)

Q. When do you recollect of talking it over with her again? (Excluded.)

A. I couldn't state any particular time. (Excluded.)

Q. Did you ever talk it over to her after she left your house? (Excluded.) A. I dare say I have. (Excluded.)

Q. Can you say whether you have or have not? (Excluded.)

A. Yes I think I can, safely say I have. (Excluded.)

Q. When was it? (Excluded.)

A. I couldn't tell. (Excluded.)

Q. Do you remember of talking it over with her before the trial at Leavenworth? (Excluded.)

A. I dare say I did. I can't specify any particular time. (Excluded.)

Q. Who was in the room during this conversation? (Excluded.)

A. No one besides myself and Mrs. Quinn besides Mrs. Hillmon, and the two men. (Excluded.)

Q. Was Mrs. Quinn in the room all the time do you know? (Excluded.)

A. She was as far as I can recollect. (Excluded.)

Q. Do you now recollect that she was in the room at the time of this conversation? (Excluded.)

A. Yes. (Excluded.)

Q. Did she take any part in the conversation? (Excluded.)

A. She did a little, not very much. (Excluded)

Q What did she say on this subject? (Excluded.)

609 A. She thought her daughter had not better see the corpse. (Excluded.)

Q. Did you take any part in the conversation? (Excluded.)

A. Nothing more only to advise her not to see the body as I thought it would be better for to remember him as she had last seen him. (Excluded.)

Q. Now at this time, so far as you knew, there had been no question raised as to whether it was John W. Hillmon who had been shot, had there? (Excluded.)

A. There had not so far as I knew. (Excluded.)

Q. And these gentlemen who were there were not raising any question as to that fact, were they? (Excluded.)

A. Not that I recollect of at that time. I don't recollect that there was anything said about it. (Excluded.)

Q. If they had raised that question you would have recollected it, would you not? (Excluded.)

A. I think I should. (Excluded.)

Q. Do you know whether this Mr. Tillinghast went at any time to Medicine Lodge, Barbour Co. near where the accident is said to have occurred?

A. I couldn't swear to that whether he went or not, but think I heard said that he did; I won't be positive.

Q. Don't you know that he came back with this body when it was brought back here?

A. No I don't know anything about it. I know that Levi Baldwin and his brother came back with the body.

MARY JUDSON.

610 Reuben Brown, a witness produced by the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Mr. C. F. Hutchings, Counsel for the plaintiff, testified as follows, to wit:

Q. State your name, place of residence and occupation.

A. My name is Reuben Brown; I live at Kansas City, Missouri, and I am working at the stock yards at present.

Q. Where did you live in the year 1879?

A. I lived in Platt county, Missouri.

Q. How long did you reside there?

A. I was there about four years if I remember right.

Q. Where did you reside prior to that time?

A. In Wyandotte, Kansas.

Q. What was your father's name? A. Robert Brown.

Q. Are you a brother of John H. Brown whose deposition has just been read here? A. Yes sir.

Q. Were you acquainted with John W. Hillmon?

A. No sir.

Q. Did you ever see him?

A. I saw him once to my recollection.

Q. Do you remember the circumstance of a dead body having been brought back from Medicine Lodge in the spring of 1879 that was said to be that of Hillmon? A. Yes sir.

Q. How long after that occurrence did you see John H. Brown?

A. Well, it was probably a week or ten days.

Q. Where did you see him? A. He came to my house.

Q. Where were you living at that time?

A. I was living in Platt county.

Q. What business were you engaged in? A. Farming.

Q. Whereabouts in Platt county were you living?

A. About three miles east of Parkville, and about six or eight miles north of Kansas City, a little northwest.

611 Q. Under what circumstances did he come to your house at that time, where did he come from, if you know? A. He said he came from over home there.

Q. From your father's home? A. Yes sir.
Q. Where did your father reside at that time?
A. He lived two miles north of Wyandotte on a farm.
Q. Where is your brother John H. Brown now?
A. He is in Jasper, Arkansas.
Q. How long has he resided there? A. Why I think he has been down there now fifteen years or more; probably longer than that. Fifteen years to my knowledge anyhow.
Q. Are you acquainted with W. J. Buchan? A. Yes sir.
Q. How long have you been acquainted with him?
A. Well, I have been acquainted with Buchan ever since 1865.
Q. Now, where did your brother John H. Brown go after he called at your house? as you say, about a week after Hillmon or the body was brought back that was said to be Hillmon's?
A. He said he would go down to a place on the Missouri River where they were building a bridge across there to see if he couldn't get some work; I have forgotten the name; Roachport, I think it was.
Q. When do you say he left your house?
A. He left along in the afternoon.
Q. Of the same day that he came there?
A. No, the next day.
Q. How did he go? A. He went on horseback.
Q. Whose horse did he have?
A. He rode one of my horses.
Q. When did you next see John H. Brown?
A. Why, it was, I couldn't give the exact date, probably three or four days afterwards, maybe a week, I don't remember just exact.
Q. Where did you see him at that time?
A. I saw him at Orrick.
Q. Now, between the time that he came to your house the day that he first came to your house, and the time that you saw him at Orrick had you in the meantime seen W. J. Buchan? A. Yes sir.
Q. Under what circumstances, and how did you come to see Buchan?
612 A. Why, he had wrote a letter to me for me to come over, he wanted to see me; I believe I got two letters from him.
Q. You got two letters from Buchan?
A. I think it was two before I went over, yes.
Q. Did you go in to see him as requested in the letters?

Counsel for the defendants object to any statement of what was contained in the letters. The Court sustained the objection, to which ruling of the Court the plaintiff duly excepted.

Q. What has become of those letters?

A. Well, sir, I couldn't tell you; they were destroyed, or throwed away, or something; never kept them.

Q. Have you seen them lately? A. No sir.

Q. Have you looked for them? A. No sir.

Q. After you received those letters, did you call on Buchan? A. Yes sir.

Q. How long afterwards?

A. Yes sir—Well, it couldn't have been more than a couple of days after I got the first of the letters before I went over; I was real busy at that time.

Q. Did you have a conversation with Buchan at that time?

A. Yes sir.

Q. You may go on and state what conversation you had with Mr. Buchan at that time.

The defendants object to the question because it calls for incompetent, irrelevant and immaterial evidence. The Court overruled the objection, to which ruling of the Court the defendants at the time duly excepted.

By the Court: I assume that by this question and others of a similar character, you propose to show Buchan's connection with this case, in so far as it led up to the execution of these releases.

By Mr. Hutchings: That is the object of this testimony.

Q. Go on and state the conversation that you had with Buchan.

A. I found Mr. Buchan in his office, and he wanted to know if I knew where John were; I told him that I did not
613 but I thought I could find him; he wanted I should go and look him up; he said he had got himself into a bad scrape and my father and brother had employed him for his attorney, and he wanted to do all he could for John and wanted I should go and hunt him up immediately.

Q. Anything further said?

A. Well, that was about the amount of the conversation.

Q. Well, what did you say to him about whether you would go and hunt him up?

A. I told him I would; I would go out and look for him; that I didn't know exactly where he was, that he had gone down to look for work.

Q. After that conversation with Buchan, what did you do, if anything, about looking him up?

A. I got on the train and went down and found him at Orrick.

Q. Where is Orrick, where is it situated?

A. It is down in—I don't know how far it is from Kansas City, probably 12 or 15 miles, on the north side of the river, right along the river.

Q. Now, then, when you found your brother John H. Brown at Orrick did you communicate to him what Mr. Buchan had said?

The defendant objects to what took place between the brothers as immaterial. The court overruled the objection to which ruling of the Court the defendants duly excepted.

Q. Go on and state.

By the Court: The question was, did you communicate to him what Buchan said?

A. Yes, sir, I told him just exactly what Buchan had said.

Q. Did you request him to go back with you to Buchan's?

The defendants object to the question as leading.

By the Court: It is leading.

Q. What, if anything, did you say to him with reference to going back with you?

A. I told him he had better go back with me and see Buchan and have this thing straightened up, that he was liable to be arrested, from what I could understand Buchan
614 to say that there was a warrant out for him and he was liable to be arrested at any time, and he wanted to see him and have a talk with him and have this matter straightened up.

Q. What did he say with reference to that?

A. He said he could not do anything more than he had done, he had told the truth at that inquest up there, or trial at Lawrence, and he couldn't do anything more.

Q. What did you do then?

A. I came back and saw Buchan and told him what brother John had said.

Q. When did you next see Buchan?

A. I saw him, I think, it was the next day, probably two days afterwards; I wouldn't be positive now, but it was a short time afterwards.

Q. Where was it you saw him?

A. I went over to Wyandotte and saw him.

Q. Did you have a conversation with him on that occasion?

A. Yes.

Q. You may state that conversation.

A. I told him what brother John had said and he wanted I should go with him and see if we could not get a statement from John different from what he had made, and have this matter straightened up; my father and my brother Tom had employed him as John's attorney, and he said he wasn't getting anything for his trouble, but he was willing to get John out of trouble if he had got into any; so we got ready and went down to Lexington.

Q. Who got ready and went to Lexington?

A. Buchan and myself.

Q. With reference to the time that you had this conversation, when did you start to go to Lexington?

A. We started sometime in the morning; left Wyandotte.

Q. Of the same day or when?

A. On the same day, yes, sir.

Q. How did you go to Lexington?

A. We went down on the train from Kansas City; Buchan went over in a buggy to the Kansas City depot and went from there down on a train.

Q. Who paid your fare?

A. Mr. Buchan paid the fare there and back.

Q. What time did you get to Lexington?

A. It was about eleven o'clock, I should judge ten
615 or eleven, probably half past ten or eleven o'clock; somewheres right in there.

Q. Whom did you meet there in Lexington, if anybody?

A. We met my brother, John Brown?

Q. Where was he at that time; where was John Brown?

A. He was near the depot.

Q. Did you have any conversation, did any conversation take place then between Mr. Buchan and John Brown in your presence? A. Yes, sir.

Q. State what was said at that time?

A. About the first thing Buchan said, "Well, old fellow, you have got yourself into a heil of a scrape, ain't you?" I think that is the words he used.

Q. Used by whom? A. Buchan.

Q. To whom?

A. To brother John. And he says, "Reuben and I have come down here now to help you out of it, and we haven't got very long to stay; we want to talk fast and get this matter in shape so we can go back on the evening train." I think those were the words spoken.

Q. Go on and state what further, if anything, was said on that occasion between you?

A. My brother told Mr. Buchan, he says, "I have made a true statement, and I can't change it at all." He says, "What I have stated is the facts, and I can't change it," and Buchan kept at him——

The defendants object to the answer and insist that the witss shall state what was said and done.

y the Court:

State what he said and did as near as you can.

A. He told him that he wanted him to make a statement; said there was a warrant out for him and he was liable to arrested at any time, and he didn't want him arrested; he anted him to make some kind of a statement so he could have e warrant stopped, or stayed for a while, at least.

Q. I wish you would go right on and state what further was id by either one of you in the conversation; state it as fully as you can?

A. Brother John told him repeatedly that he could not make any other statement than he had already ade; that he didn't fear anything from it at all; we went and our dinner; nothing was said much while we were in the tel eating dinner. After dinner, Mr. Buchan told me to k to John, and see if we couldn't get some kind of a statent out of him, a letter to Mrs. Hillmon or something of the nd, so he could show to the insurance company that it s not as first stated, to satisfy them; that is what he wanted do to get John out of trouble; John held out that he couldn't ke any other statement——

The defendants ask to have the last statement of the witness icken out as not proper evidence.

the Court:

That is another way of saying that John repeated what he l said before. The Court overruled the motion, to which ion of the Court, the defendants then and there duly exted.

Q. Go on.

A. I got at him to give Buchan some kind of satisfaction; I l him that Buchan had always been our friend, and that her and my brother, Tom, had employed him to look after s, and keep him out of trouble, and if he could do him any od, why to do so, and he declared he could not make any er statement, and finally, just before train time, Buchan s, "Here, John," he says, "Give me a letter to Mrs. Hillmon ing where John is. John Hilmon." He said that would a funny kind of a letter; that wouldn't do any good. Bun says, "You write it and I will word it, to Mrs. Hillmon, ing where John is, and where can I see him or when can I him, hear from him; that is about all there was in the er. John signed his name and asked Buchan if that would him any good.

Q. Who did you say wrote it?

A. John Brown wrote it.

Q. Who did you say dictated it?
A. Buchan dictated it.
Q. Now, what was done with the letter?
A. Buchan put it in his pocket.
617 Q. What did you do th-n?
A. We got on the train and came back.
Q. Do you remember the wording of that letter?
A. That was the wording as near as I can recollect.
Q. I wish you would state that again.
A. Asking Mrs. Hillmon where he could find, where he, where is John, and where can I find him, and when can I see him or hear from him; when can I hear from him? That was about all there were in the letter to my knowledge.
Q. Did you see the letter and read it yourself?
A. No sir, I just heard him, Buchan dictate, and seen John writing it.
Q. You are giving your recollection from what you heard at the time? A. Yes, sir.
Q. What, if anything was said at that time, about John H. Brown's turning state's evidence?
A. Why, he had asked him before this to turn state's evidence and John told him he never could do it because he had done nothing wrong and that the statement he had made was true, and that he couldn't tell any other story, and he didn't propose to turn state's evidence.
Q. After the writing of this letter how long did you remain at Lexington?
A. We didn't remain but a few minutes until train time.
Q. Where did you go them?
A. We came back to Kansas City, Wyandotte, rather.
Q. When did you next see Buchan?
A. I next seen Buchan at my house.
Q. When; how long after this trip to Lexington?
A. Well, it must have been three months; maybe two or three, somewheres along in there; I don't recollect just the exact time now, but I know it was quite a little bit.
Q. Returning to Lexington, you say you came away from there; who came away? A. Buchan and myself.
Q. Where did John Brown—did he remain at Lexington?
A. He remained at Lexington.
Q. During the time of that conversation at Lexington, do you remember whether or not anything was said in relation to money?
618 A. Why, yes, Buchan asked him if he needed any money; John told him he wasn't quite broke; Buchan handed him fifteen dollars and told him that would pay his board and get him farther away, that would pay his board a week and get him farther away.

Q. Coming back to the next time you saw Buchan after the visit at Lexington, where did you see him next?
A. At my house in Platt county.
Q. Was anybody with him at that time?
A. Yes, a man by the name of Ward came over with him.
Q. Who was Ward?
A. Afterwards I understood he was a deputy sheriff or constable of Wyandotte county.
Q. Were you acquainted with Ward at that time?
A. No, sir, I had heard of him but was not acquainted with him.
Q. Did you know that Buchan was coming there that day before he came? A. No, sir.
Q. Where was John Brown at that time?
A. He was at work right close by.
Q. Who was he working for? A. He was working for me.
Q. What was he doing?
A. He was hauling lumber or wood; don't know which one it was that day; he generally hauled wood a while and then lumber from the sawmill.
Q. How did Buchan and Ward come there?
A. They came over in a buggy.
Q. You may state what took place there, what was said between you and Buchan at the time he and Ward came there?
A. Buchan asked me where John was and I told him.
Q. What did you tell him?
A. I told him John was probably up there at the mill or if he wasn't he was on the road to the depot with either lumber or wood and he would probably meet him on the road; he got to the mill and found John.
Q. Where were you when you told him this?
A. I was near the house in the barn lot.
619 Q. Who was present?
A. No one except this man Ward who was with him.
Q. Where was Ward at that time?
A. He was in the buggy with him.
Q. Was Buchan also in the buggy then? A. Yes, sir.
Q. What did Buchan do or where did he go after you had the first conversation with him?
A. They went to hunt John up about the mill.
Q. What did you do; where did you go?
A. I knocked around the house there.
Q. Did they come back again; did Ward and Buchan return again to the house? A. Yes, sir.
Q. Did they bring John with them? A. Yes, sir.

By Mr. Barker: It seems to me he is leading the witness.
By the Court: Yes, that question is leading.

Q. When they came back with John Brown, what did they do; what was done?

A. They put their teams up and after they put the teams up Buchan came to me and wanted me to talk to John, and see if he would not turn state's evidence; that there was a warrant out for his arrest and he was liable to be arrested anyhow; he said the deputy sheriff here was along and he didn't want John to be arrested if he could possibly help it; he wanted me to talk to John and do all I could towards getting him to turn state's evidence. He repeatd that father and my brother had employed him as John's attorney, and he wasn't getting anything out of it himself, but he was doing it for to get John out of trouble because we had been acquainted a good many years, and I had a talk with John and done all I could.

Q. Did you and Buchan have a conversation with John there after your return to the house? A. Yes, sir.

Q. Was that before or after the conversation that you have testified to between you and Buchan?

A. I think that was after I talked to John; I am not positive but I think it was after; I talked with John first; I think Buchan had spoken to John on the road down there about what he came for and what he wanted him to do. I
620 think the first thing Buchan told me was to have a talk with John and see what I could do.

Q. What, if anything, did Buchan say in relation to having talked with John about it? A. At that time?

Q. Yes, or at any time there that day?

A. Well, he had a talk with John when I wasn't present; they took a walk up in the orchard and were gone some little time, and then after that Buchan came to me and he said John seemed to be determined that the statement he had made was true, and he couldn't change it one bit, and he couldn't do nothing with him and he wanted me to talk to him again and see what I could do. I got to talking to him, and he says, "Reub, I have told the truth."

Q. Who was it that said that? A. John Brown.

Q. Yes, go on.

A. And he was going to stick to it, and he didn't see why Buchan should try to persuade him to do something contrary to the statement that he had made, the truth, and he wasn't going to vary from it.

Q. Well, what further was said, if anything?

A. Well, Buchan then got John and I together and went off to one side, and I talked to John and told him that I thought Buchan would not ask him to do anything that would lead him into any trouble, and I thought it best to do as Buchan asked him to do, and he still repeated that he had told the truth. He says, "Reub, I can't change it; that is my statement, and it

is true, and I can't change it," but we pinned him down so close and he was afraid that the officer that was with Buchan—I made sure that he would be arrested if there wasn't some change made in the—

The defendants object to the statement of the witness as to what he made sure of as incompetent, irrelevant and immaterial.

By Mr. Hutchings: I understand this to be his method of stating it.

By the Court: It is objectionable unless he told John Brown.

621 A. That is what I told my brother John Brown.

Q. I wish you would state that; you say that you made sure; what did you mean by that?

A. I made sure, I told him I made sure he would be arrested if he didn't make a statement in the way Buchan wanted him to, to turn state's evidence, or something of the kind, or write a letter of some kind showing that it was the way Buchan wanted him to do. He finally agreed to write some kind of a letter and they went then into the house, in the hall, and got a table and was there writing a letter.

Q. Who did the writing? A. Buchan did the writing.

Q. How long were they engaged there in that work?

A. Well, I think as near as I can recollect probably an hour.

Q. Where were you during that time?

A. I was knocking around the house; Ward and I was together a little while and then I passed through the hall a time or two from the house to the barn.

Q. Did you hear any conversation between them while they were engaged in writing this paper?

A. No, sir, if I did I didn't know what the conversation was; I heard them talking but didn't understand what they were talking about.

Q. After they got through this writing, what, if anything, was done?

A. We hitched up Buchan's buggy, and I saddled a horse or two, and all four of us went to Parkville.

Q. Who was it suggested going to Parkville, if anybody?

A. Buchan.

Q. Well, what did you observe after you got in Parkville?

A. From Parkville?

Q. In Parkville.

Q. Why, Buchan and John went up to the justice of the peace office, I believe his name was Donald.

Q. How long were you there?

A. Why, I don't think more than half an hour or such a matter.

Q. What was done then?

A. I couldn't tell you, I wasn't with them; we got ready to go home; we all come home together, that is, down to
622 the turning off place; Buchan and Ward went on to Kansas City and John and I came on out home.

Q. When did you next see Buchan if at all?

A. I don't think I saw Buchan any more; I don't recollect when I did see Buchan after that.

Q. At that time about how old was your brother John?

A. Well, I will have to kind of study that up.

Q. Well, approximately? A. About thirty, I think.

Q. Was he older or younger than you?

A. Younger than I am.

Q. How much younger?

A. He is four years, I believe, or five.

And in answer to cross-interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the Mutual Life Insurance Company, one of the defendants, the witness testified as follows, to wit:

Q. In April, 1879, I understand you were living near Parkville, Missouri? A. Yes sir.

Q. How long had you been living there then?

A. Well, sir, I had been living there a couple of years I guess.

Q. Where were you living before that time?

A. In Wyandotte county.

Q. Did you use to live in Wyandotte county? A. Yes sir.

Q. You lived there for a good many years? A. Yes sir.

Q. You moved from Wyandotte county to Parkville, did you? A. Yes.

Q. You were acquainted with Buchan when you lived in Wyandotte county? A. Yes sir.

Q. Now, I understood you to say that on or about the 10th day of April, 1879, John Brown came to your house near Parkville, Missouri; is that correct? A. It was in April sometime.

Q. You had heard of this coroner's inquest at Lawrence, had you not? A. Not until my brother told me.

Q. The first you learned in regard to that inquest was the information which you received from your brother John?

A. Yes sir.

623 Q. How did he come to your house at that time?

A. I couldn't state; the first I saw of him he came up through the barn lot.

Q. Didn't he come on horseback?

A. I couldn't state, sir.

Q. You don't know whether he came there on horseback on that occasion or not? A. I could not state.

Q. Is it not a fact that he rode your father's horse over to your house on that occasion and left his father's horse there at your house when he went away?

A. No, sir, if he did, he didn't bring the horse to my place.

Q. You didn't see it then? A. No sir.

Q. And don't know whether he came there on horseback or not? A. No sir.

Q. What time of day did he come there?

A. He came there along in the afternoon.

Q. Can you tell what day of the month it was? A. No sir.

Q. About how long before that time had you seen John?

A. Why, I have forgotten how long it was.

Q. Had it been a year or more?

A. I think it was along in the winter before; that fall or winter before April.

Q. Then you think you had seen him the fall or winter of 1878? A. Yes sir.

Q. It had been several months since you had seen him?

A. Yes, I am not positive about that, I think that is right.

Q. Where did you see him then, I mean when you saw him prior to this April, 1879? A. I saw him in Kansas City.

Q. Where was he? A. He was on Main Street.

Q. You saw him on Main street? A. Yes sir.

Q. You happened to be in Kansas City and he happened to be there and you saw him? A. Yes, sir.

Q. Have you any means of fixing the date when you saw him there? A. No sir, I have not.

Q. How long did you say John remined at your house at that time?

624 A. Why, he was there from the afternoon until the next afternoon, about one day.

Q. Had he ever been at your house at Parkville before, if so, when? A. I don't think he ever had.

Q. That was the first visit he had ever made you at your home near Parkville, Missouri?

A. To my recollection, that is the first, yes.

Q. You said he remained until the following afternoon?

A. Yes sir.

Q. And then he went away? A. Yes sir.

Q. Went away on one of your horses? A. Yes, sir.

Q. Took one of your horses with him? A. Yes sir.

Q. Do you know where he went from there?

A. No sir, not at that time, I didn't.

Q. What would be your best recollection as regards the day he went away, the 10th, 11th or 12th, or whatever day you say it was? A. I don't recollect the day of the month.

Q. Can you tell the month?

A. I think it was either April or May; I think it was April.

Q. Now, where did he go from your house?

A. He said he was going down to Roachport, I think was the name of the place, to look for work; they were building a bridge there.

Q. He was hunting work through Missouri at that time on horseback? A. Yes sir.

Q. And on your horse? A. Yes sir.

Q. When did you next see John?

A. I next saw him at a town by the name of Orrick down on the Missouri River.

Q. You next saw him at Orrick, Missouri, did you?

A. Yes sir.

Q. What county is Orrick in? A. It is in Clay, I think.

Q. How far is Orrick from where you lived at that time?

A. I don't know the exact distance but I think it is probably 12 or 15 miles, as near as I can remember; I am not positive.

Q. When did you see him at Orrick; that is, how long from the time you had seen him at your house?

625 A. It was several days or a week; somewheres, probably a week after he left my house; maybe not quite so long. I think that is about the time; I am not positive.

Q. Now, was any one with you when you saw him at Orrick? A. No, sir.

Q. The first time? A. No sir.

Q. Didn't you and your father go down to see him at Orrick? A. No, sir.

Q. The first time that you saw him at Orrick you say was about a week or ten days after you saw him at your house, and nobody was with you? A. Yes sir.

Q. Did you say between the time you saw him at Orrick and the time he was at your house, you had seen Mr. Buchan?

A. How is that?

Q. Between the time you saw your brother at Orrick, and the time you had seen him at your house, had you seen Mr. Buchan?

A. Yes, I went over there when he wrote for me to come over.

Q. When do you say you saw Mr. Buchan?

A. Just the day I went down to see my brother John down at Orrick.

Q. Can you fix the date? A. No, I can't.

Q. Then, this first conversation at that time was the first conversation that you ever had with Mr. Buchan in regard to your brother John? A. Yes sir.

Q. That was in his office? A. Yes sir.

Q. In Wyandotte? A. Yes sir.
Q. Anybody present at the time of the conversation?
A. No, sir.
Q. What was that conversation?
A. He wanted to know if I knew where brother John was.
Q. When he asked you, what did you tell him?
A. I told him I didn't know; I told him where he said he was going.
Q. Where did you tell him he said he was going?
A. To Roachport, I think is the name of the place.
Q. You told him that that was where he said he was going?
A. Yes.
Q. What did he say about that?
A. He said he wanted to find him; he wanted to see him.
Q. What did you say in answer to that?
626 A. I told him I would go out and look for him. Go down to Roachport and look for him.
Q. Who was in the office when you and Mr. Buchan had this conversation?
A. There was no one at that time.
Q. This was the first conversation? A. Yes sir.
Q. He asked you if you knew where John was and you told him where he was going?
A. Yes, sir.
Q. He asked you if you could find him and you told him you thought you could? A. Yes, sir.
Q. Did he give you some money then to go and find him?
A. No sir.
Q. Did he pay you anything?. A. No sir.
Q. Did you have any talk with him about paying you for your time and trouble in looking him up?
A. Not that I recollect of.
Q. Had no conversation? A. Not that I recollect.
Q. How long were you in his office?
A. I couldn't have been there more than half an hour, may be an hour.
Q. Have you told all that took place between you and Mr. Buchan as near as you can recollect it the first time you had a talk with him?
A. No sir, he told me that John had got himself into a bad scrape, and father and my brother Tom had employed him to see John and get him out of this scrape, and he wanted to know if I could go down and hunt John up and bring him up so that he could have a talk with him, or if not, if we could find him, he would go down and see him; I told him all right.
Q. Have you told all that was said there?

A. Why, as near as I can recollect; the substance of what was said.

Q. Now, is it not a fact and have you not so testified before, that Mr. Buchan told you not to bring him up there but he would go down and see him?

A. Well, as I said before, he either wanted—

Q. I am asking you if he did not tell you not to bring him up there? A. I don't recollect whether he did or not.

Q. Don't remember what he said in regard to that?

A. He wanted to see him.

627 Q. Did he tell you he wanted to see him in Wyandotte?

A. I don't recollect whether he did at that time or not.

Q. You don't recollect in regard to that? A. No sir.

Q. Now, to refresh your recollection—you have testified several times in regard to this case; I will ask you if you have not testified on those occasions that he told you he did not want you to bring him to Wyandotte; he wanted you to find where he was and he would go and see him? I am asking at this conversation now, if he didn't tell you, and if you haven't so testified on various occasions?

A. If I have, I have forgotten.

Q. What do you say now?

A. I don't recollect now.

Q. Don't recollect whether he told you?

A. Not that particular question, I couldn't tell you for certain.

Q. Well, now, you state that you went down there: That was all the conversation down there at Buchan's office?

A. Yes sir.

Q. Now, how long was it after you had this conversation with Buchan before you went down to Orrick to see your brother John?

A. I went down the same day; the same morning.

Q. The same morning? A. The same morning.

Q. How far is it from Kansas City, Kansas, to Orrick?

A. Why, I think it is 10 or 12 miles, somewhere along in there; I am not positive of the distance.

Q. You found John at Orrick, did you? A. Yes sir.

[—] Was anybody with him? A. No sir.

Q. Did he have your horse with him?

A. Yes sir, he had his horse down in the stable.

Q. You had a talk with John, did you? A. Yes sir.

Q. Now, what did you tell John there; go on and state the whole conversation now?

A. I told John that father and Tom had employed Buchan for his attorney.

628 Q. Let me interrupt you: John had told you that the first time he saw you, had he not, the first time you

saw him at your place near Parkville, Missouri; he told you that Tom and his father had employed Mr. Buchan, did he not? A. I don't recollect whether John told me or not.

Q. Don't recollect in regard to that?

A. Not the first time, no sir, when I saw him.

Q. When was it that John did tell you that?

A. I don't know that John told me at all.

Q. Go on and state what was said down there between you and John?

A. And that Buchan had always been a particular friend of ours, and he said, "You have got yourself into a terrible scrape, and he wanted to see you and have a talk with you, and see if he couldn't straighten it up.

Q. Is that all you said to him? A. No sir.

Q. Go on and state all you said to him?

A. I don't recollect word for word all that I did say, but I did tell him I thought whatever Buchan asked us to do, him or any of us, we ought to do it because we knew that Buchan had always been a friend to us, and never had any trouble, that father put confidence in him, and I thought whatever Buchan wanted us to do that we had better do it, that he might get himself into a terrible scrape if he didn't listen to Buchan and do as Buchan wanted him to. He says, "Reub, I will never, I can never change my statement I made in the first place; it is the truth and I can't make a change in it."

Q. Is that all that he said?

A. That is about all the substance of the conversation.

Q. Now, what did he say about going up to see Buchan; I understood you to testify on your direct examination that you urged him to go and see Buchan and he said he wouldn't do it? A. I don't know as I urged him to go up.

Q. Now, what did you say in regard to that; did you say anything to him about going up?

A. I don't recollect whether I did or not.

629 Q. Now, your memory being refreshed, what did you say in regard to Buch asking you to have him come up to his office?

A. I don't recollect whether I insisted on John coming up to Buchaan's office or not.

Q. Do you remember of Buchan saying anything about that?

A. I remember Buchan saying he wanted to see him, to find him and let him know where he was so he could go and see him.

Q. You have gone on and said that John said that he could not change his statement? A. Yes sir.

Q. That he had made this statement and that he could not change it for Buchan or anybody else; that was your idea wasn't it? A. Yes.

Q. Mr. Buchan up to that time had never said a word about changing the statement, had he? A. Yes sir.

Q. When and where?

A. Not direct to me, only through brother Tom.

Q. You had had no conversation, you and Mr. Buchan had never had any conversation in regard to that?

A. Only that time when I met him when I went down to see John.

Q. I am speaking before this conversation between you and John? A. Yes sir.

Q. You say that the very first conversation you had with him he said that he couldn't change his statement, he had stated the facts and couldn't change it? A. Yes sir.

Q. I understood you to state on your direct examination that he said he could not go back, wouldn't go back?

A. I don't recollect about that.

Q. You don't recollect in regard to that?

A. Not in regard to that.

Q. You left John there, did you? A. Yes sir.

Q. Did you take your horse away then? A. No sir.

Q. Then, where did you go? A. He went—

Q. Where did you go, Mr. Brown? A. I went back home.

Q. You went back to Parkville? A. Yes sir.

630 Q. Can you tell when that was?

A. That was in April some time; I could not tell—

Q. Some time in April, 1879? A. Yes sir.

Q. When did you see Mr. Buchan again?

A. I think it was the next day.

Q. The next day you went over to his office.

A. Yes sir.

Q. How far is it from Parkville to Wyandotte?

A. The way we generally go by the road it is fifteen miles.

Q. You went to Buchan's office, did you? A. Yes sir.

Q. And you had another conversation with him, did you, there? A. Yes sir.

Q. What did you tell him there?

A. I told him that I had found John and had a talk with him.

Q. Did you tell him where John was? A. Yes sir.

Q. Did you tell him he was down at Orrick? A. Yes sir.

Q. Tell all that was said there now between you and Mr. Buchan on that occasion. Don't let anything escape.

A. I don't recollect just word for word, but the main talk was about John. Buchan wanted to see him, he said he must see him, and we got on the train and went to Lexington.

Q. You have stated all you recollect of the conversation between you and Mr. Buchan on that occasion, have you?

A. Well, it was about wanting to see John—

Q. Now, I want you to state what was said, and all there was in regard to it. You told him where John was, you had been to Orrick and had seen John? A. Yes sir.

Q. You told him he was down there? A. Yes sir.

Q. Mr. Buchan said he wanted to see him? A. Yes sir.

Q. And you said you would go down with him, didn't you?

A. Yes sir.

Q. That was the substance of your conversation there on that occasion, was it not? A. Well, about, yes sir.

Q. And that very same day you did leave, you and Mr. Buchan for Orrick? A. For Lexington.

631 Q. How far is Lexington from Orrick?

A. I don't know; it can't be far.

Q. About how far?

A. I would just [giess] about ten miles.

Q. How did it happen that you saw your brother John at Orrick and then you and Mr. Buchan went to Lexington to see him the next day?

A. Because brother John was going to Lexington.

Q. You made arrangements then, did you, with your brother John, it was understood that you and Mr. Buchan were to meet him at Lexington the next day?

A. No sir, I didn't make any arrangement.

Q. And John told you he would be in Lexington, and you told Mr. Buchan before you left that John would be in Lexington the next day? A. Yes sir.

Q. And you would go down to Lexington with him to see him? A. Yes.

Q. Then you and Mr. Buchan went down to Lexington the next day? A. Yes sir.

Q. You said that John was there? A. Yes sir.

Q. Where did you meet John?

A. We met him at the depot.

Q. How did you happen to meet him there?

A. I saw him from the window.

Q. Near the depot? A. Yes sir.

Q. Had you made an arrangement to meet him near the depot? A. No sir.

Q. How large a place is Lexington?

A. I couldn't tell you; I was never in the main part of town.

Q. Can you approximate the size of the place?

A. No sir.

Q. You heard a conversation there between John and Mr. Buchan, did you? A. Yes sir.

Q. What did you say Mr. Buchan said to John?

A. He says about the first thing, "Hello, old fellow, you have got yourself into a hell of a scrape."

Q. What did John say to that?

A. He said he didn't know.

Q. What did you say?

A. I don't know as I said anything right then.

632 Q. Where about did this conversation occur?

A. Buchan was talking—

Q. I know, but I say whereabouts in the town of Lexington did this conversation occur?

A. Near the depot; it commenced near the depot and from that on up towards the hotel in the edge of the city.

Q. It commenced near the depot, and you walked along, did you, to near the hotel? A. Yes, sir.

Q. What else did Mr. Buchan say?

A. Well, he told John that he had got himself into a scrape, and he had come.

Q. I was inquiring in regard to this conversation at Lexington. You had told me the first thing, I think, that Mr. Buhan said, and I asked you what was the next thing he said, that is, after he said [said] to John that he had gotten into a bad scrape; what was the next thing that was said between them?

A. He said, "John, I have come down to see you and have a talk with you to see if I can't get this thing straightened up. He says, There is a warant out for your arrest, and you are liable to be arrested and put in jail at any time, and he says I want to help you out of it if you will—

Q. Anything else that he said?

A. And he wanted John—

Q. No, I want you to state what he said as near as you can; I want all that he said, now.

A. I could not state exact word for word all that he said.

Q. Are you sure that he said on that occasion there was a warrant out for John? A. Yes, sir, sure of that.

Q. You testified in this case in 1895 and 1896, did you not; I beg pardon; you testified in this case in 1895, did you not; you testified in this case in 1895, did you not, before Judge Thomas at Topeka?

A. I think that was about the date, yes, sir.

Q. In your testimony there, did you say that there was nothing said about a warrant that you recollected of on that occasion; do you understand my question? A. Yes, sir.

Q. I will ask you if in 1895, before Judge Thomas,

633 you did not testify that you had no recollection of there being anything said about a warrant on that occasion?

A. I think that was the time.

Q. I know, but do you recollect testifying in that way? before Judge Thomas? A. No, sir.

Q. Do you recollect what you did testify in regard to that matter before Judge Thomas in 1895? I am calling your attention to Mr. Buchan saying anything about a warrant?

A. I think though that at Lexington as near as I can recollect now—

Q. Did you testify that Mr. Buchan said there was a warrant out for him, in 1895? A. Yes, sir.

Q. In 1895, did you testify that Mr. Buchan said that there was a warrant out for John Brown's arrest when he was at Lexington? A. I think I did.

Q. You have stated all you recollect of Mr. Buchan stating up to that time?

A. He told John if he couldn't do something for him,—I talked to John awhile—

Q. What do you say Mr. Buchan said?

A. He asked him if he couldn't do something for him; that he had come down to see him and try to get him out of that trouble, and wanted to do something to show that he was trying to do all he could for him, as father and brother Tom had employed him as attorney, and he wanted the insurance company, he wanted John to give him a letter of some kind, or turn state's evidence or something.

Q. What did he say in regard to having John turn state's evidence on that occasion?

A. Well, sir, I don't recollect if I gave that in Topeka; I don't recollect.

Q. I am not asking you anything about Topeka; I am asking you now what Mr. Buchan said to John about John turning state's evidence?

A. I think he wanted him to do it at that time.

Q. What did he say? A. He said he couldn't do it.

Q. I know, but what did Mr. Buchan say to John in regard to that; give the substance of his language in regard to turning state's evidence?

634 A. I believe the substance of it was that he had better do it.

Q. That is, Mr. Buchan told John he had better turn state's evidence? A. Yes, sir.

Q. What did John say to that?

A. He said he couldn't do it, he had made a true statement and he couldn't vary from it.

Q. Was that before or after you and John had a talk?

A. It was neither one; we were all together; that is, when that conversation was going on.

Q. You state what Mr. Buchan said and what John said; what did you say?

A. I would speak up once in a while and urge John to do something.

Q. State as definitely as you can what you said?

A. I told John that he had better do it.

Q. That is, you meant by that, that John had better turn state's evidence? A. Yes, sir.

Q. You advised John to turn state's evidence, did you?

A. Well, yes, advised him to do it because I thought that Buchan—

Q. I am not asking that; I am asking what you did state; I am not inquiring for your thoughts. You advised him to turn state's evidence? A. Yes, sir.

Q. What else was said there?

A. John was so determined—

Q. State what was said, Mr. Brown, as near as you can remember; I don't expect you to give the exact language but the substance.

A. I could not state word for word what was said as it was said.

By the Court: Remember, Mr. Barker, that this conversation occurred over twenty years ago.

By Mr. Barker: I am only asking for the substance of the conversation. What I want to get at is what was said and done after Mr. Buchan advised him to turn state's evidence and after Mr. Brown had advised him to turn state's evidence, what was said?

A. The substance was that both done all we could to get John to do something, either write a letter or turn state's evidence or do something of the kind to satisfy Buchan;
635 we thought—

Q. I cannot permit you to state what you thought. Then I understand—see if I am correct in regard to that—you and Buchan advised John to turn state's evidence? Is that a fair statement? I say you and Mr. Buchan both advised John to turn state's evidence; I say you and Mr. Buchan both advised John to turn state's evidence did you not?

A. I don't know that we advised him but we asked him to.

Q. You and Buchan both asked him to turn state's evidence? A. Yes.

Q. And John declined to do so? A. Yes, sir.

Q. What was the next thing that was said?

A. The next thing was said, when we found out John wasn't going to do anything of the kind Buchan got at him to write a letter.

Q. I want to ask you again: What did you understand by turning state's evidence? A. Well, really I didn't know.

Q. You didn't know what turning state's evidence was?

A. No, I really did not.

Q. You mean to say now that you didn't know what turning state's evidence was? A. No.

Q. How old a man are you? A. I am 54 years old.

Q. You are 54 years old? A. Yes, sir.

Q. Didn't you testify in this matter at Topeka and state that you did know what turning state's evidence meant?

A. Why, I don't recollect.

Q. Didn't you state before Judge Thomas on the trial of this case that you understood that turning state's evidence meant turning from truth to falsehood; did you not so state that you understood turning state's evidence meant turning from truth to falsehood and were you not asked in the same connection if you advised your brother to do so and you stated you did? A. I don't recollect what I said then.

Q. You don't recollect in regard to that?

A. No, sir.

636 Q. Now, the next thing is in regard to a letter; you said there was some conversation in regard to a letter, was there? A. Yes, sir.

Q. State what you say that conversation was?

A. Mr. Buchan got at him, and he says, "You must do something for me," he says, "Write me a letter if you won't do nothing else," and then I got at him.

Q. State what you said to him.

A. "John, I would do as Buchan says if nothing more than write that letter for him." John says, "That would be a great letter," worded like Buchan wanted him to word it. Buchan says, "John, can't you do that for me," and pulled out a paper and pencil, and, "John," he says, "You do that any way." He says, "Write me a letter," and John took the paper and pencil and wrote it.

Q. Now, I will ask you in regard to that: Where did John get the paper on which the note was written?

A. Buchan gave it to him.

Q. Where did Buchan get it? A. I could not tell you.

Q. Did he take it out of a note book or did he take a piece of paper out of his pocket, tear it out of a pass book or get it out of his pocket?

A. I don't know whether he tore it out of a book or not.

Q. Now, where were you when you were talking about that letter?

A. We were close to the depot standing on the side of the railroad track.

Q. At Lexington, Missouri? A. Yes, sir.

Q. Now, where did John write that letter, I mean, did he write it on a book, on the bottom of a flat car, or the side of a car? A. He wrote it up against a car.

Q. He wrote it up against what kind of a car, a box car?

A. I couldn't tell you; it seems to me it was like a coal car.
Q. A coal car or a flat car?
A. I am not positive about what kind.
Q. I don't want to misunderstand you; you say he wrote it on the side of a coal car?
A. I don't recollect whether it was a coal car or not;
637 I say on a car; it might have been a box car for all I know.
Q. What would be your recollection; was it on the side of a box car?
A. It was on the side of the car; I couldn't state positive.
Q. Then he put that paper up against the side of a box car and wrote that letter against the car; that is a fair statement of it, is it? A. Yes, sir.
Q. That is a fair statement of it, is it; he wrote it against, or put the paper up against the side of a car and wrote the letter.
A. I don't know whether it was against the side; he was probably standing up so he could lay it down on the boards.
Q. I will ask you if in 1895 you did not testify that he wrote that on the bottom of a flat car, that note, referring to the same note, on the bottom of a flat car?
A. It might have been on the bottom, but it was on the end that projected out.
Q. I will ask you if you did not testify in 1895 before Judge Thomas that he wrote that letter on the bottom of a flat car? A. I don't recollect.

Counsel for the plaintiff objects to the questions for the reason that they do not tend to contradict the witness, and are not inconsistent with his former testimony.

[Q.] By the Court: There is no real difference between you, as to whether he wrote the letter on the bottom or top of a car or what kind of a car it was, unless to test the recollection of the witness.
By Mr. Barker: It is to show that the witness does not know whether it was written on the top, or the side or the bottom of a car or on a book.

The Court overruled the objection, to which ruling the plaintiff duly excepted.

Q. Now, I will ask you if you did not testify before Judge Brewer in 1885 that he wrote that letter on a book, holding the book in his hand? A. Well, sir, I don't recollect.
Q. I will ask you if you have not testified in regard to this matter that he wrote it on the bottom of a flat car,
638 that he wrote it on the side of a box car, and that he wrote that letter on a book, holding the book in his

hand; if you have not testified in these various ways in regard to that letter?

Counsel for the plaintiff objects to the question for the reason that it does not fix the times of the trials.

Q. I will ask you if you remember whether in 1885, you did not testify that John wrote that letter on a book, holding the book in his hand. Objected to and not answered.

Q. I will ask you if you didn't testify before Judge Shiras that he wrote it on the side of a car, Judge Shiras in 1887?

A. I don't recollect.

Q. I will ask you if you didn't testify in 1895 before Judge Thomas that he wrote it on the bottom of a flat car?

By the Court: He answered that question.

Q. At the same time before Judge Thomas, in 1895, did you not state that the letter might have been written partly on the side of a box car, partly on the bottom of a box car, and the bottom of a flat car; I will ask you if you didn't testify that the letter might have been written partly on the side of a box car and partly on the bottom of a flat car?

A. I don't recollect sir.

Q. You say that letter was given to Mr. Buchan by your brother there at Lexington, and that you and Mr. Buchan went away and left your brother there at Lexington?

A. Yes, sir.

Q. About what time did you go away?

A. It was in the afternoon probably half-past three.

Q. Where did you go?

A. I went back to Wyandotte, and from that on over home to Platte county.

Q. Did you remain in Wyandotte that night?

A. I don't recollect whether I did or not; I think not, though.

Q. You think you went over to your home?

A. Yes, sir.

Q. Now, when was the next time you saw Mr. Buchan?

A. The next time, I don't recollect when the next time was.

Q. Can you fix any date at which you saw him
639 again? A. It was at my house.

Q. When was that; sometime in September, 1879?

A. It was along in August or September.

Q. 1879? A. Yes, sir.

Q. That is the time he came there with Mr. Ward?

A. Yes, sir.

Q. How long had you known Mr. Ward?

A. I never knew him.

Q. Didn't you know him when you lived in Wyandotte county? A. No, I had heard of him,

Q. Were you personally acquainted with him?

A. No, sir.

Q. You say Mr. Buchan and Mr. Ward came there to your place at the time you have mentioned? A. Yes, sir.

Q. Came with a team, did they? A. In a buggy.

Q. Do you know whose buggy? Mr. Ward's buggy, wasn't it? A. I couldn't tell you.

Q. Where did you first meet them, up by your house?

A. Yes, sir.

Q. Did Mr. Buchan introduce Mr. Ward to you at that time? A. Yes.

Q. Then Mr. Buchan inquired where John was, did he not?

A. Yes, sir.

Q. And you told him where John was? A. Yes, sir.

Q. Now, then, you and Mr. Ward went down to the barn, didn't you? A. No, sir.

Q. Where did you and Ward go?

A. Buchan and Ward went up to where John was.

Q. Where was John with reference to where you were at that time?

A. He was about half a mile from myself, where they found him.

Q. Did you see them; you saw them drive off in that direction, did you?

A. No, I didn't notice which way they went; I told him how to go and I didn't notice them any more.

Q. When did you next see them?

A. About probably half an hour after that.

Q. Where were they when you saw them the next time?

A. They were coming up in the barn lot.

640 Q. Walking or driving? A. They were driving.

Q. All three of them in the buggy?

A. No, my brother brought his team back; Ward and Buchan, I think, was in the buggy; I am not certain about that, but one of them drove the team and the other the buggy.

Q. Wasn't Ward and Buchan riding in the buggy, and John hauling a load of lumber?

A. I couldn't say to that but they all came back and brought both teams.

Q. And stopped at the barn, did they? A. Yes, sir.

Q. Did Mr. Ward put his team in the barn? A. Yes, sir.

Q. And Mr. Buchan came along down to the house where you were?

A. After they got the horses put up; they were all there in the yard.

Q. Did you help put the horses up? A. Yes, sir.

Q. Then there was you, Mr. Buchan and Ward and John there? A. Yes.

Q. Did there any conversation take place in regard to this matter while all four of you were together?

A. Not that I recollect of.

Q. You have no recollection of any conversation at that time? A. No, sir.

Q. Then you all walked down to the house, did you?

A. Well, not right at that time. I think John and Buchan stayed back talking.

Q. And you and Mr. Ward walked on down to the house, did you? A. Yes,—I don't know as we walked to the house.

Q. You walked away from John and Buchan? A. Yes, sir.

Q. So that John and Buchan had a conversation there by themselves, did they not? A. I suppose so, yes.

Q. You saw them talking? A. Saw them together.

Q. You couldn't hear what they said there?

A. I could not, no.

Q. How long did they remain there in that way?

A. Well, probably half an hour or three quarters.

Q. Then John and Buchan were talking half an hour or such a matter there by themselves? A. Yes, sir.

641 Q. You didn't hear what was said there?

A. No, sir.

Q. Then, when did you next see John and Buchan have any talk together?

A. They were talking more or less all the time; they were not togther all the time except in the orchard; they were gone a little.

Q. They walked up in the orchard togetber; were you with them up there? A. No, sir.

Q. Was Mr. Ward with them? A. No, sir.

Q. When was the first conversation, now, after they came back that you and Buchan had, where was it, and who was present?

A. It was somewheres in the lot or yard, that Buchan came to me.

Q. Buchan came to you somewhere in your lot or yard at Parkville, Missouri? A. Yes, sir.

Q. What did he say to you there?

A. I couldn't state word for word.

Q. I am not asking you to state word for word; I am simply asking you to state the substance of it, Mr. Brown; state as definitely as you can, of course?

A. He said that John had got himself into a scrape and he came over for the purpose of helping him out, and John seemed to be determined in his stand, said he had told the truth, and he was going to stick to it, and there was no way

to persuade him to do so; he said he had been talking to him and trying to get him to turn state's evidence, I think, and Buchan said he could not do nothing with him, and wanted I should go and talk with him. He says the deputy sheriff is here and he is liable to be arrested most any time,—the deputy sheriff or constable, I don't remember now; I know, however, he mentioned the official, and so I had a talk with John.

Q. What did you say when Mr. Buchan made that request of you, in substance?

A. I told him I thought he had better do as Buchan advised.

Q. I am asking your what reply you made to Mr. Buchan when he made that statement to you; what was the substance; what did you say to Buchan?

642 A. I don't recollect what I said to him.

Q. Was John there when Buchan made that statement to you?

A. I couldn't state now whether he was or not; he wasn't far off.

Q. You went and saw John, did you? A. Yes, sir.

Q. You had a talk with him? A. Yes, sir.

Q. You may state what you said to him in regard to turning state's evidence?

A. I told him we ought to do as Buchan advised us to do, I thought it was the best thing to be done to get him out of trouble. John says: "Reub, I can't do it, I have told the truth and I am going to stick to it, I can't make any change." While I talked to him he seemed determined not to do anything, and then Buchan and I and John together went in a shed, a stable like there, and talked.

Q. What was said in the stable when you were together?

A. The same thing; we wanted John to turn state's evidence, or something of the kind or write a letter of some kind. Finally John consented and we went to the house.

Q. What was in the letter? A. I couldn't tell you.

Q. Was there any conversation in regard to John writing a letter, the last time he was there in September, 1879; did Mr. Buchan say anything about John writing a letter that day? A. Oh, yes.

Q. What did he say? A. He wanted him to write a letter.

Q. Give us the language as near as you can?

A. I don't recollect what he said, but just asked him if he couldn't write a letter; he would dictate it to him.

Q. That was after he had written the letter at Lexington, wasn' it? A. Yes, sir.

Q. You said he spoke to him about writing another letter?

A. Yes.

Q. Wanted him to turn state's evidence? A. Yes, sir.

Q. And John said that he had made a true statement, and couldn't do it, and you advised John to turn state's evidence; you urged him to turn state's evidence, didn't you?

A. I advised him to do as Buchan wanted.

643 Q. I ask you if you didn't advise and urge him to turn state's evidence? A. Probably did.

Q. You know you did, don't you?

A. Yes, sir, I told him I thought that was the best thing he could do.

Q. You understood then what that meant, did you?

A. I didn't know how severe probably it might be afterwards.

Q. That is to say, your brother told you he had made a true statement, and then you advised him to make a statement that wasn't true, did you? A. Yes, sir.

Q. You advised him to tell a falsehood?

A. I done it through—

Q. I am asking if you did not advise him right then and there to tell a falsehood? A. Yes, sir.

Q. In regard to the killing of a man, in regard to this Hillmon business, you advised him to tell a falsehood—

A. I done it—

Q. I am not asking you why you did it; I am asking if you did it? A. Yes, sir, I did.

Q. Then John went into the house with Mr. Buchan?

A. Yes, sir.

Q. I understood you to say you didn't know what took place there?

[Q.] No, sir, I saw them writing but didn't hear.

Q. How long were they in there?

A. Probably half an hour; maybe an hour.

Q. They were in there half an hour to an hour.

A. Maybe, yes.

Q. Where was Mr. Ward during this time?

A. Him and I was together part of the time, knocking around through the orchard and barn lots.

Q. And left Mr. Buchan and John there in the house writing? A. Yes, sir.

Q. You passed through the house three or four times, through the room three or four times, while they were writing?

A. I recollect once going through, and might have went through twice.

Q. After they had finished writing, what was said first to you?

A. They said, "Reub, we will all go up to Parkville and have this paper signed by a justice of the peace and

644 sworn to.

Q. Who said that? A. Buchan.

Q. Then you saddled up your horses, did you?
A. I think two of us went horseback and the other two in the buggy.
Q. You and John went on horseback?
A. Yes, I think we did.
Q. And Buchan and Ward went in the buggy?
A. I think that is about the way we went; I am not positive.
Q. You went over there, did you, to give John an opportunity to swear to this statement, whatever it was; that was your only business over there, wasn't it?
A. Yes, sir, I didn't know what kind of a statement he had written.
Q. You didn't know what kind of a statement he had written but you knew you advised him to make a false statement, did you not; you had so advised him, had you not? A. Yes sir.
Q. And you went with him over there to this place—Lexington, was it—Parkville, for him to swear to the false statement you had advised him to make? A. Yes, sir.
Q. That is a fact, is it? A. Yes, sir.
Q. He went over there, did he? A. Yes, sir.
Q. And they went up in the justice's office or notary public's office? A. Yes, sir.
Q. You did not go up with them? A. No, sir.
Q. They came down? A. Yes, sir.
Q. Do you know whether he swore to it up there or not?
A. No, sir, I don't.
Q. You don't know in regard to that? A. No.
Q. Then you came back, did you? A. Yes, sir.
Q. You went to your home? A. Yes, sir.
Q. John went with you, didn't he? A. Yes, sir.
Q. John remained with you then? A. Yes, sir.
Q. And Buchan and Ward went home? A. Yes, sir.
Q. Did you see the statement, the paper that was prepared there before you went there? A. No sir.
645 Q. Did you see it after you came back?
A. No sir.
Q. You say that John is now down in Arkansas, do you?
A. Yes sir.
Q. And he has been there for a good many years, I think you said, something over fifteen years?
A. He has been down there about fifteen years I think.
Q. Where do you say you live now?
A. I live in Kansas City.
Q. You have moved back to Kansas City? A. Yes, sir.
Q. And you are working in the stock yards? A. Yes sir.
A. Yes sir.
Q. In what capacity?
A. Why, my general work is yard cleaning.

Q. How many times have you been up there on this occasion to testify?
A. This is my second trip up to Leavenworth this last time.
Q. Have you had your evidence read over to you?
A. I read it.
Q. You read over your evidence? A. Yes sir.
Q. You had a copy of this note that John signed furnished to you, didn't you? A. No sir.
Q. In your evidence wasn't there a copy of that note?
A. I didn't see it.
Q. But you have said—
A. It was given too; I recollect this note.
Q. So you have read your evidence, including a copy of the note?
A. Yes sir, the one that was gotten up at Lexington.
Q. I will ask you if in 1895; before Judge Thomas, on the trial of this case, you were not asked the following question: "Q. You understood the meaning then of turning state's evidence," and if you did not answer, "Well, yes." Did you not answer it in that way?
A. I don't recollect whether I did or not.
Q. Then another question: "It means for a man to come out and tell the whole truth, the exact facts, and get the benefit of that. That is what you understand by turning state's evidence, don't you? A. By turning state's evidence I understood if he told the truth in the first place. Q. Well, I didn't ask you in regard to that; I ask you if you don't un-
646 derstand by turning state's evidence a man told the truth and received immunity thereby." And to that question did you not answer, "No, sir." A. I don't recollect.
"Q. But you don't understand that a man was to turn from telling a falsehood to telling the truth," and to that question, did you not answer, "No sir."
A. I don't recollect whether I did or not.
"Q. Don't you understand that turning state's evidence is to make a clean breast of the whole transaction; is that your understanding," and to that question, did you not answer: "My understanding is that a person turning state's evidence is that he varies from the truth, that he states a falsehood by turning state's evidence." Did you not so answer that question? A. I don't recollect.
Q. I will ask you if you did not testify before Judge Thomas in this case in 1895, that you understood by turning state's evidence was—You said you don't recollect answering that; then I asked you if you didn't understand that by turning state's evidence, that he varies from the truth, that he tells a falsehood by turning state's evidence? A. I don't recollect.

Q. You knew as much about the effect of turning state's evidence then as you do now, did you not? I mean in 1895?

A. I should think so, yes sir.

"Q. That is what you understand, that he turns from the truth to falsehood; that is what you understand, that he turns from the truth to a falsehood," and to that question did you not answer: "Yes sir."

By Mr. Hutchings: I object to the question as not proper cross-examination; it is not proper for any purpose unless it is to impeach the witness, and he has already said he understood he wanted Brown to tell a falsehood. The Court overruled the objection, to which ruling the plaintiff duly excepted.

The question was read. A. ' I don't recollect.

Q. Did you not on that occasion, to wit, before Judge Thomas in 1895, in answer to this question: "Q. You
647 understood he was turning to a lie, did you,—that he was turning to a lie, did you," and did you not answer, "Yes sir."

By Mr Hutchings: Doesn't he say precisely that now?

By the Court: He may answer that question if he recollects.

A. I have no recollection about that question.

Q Another question: "Q. You understand it then," and did you not answer, "Yes sir." Do you remember?

A. No, sir, I don't remember.

Q. And the question: "Q. Clearly, did you?" And to that question, did you not answer, "Yes sir."

A. I don't remember.

"Q. I understood you to say you understood turning from the truth to a falsehood was turning state's evidence," to which question, did you not answer: "Sometimes, yes sir."

By the Court: What question is predicated on that?

By Mr. Barker: If he didn't understand it at that time.

By the Court: You are simply reading a question and answer from a trial four or five years ago without predicating any question upon it.

By Mr. Barker: I am asking if he did not answer that question at that time in that way.

A. I don't recollect.

Q. This question: "Q. You understood that he had told the truth before"—this question before Judge Thomas in 1895, and in answer to that, did you not say, "Yes sir."

A. I don't recollect.

Q. To this question on the same time and occasion; "Q. And that by turning state's evidence he would tell a false-

hood?" And to that question, did you not answer: "Yes sir." A. I don't recollect.

Q. I understand you don't understand whether you testified before Judge Thomas that you understood that turning state's evidence meant to turn from truth to falsehood?

A. I don't know what Judge it was.

Q. You don't recollect anything about that.

[—] I recollect attending the trial as a witness.

The Connecticut Mutual Life Insurance Company, de-
648 fendant, adopts the cross-examination of Mr. Barker as its own.

Witness excused.

649 James W. Green, a witness already produced and sworn on behalf of the plaintiff, being recalled for further examination on behalf of the plaintiff, testified, in answer to direct interrogatories propounded to him by Mr. Hutchings, counsel for the plaintiff, as follows, to wit:

Q. Do you remember, Mr. Green, of the bringing of a body to Lawrence that was claimed to be Hillmon's? A. Yes, sir.

Q. What official position did you hold at that time in Douglas county? A. I was county attorney.

Q. Were you present at the inquest that was held in Lawrence over that body? A. I was.

Q. You may state who, if any one, appeared there representing the insurance companies at that inquest?

A. No one that I know of. Do you mean appeared there to take part in it?

Q. Yes, in the examination of witnesses at the inquest, if any one appeared there representing the insurance companies?

A. No.

Q. You may state whether any persons appeared there and examined witnesses who are now counsel for the insurance companies?

The defendants object to the question as immaterial.

By the Court: It is preliminary. The court overruled the objection to which ruling of the Court the defendants at the time duly excepted.

A. Mr. Barker and myself.

Q. Did John Brown testify at that inquest? A. He did.

Q. You may state whether or not at that inquest he testified that that body was the body of John W. Hillmon?

A. My recollection is that he testified it was the body of John W. Hillmon.

Q. Now, do you know a man by the name of H. B. Munn?

A. I do.

Q. What connection did he have in 1879 with these insurance companies?

A. He represented to me that he was representing the insurance companies.

By Mr. Barker: We object to the statement of this
650 witness as to what Munn represented himself to be.

The Court sustained the objection and motion to which ruling of the Court the plaintiff duly excepted.

Q. You may state if you know who employed attorneys, if anybody, at Lawrence, for the insurance companies.

Counsel for the defendants object to the question as incompetent.

By Mr. Hutchings: We want to show that Mr. Munn did, and to follow that by proof of interviews between the County Attorney and Mr. Buchan to show the origin and genesis of the getting of these releases. The Court overruled the objection, to which ruling of the Court the defendant at the time duly excepted.

A. Mr. Alton of the Connecticut Mutual employed myself and one Dr. Carney employed Mr. Barker and myself for the New York Life. I don't know who employed Mr. Barker for the Mutual Life.

Q. When did you first see Mr. Munn?

A. It was about the 15th of July.

Q. What year?

A. 1879; I have stated heretofore I thought it was the last of May or the first of July, but on examination of memoranda I find it was about the 15th of July.

Q. Now, I will get you to state—I believe you have already said you were county attorney of Douglas county?

A. Yes, sir.

Q. When did your term begin and when did it end?

A. It began on the 14th of January, 1879, and would terminate two years thereafter.

Q. Now, I will get you to state whether, during the time you were county attorney of Douglas county, and especially prior to September, 1879, any warrant was issued in Douglas county for the arrest of John H. Brown?

The defendants object to the question as not the best evidence. The Court overruled the objection, to which action and ruling of the Court the defendants then and there duly excepted.

A. I have no distinct recollection of a warrant having been issued; I presume—

Q. I don't care for what you presume, whether you
651 have any knowledge. When did you next see Mr. Munn after the meeting in July?

A. When I first met him in July, Mr. Munn was there for, I will say several days at that time and I saw him from day to day.

Q. You saw him from day to day? A. Yes, sir.

Q. He had some connection with this matter, had he not?

Defendants object to the question as incompetent. Question not pressed for answer.

Q. I will ask you what the subject of your interviews with him was in July, and state whether it had any connection with this Hillmon matter.

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: Do you expect to show that he was a representative of the insurance companies by his own declarations?

By Mr. Hutchings: We expect to show it by their accepting the fruits of what he did. These releases were obtained by him. He hired a man to get them, and we invoke the doctrine that where the insurance companies take the benefit of an act, they take it cumonere.

The Court overruled the objection, to which action and ruling of the Court the defendants then and there duly excepted.

A. Among other things, we discussed this Hillmon matter.

By the Court: Was Mr. Green at that time a representative of one of the insurance companies?

By Mr. Hutchings: He was county attorney.

Q. At that time, had you been employed by the insurance companies? A. Yes, sir; I had.

Q. You had at that time? A. Yes, sir.

Q. You had been employed to manage the cases of the company in relation to the claim upon these Hillmon policies?

A. My first employment was to investigate the case.

Q. Well, at the time that Mr. Munn came there, at
652 that time, you were employed by the defendant companies or one of them, to look after their interests generally in relation to these Hillmon policies?

A. I was employed to investigate the case.

Q. When was your employment made?

A. That was made about the 12th or 15th of April, 1879.

Q. Now, are you acquainted with W. J. Buchan?
A. I am, yes, sir.
Q. When did you become acquainted with him?
A. I am not able to state exactly when I did meet Mr. Buchan first. Possibly I was acquainted with him at that time.
Q. Did you ever meet him, to your recollection, until he came to Lawrence?
A. Not to my recollection but I may have done so.
Q. Now, when did Mr. Buchan first appear at Lawrence in connection with this Hillmon matter?
A. The first time that I recollect of Mr. Buchan's coming there would be along in the fore part of September.
Q. Where did you meet him? A. At my office.
Q. Who was there besides Mr. Buchan? A. Mr. Munn.
Q. That was the H. B. Munn that we have spoken of?
A. Yes, sir.
Q. Now, I will ask you to state what conversation you had with Mr. Buchan there on that occasion?

The defendants object to the question as incompetent, irrelevant and immaterial.

By Mr. Hutchings: It goes to the question of these releases.

The Court overruled the objection, to which action and ruling of the Court the defendant at the time duly excepted.

A. Mr. Buchan came to the office, and among other things he proposed or he thought that he could get up the policies which had been issued on the life of John W. Hillmon.
Q. Could you fix the date, or approximately the date of that?
A. I would say from memoranda that I have that that must have been about the fifth of September, 1879.
Q. When he came there and proposed to get up
653 these policies, did you know he was the attorney of John H. Brown?
A. Not from anything that he had told me; I had so understood.
Q. Now, you may whether on that occasion, a paper was prepared and signed by Mr. Munn; if so, produce it.
A. There was a paper prepared, but I think not at my office, but whether just at that time or not, I am not able to state; my recollection would be that the paper which I presume you refer to, was prepared by Mr. Munn at the hotel as he did most of his work at the hotel.
Q. I refer to the paper that has been heretofore known as the "To whom it may concern paper." A. Yes, sir.

Q. Will you produce that?
A. As I say, I think it was prepared at the hotel and brought over.

Said paper is produced and marked for identification "Exhibit 15."

Q. This paper, Exhibit 15, which I will designate as the "To whom it may concern" paper. When did you first see that paper? A. It was at that time.
Q. At that time you were county attorney of Douglas county? A. Yes.
Q. And you were also attorney for the defendants?
A. For the Connecticut Mutual and the New York Life.
Q. One of the defendants, the Connecticut Mutual?
A. Yes, sir.
Q. After that paper was signed by Mr. Munn, as you have stated, what was done with it?
A. It was handed to Mr. Buchan.

By Mr. Hutchings: We desire to offer the paper in evidence for the purpose of examining further in relation to it.

By Mr. Barker: We object to the paper as incompetent, irrelevant and immaterial, and especially on the part of the Mutual Life Insurance Company of New York, because it is not claimed Mr. Green was attorney for it.

Q. Do you know whether this paper was seen by Mr. Barker at that time? A. I do not.
Q. Was Mr. Barker, at that time, do you know, re-
654 tained by the defendants or either of them?
A. The New York Life, I know as to that. I don't know as to the others of my own knowledge.

By the Court: Do you expect to connect this man Munn by further evidence with the Mutual Life?

By Mr. Hutchings: I am not so certain as to that except in this way: We shall show that these releases were obtained; that this paper was presented to the plaintiff herself; that it was one of the instrumentalities by which they obtained the releases; that they availed themselves of all that Mr. Munn did by virtue of this paper and I think we will show that their attorneys, who are managing this case, knew all about it when they set up the releases. It was claimed that Buchan was the attorney of Brown. This paper was given to Brown's attorney, and it was used as a lever on Brown through his attorney; it was then exhibited to the plaintiff and the releases were obtained.

By the Court: I do not recall that it was shown to Brown.

By Mr. Hutchings: No, but it was shown to his attorney; he was acting for the insurance companies and for Brown. It will apepar that the paper was written after the Parkville incident; that Mr. Munn, Mr. Buchan and Mr. Green were discussing the getting up of the policies at Lawrence on the 6th of September, 1879; that Buchan wanted such a paper and that Munn gave him this identical paper.

By Mr. Barker: In the first place it is conceded that Mr. Green was not the attorney of the Mutual Life, so of course, he could not have any authority to speak for that company. It is admitted that the paper was written after the Parkville incident; therefore the paper could not have influenced John Brown in his actions, and Mrs. Hilmon swears that she never heard of this paper until after the releases were signed.

By the Court: Were the releases ever delivered to Munn?

By Mr. Wheat: They were delivered to the companies. I think there is evidence that Munn had them at one time.

The Court overruled the objection, to which action and ruling of Court the defendant at the time duly excepted.

655 Mr. Hutchings here reads the paper, Exhibit 15, in evidence. It is in words and figures as follows, to wit:

"The undersigned attorney, representing the Mutual Life Insurance Company of New York, the [The] New York Life Insurance Company of New York and the Connecticut Mutual Life Insurance Company, hereby stipulate and agree, so far as said companies are concerned, to desist from any further pursuit and prosecution of John W. Hillmon, John H. Brown, or any other parties in connection with the Hillmon cases, provided the respective policies are surrendered and order for their delivery executed, and all claims under the same released to said companies by Sallie E. Hillmon, wife of said John W. Hillmon and beneficiary under said policies, and in so doing represent their officers and agents everywhere.

Lawrence, Kansas, September 6th, 1879.

H. B. MUNN."

Q. Now, then, I will get you to state to the jury what conversation there was at that time between you and Mr. Munn and Mr. Buchan as to giving him this kind of an instrument?

The defendants object to the question as incompetent, irrelevant and immaterial, and desire it understood that all testimony upon this subject is under their objection. The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted and still except.

A. I do not at this late day presume to state the exact words [whic] which were used at that time, but as I state- before, Mr. Buchan proposed that he could get up the policies which had been used by the companies on the life of Hillmon. I remember sta-ing myself in substance I did not believe he could do any such thing, and he thought he could and wanted an opportunity to try. Mr. Munn told him that he might go ahead and try to get the policies up if he could and if
656 he could, that he would pay his expenses anyhow, and if he could get the policies up, he would pay him liberally for so doing. Mr. Buchan then wanted authority from Mr. Munn to pay the plaintiff Mrs. Hillmon something for delivering up the policies. Mr. Munn refused, and said that the companies would not pay a dollar; that they believed the whole scheme was a fraud, and consequently they would not pay a dollar for these and went further and said that Mr. Buchan should not go so far as to pay any of the compensation wh-ch might be given him, or which he might receive in payment, to Mrs. Hillmon for delivering up the policies. That was substantially the conversation, a portion of it, possibly, in the words.

Q. Now, calling your attention directly to the point. What, if anything about prosecuting and sending these parties to the penitentiary?

A. Nothing at this particular conversation.

Q. This instrument is dated the 6th day of September?

A. Yes, sir, 1879.

Q. This paper, as I understand, was delivered to Buchan there at that first conference?

A. No, my recollection would be that Mr. Buchan was up there on the 5th.

Q. That was the first conference? A. Yes, sir.

Q. As to the date of this instrument, when was it delivered to Mr. Buchan?

A. I have no distinct recollection but I have no doubt from the date of the instrument that it was delivered on the day that it bears date. My recollection as I say, was that he came up on the 5th and was there again on the 6th.

Q. The conversation in which Buchan said that he thought he could get up these policies, and in which Mr. Munn offered to reward him in case of success, was that on the 5th?

A. That would be on the 6th. That would be my recollection.

Q. You think he was there on the 5th? A. Yes.

Q. Do you remember whether there was an interview between Mr. Munn and Mr. Buchan on the 5th? A. Yes.

657 Q. What was the nature of that?

A. Mr. Buchan brought the so-called confession of

John H. Brown up there and showed it to Mr. Munn and myself.

Q. That was on the 5th?

A. That is my recollection now, that that was on the 5th

Q. Well, upon that occasion, was anything said by Mr. Munn about his intention to prosecute Brown and Hillmon and everybody?

A. Mr. Buchan showed Mr. Munn that paper, and Mr. Munn read it, and Mr. Munn said, after reading the paper, that a man who would be guilty of a cold-blooded murder—I think he said it in a way like that—should be prosecuted, even if he had to see it was done by himself. Mr. Buchan in a few moments asked to see the paper; Mr. Munn handed him the paper and Mr. Buchan put the paper in his pocket, and said that he would not prosecute a client of his by a paper which he procured him to sign, or words to that effect, and put the paper in his pocket and refused to give it up. I had some considerable difficulty in harmonizing things.

Q. Now, then, before Mr. Munn signed this paper granting immunity, he had read what Mr. Buchan brought there as being some confession or statement of John Brown?

A. That is my recollection, yes, that that was on the 5th and that this paper was delivered on the 6th.

Q. And he had expressed himself on the 5th that it was a cold-blooded murder and ought to be prosecuted and he would prosecute at his own expense?

A. He didn't say at his own expense, but that he would see it prosecuted.

Q. And on the 6th he gave this paper? A. Yes, sir.

Q. Now, then, did you see that paper which was brought there which you have spoken of as the confession of John Brown, or something of the kind? A. Did I see it?

Q. Yes. A. Yes.

Q. Did you see it before this paper was delivered to
658 Buchan?

[Q.] My recollection would be that I saw it the day before.

Q. The day before it was delivered? A. Yes, sir.

Q. So that, after you had seen that paper, this Exhibit 15 was delivered to Mr. Buchan in your presence?

A. I think it was.

Q. Now, I want to ask you whether you ever again saw that paper which you have spoken of as John Brown's confession? A. I don't know.

Q. Did you ever see any paper similar to it. That is, what is your information about it? A. I have seen a copy of it.

Q. Did you ever see the paper which was exhibited to you in Lawrence as the John Brown confession, either in its integrity or torn to pieces afterwards?

A. I saw what was said to be it.

Q. You say it was said to be; what is your opinion?

[—] I cannot give an opinion because I never compared it at all.

Q. But you read it; you read the one that was brought there to Lawrence? A. Yes, sir.

Q. And you read the one that you saw afterwards?

A. I don't understand, Mr. Hutchings.

Q. You saw the statement which was brought to Lawrence by Mr. Buchan early in September? A. Yes, I saw that.

Q. And subsequently you saw a paper torn in shreds, did you not? A. I saw pieces of paper.

Q. Well, now, then, you read both of them, didn't you?

A. No, sir.

Q. Have you ever read the one that was torn to pieces?

A. No, sir.

Q. Didn't you make a copy of it?

A. No, sir. One moment, Mr. Hutchings; allow me, so that we will have no misunderstanding, I never made a copy of the paper, if that is the paper, after it was torn in pieces.

Q. Will you state from whom you received a paper torn in pieces?

The defendants object to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants then and there duly excepted.

A. W. J. Buchan.

659 Q. When?

A. Probably in the month of January, 1882.

Q. Where? A. At his office at Kansas City, Kansas.

Q. Did you ever put those pieces together and try to read them? A. Not that I recollect of.

Q. Did you ever compare it to see whether it was in fact the paper which you had seen in Lawrence torn to pieces?

A. No, sir.

Q. Did you ever look at it to tell, to see if there was anything written on those pieces that were torn up?

A. I probably did that.

Q. There was something written on those pieces?

A. Yes, there was something written on those pieces.

Q. Now, the something that was written on those papers, did it bear any resemblance to what was written on the paper you saw it Lawrence?

The defendants object to the question as not the best evidence.

By the Court: You would want to account for the pieces before you do that.

Q. Now, then, I will get you to produce, if you please, the paper that is called the "Where is John" letter. I believe it has already been introduced in evidence.

By Mr. Hutchings: In order that the jury may understand what this [—] I will read.

"Mrs. Hillmon: I would like to know where Johny is and how that buisness is, and what shall i doe if anything. Let me know threw my Father. JOHN BROWN."

Q. When did you first see that paper?

A. Presumably in the month of January. I say in the month of January, because I saw it during the time of the taking of this deposition which we have just finished, and that deposition began in December, and ended in January, I think.

Q. From whom did you receive it? A. I received it from W. J. Buchan.

660 Q. Now, if you please, produce the releases which are set up in the answers in this case—So far as you know that paper was never in the possession of Mrs Hillmon, the plaintiff? A. I don't know anything about that.

Q. I will get you to examine the endorsement on the back of this release which will be marked "Exhibit 16" and state in whose handwriting it is, if you know?

A. That is in Mr. Munn's handwriting.

Q. H. B. Munn's handwriting? A. H. B. Munn.

Q. That is the same H. B. Munn who was there at the time Mr. Buchan was there, and who gave this other paper?

A. Yes, sir.

Q. Now, state whether the releases on the back of all these releases is in the handwriting of H. B. Munn, the same H. B. Munn you have already mentioned? A. They are.

Q. When did you first see these releases?

A. My recollection would be the first time I saw them was a short time prior to the first trial of this case; I don't remember of having seen them before.

Q. From whom did you receive them?

A. I have not a distinct recollection, but I think from the companies.

Q. Did you get them from the companies or from Munn?

A. I don't recollect whether I got them from the companies or from Munn.

Q. These are the same releases set out in your answers?

A. I believe they are, yes, sir.

Said releases are marked, respectively, at this trial, Exhibits 16, and 17. No. 16 is the release of the Mutual Life policy and No. 17 of the Connecticut Mutual policy.

The paintiffs offers the same in evidence. There being no objection, said reeases were severally read to the jury and are, respectively, in words and figures as follows, to wit:

661 EX. 16.

Leavenworth, Kansas, Sep. 15, 1879.

In consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release—surrender and acknowledge satisfaction in full of all claims against the Mutual Life Insurance Company of New York by release of policy No. 195,132, issued by said company, dated Dec. 10, 1878, and for the sum of ten thousand dollars in the life of my husband, John W. Hillmon, and hereby enter satisfaction in full and order the dismissal of any and all suits or proceedings commenced or that may hereafter be commenced by any person in my behalf for the collection of the same.

(Signed) SALLIE E. HILLMON.

Attest:

W. J. BUCHAN,
JOHN H. BROWN.

EX. 17.

662 Leavenworth, Kansas, Sept. 15, 1879.

In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the Connecticut Mutual Life Insurance Company by reason of policy No. 153,614, issued by said company, dated March 4th, 1881, and for the sum of five thousand dolars, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full, and order the dismissal of any and all suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.

(Signed) SALLIE E. HILLMON.

Attest:

W. J. BUCHAN,
JOHN H. BROWN.

663 Q. When did you next see Buchan after this Munn paper, Exhibit 15 was delivered to him?
A. I don' tremember when I did next see him.
Q. Do you remember where you saw him next?
A. I do not.
Q. You say you never saw these releases at all until in 1882?

A. I have no recollection of seeing these releases, but it may be that after Mr. Buchan secured these releases, that he brought them to Lawrence. My recollection would be however, that he did not; if he did, I probably saw them at that time.

Q. Don't you remember that he did bring them to Lawrence and delivered them to Mr. Munn there at Lawrence?

A. I can't recollect.

Q. You don't remember? A. No, I don't remember.

Q. Is it not a fact that you and Mr. Barker and Mr. Munn and Mr. Buchan met in Kansas City?

A. No sir, I don't think I was ever in Kansas City.

Q. Did you have a meeting at a hotel anywhere, you and Mr. Barker and Mr. Buchan and Mr. Munn? A. No sir.

Q. Now, at the coroner's inquest, I will get you to state if you remember seeing the plaintiff? A. I saw her there.

Q. Do you remember of the plaintiff producing there photographs of John W. Hillmon?

A. I remember that she produced photographs[ther]there of John W. Hillmon.

Q. Now, I want to direct your attention specially to the fact of her producing a picture of two standing figures one of which was John W. Hillmon?

A. I remember of her producing a photograph there or tintype of two persons standing, said to be Brown and Hillmon.

Q. Said to be Brown and Hillmon? A. Yes sir.

Q. You recognized them to be such, didn't you?

A. I never saw Hillmon, to my knowledge.

Q. But from the other pictures of Hillmon that were produced there?

The defendants object to the question as incompetent. The Court sustained the objection, to which action and ruling of the Court the plaintiff duly excepted.

664 Q. Well, did you recognize one of those pictures as being that of John H. Brown who was present and testified?

A. I presume I did; I have not distinct recollection of it one way or the other.

Q. They were standing, I believe you said; taken in a standing attitude or pose?

A. They were standing; whoever the persons were, were standing.

Q. Do you know what became of that picture?

A. I do not.

Q. Do you know whether it was left with Dr. Morris, the coroner?

A. I don't; my recollection is that the pictures were produced by Mrs. Hillmon upon notification of Dr. Morris, or the

request of Dr. Morris, to bring all pictures which she has, and they were brought there; to whom they were delivered, I don't know, whether to Sheriff Clarke, or to the coroner or to whom.

Q. Do you remember of Mrs. Hillmon, the plaintiff, producing at that coroner's inquest, a letter which was said to have been written by her and addressed to her husband at Medicine Lodge which was taken from the body?

A. No sir, I don't remember of any such letter.

Q. Do you remember of her producing any letters there from her husband? A. From her husband?

Q. From her to her husband? A. No sir.

Q. Did any one produce any papers there at that inquest that were said to have been taken from the body after death?

A. There was one paper produced there which was said to have been taken from his body.

Q. What was that?

A. That was a discharge, I presume, from the army.

Q. Was the diary produced?

A. Yes, there was a diary produced also.

Q. Was a picture of his wife produced which was said to have been taken from the body after death? That is, a picture of the plaintiff, a photograph? A. I don't remember.

Q. Now, as to that coroner's inquest, if you know, Mr. Green, you may state who paid the expenses of that inquest?

The defendants object to the question as incompetent,
665 irrelevant and immaterial.

By the Court: What relevancy has that?

By Mr. Hutchings: I confess I cannot exactly see what it has.

Q. Now, then as to the services which were performed by Mr. Buchan in the matter in getting these releases and surrendering them, state if you know who paid them, and what amount was paid to Mr. Buchan?

A. I don't know who paid it or what amount.

By Mr. Wheat: This matter of payment of the cost of the inquest by the insurance companies: If it was paid by them, it helps to show the question of the bona fides of the transaction. We are claiming all the time that the inquest was not held for the purpose of ascertaining who that corpse was, but for the purpose of picking up such items of evidence as they could get by swearing people, etc., to show that it was not Hillmon. Here was the county attorney at the time attending to the matter and we want to show that the county did not pay the expenses but that the insurance companies did.

The defendants object to proof on the subject. The Court sustained the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

And in answer to cross-interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Where were you living in 1879?
A. In Lawrence, Kansas.
Q. How long had you been residing there then?
A. I moved from Olathe to Lawrence, Kansas in January, 1877.
Q. State if you have lived there ever since? A. I have.
Q. State if you are living there now; if Lawrence is your home? A. It is my home.
Q. You may state what position, if any, you hold in
666 the University?
Q. I am dean of the law school.
Q. How long have you held the position of Dean of the law school?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection to which ruling of the Court the plaintiff at the time duly excepted.

A. Ever since the [plsition] was created; I think it was created along about 1883, before that I was connected with the law school, had charge of it.
Q. How long have you been connected with the law school in that capacity? A. In what capacity?
Q. As Dean of the Law Department?
A. I say ever since it was created, I think, about 1883.
Q. I understood you to say before it was created—
A. I had charge of the law school before that position was created.
Q. And been county attorney of Douglas county?
A. Yes sir.
Q. You were county attorney from 1879 to 1881?
A. Yes sir.
Q. You have stated the fact that you remember the fact of a body being brought to Lawrence? A. I do.
Q. In the spring of 1879? A. Yes sir.
Q. And the holding of an inquest there? A. Yes sir.
Q. At the time that body was brought there and this inquest was held, I will ask you to state what connection, if any, you had with the defendants in this case?
A. None whatever nor never had.
Q. I will ask you to state if you were employed by me as attorney for the Connecticut Mutual, or the Mutual Life Insurance Company of New York, or any other insurance company?

The plaintiff objects to the question as not proper cross-examination.

By the Court: Nothing was said as to whether you employed him.

By Mr. Barker: Not in the testimony, but you remember the opening statement.

The Court overruled the objection, to which ruling of
667 the court the plaintiff at the time duly excepted.

A. I was not.

Q. Now, you may state by whom you were employed?

A. By Mr. Alton.

Q. And Doctor Carney, I believe? A. Yes sir.

Q. Have you stated, if not, I will ask you what was the nature or character of your employment, what were your first duties, what was the first thing they required of you?

A. It was to still further investigate the question as to whether that was the body of John W. Hillmon or not.

Q. That was the purpose for which you were employed?

A. Yes sir.

Q. I will ask you if you carried on to some extent an investigation then for the purpose of determining whether that was the body of John W. Hillmon? A. I did.

By the Court: Did you take directions from Mr. Munn?

A. After Mr. Munn came there, and that was in July, I should say I did more or less; in some things I did.

Q. Were you employed before Mr. Munn came upon the scene at all? A. Yes sir.

Q. Some time before that?

A. I was employed as I said in my direct examination somewhere from the 12th to the 15th of April; and my first acquaintance with Mr. Munn was about the 15th of July.

Q. Now, I will ask you in regard to certain pictures. I understood you to say that those pictures were brought to the inquest by Mrs. Hillmon? A. I understand they were.

Q. I will ask you, for the purpose of refreshing your memory, if you remember who was sheriff at that time?

A. Mr. H. S. Clarke.

Q. I will ask you to state now whether those pictures, whatever they were, were not brought to the inquest by Mr. H. S. Clarke?

A. That would not be my recollection; my recollection is that Mrs. Hillmon was requested to bring them there, or notice was served on her, probably by Mr. H. S. Clarke, and that she brought them; that would be my recollection.

Q. I will ask you if the first time the pictures were
668 ever submitted to you or to us they were not submitted by Mr. Clarke at the inquest?

A. That may have been.

Q. What is your recollection now?

A. I haven't any distinct recollection on that point.

Q. How long was it after this coroner's inquest before you saw or had a conversation with Mr. Buchan and Mr. Munn together, the one they have called your attention to?

A. That would be in September.

Q. The following September? A. Yes sir.

Q. Was that the first time that you recollection of having seen Mr. Buchan or had any talk with him in connection with this Hillmon matter? A. Yes sir.

Q. About how many times did you see him about that time? I mean by that time during the early part of September, and I mean by him, Mr. Buchan?

A. If my recollection serves me right, I first saw him about the 5th.

Q. The 5th of September? A. Yes sir.

Q. Where was that? A. It was at my office.

Q. Who was present?

A. Mr. Munn was present some of the time anyhow.

Q. Yourself and Mr. Buchan? A. Yes sir.

Q. Do you remember anybody else being present?

A. No sir, I don't.

Q. That was the first time you had a conversation?

A. Yes sir.

Q. Now, I will ask you to state briefly what that conversation was, this conversation of September 5th?

A. As I say, Mr. Buchan came to the office and he had with him the so-called confession of John H. Brown, and also another paper signed by John H. Brown.

Q. Will you look at this paper and see if you recognize that as the other paper which you spoke of his having there at that time? A. Yes, that is the other paper.

Said paper is marked for identification Exhibit 18.

Q. You may state when and where you first saw Exhibit 18?

A. I saw it at that time, on September 5th; I presume it was; I think it was on that date, 1879.

669 By Mr. Barker: In connection with the cross-examination of this witness, I now offer this paper (Exhibit 18) in evidence.

Admitted without objection.

Said papers is in words and figures as follows, to wit:

EX. 18.

"Parkville, Missouri, September 4th, 1879.

I hereby authorize W. J. Buchan to make arrangements, if he can, with the insurance companies, for settlement of the Hillmon cases by them stopping all pursuit and prosecution of myself and John W. Hillmon if suit for money is stopped and policies surrendered to Companies.

JOHN H. BROWN."

Q. Now, when was the next time that you had an interview with Mr. Buchan?

A. You have asked me a question that I have not answered.

Q. I asked you first was this the paper?

A. I saw it at that time, at the time that Mr. Buchan brought the so-called confession of John Brown there.

Q. This is the first time, is it not, that the companies were approached by John Brown or his attorney, for a settlement of this matter that you have any knowledge of?

A. That I have any knowledge of, yes.

Q. Was this paper presented at the time that there was a conversation in regard to Mr. Buchan getting up the policies?

A. Yes sir.

Q. Was this paper shown to Mr. Munn or to yourself at that time? [Q.] Shown to Mr. Munn and I saw it.

Q. Shown to Mr. Munn in your office? A. Yes sir.

Q. Now, what was the question I asked that you did not answer?

A. You asked me in regard to the conversation that took place; that is the same conversation that I repeated as near as I can on my direct examination; the conversation turned upon Mr. Buchan's getting up the policies and his ability to do it.

670 Q. Then, when did you see Mr. Buchan again?

A. I think the next day.

Q. In the presence of Mr. Munn? A. Yes sir.

Q. You three were there together, were you?

A. Yes sir.

Q. What took place then; I am speaking now of the second time?

A. The second time would be on the 6th I think, the date of that paper. I was mistaken as to the authorization. The first day he brought that confession up; the next day the conversation took place in regard to his getting the policies up; it was at that time that the paper which you have just produced was shown. I don't remember of seeing it the day before.

Q. Tell the jury briefly what Mr. Munn did say to Mr. Buchan in regard to getting up these policies?

A. Mr. Buchan proposed to get up these policies.

Q. Did he state anything at that time about being authorized by John Brown to get them up?

A. He showed that paper as an authorization from Brown, and as I say, I said that I did not believe he could get these policies; he thought he could. I don't remember what Mr. Munn said in that connection, or if he said anything, but the result was that Mr. Munn told him he could try to get up these policies; that he would pay him his expenses anyhow, whatever expense he might be at, and that he would pay him liberally if he should be able to get the policies, and then Mr. Buchan wanted an authorization to pay some money towards getting them up. Mr. Munn told him that he could not and would not permit a dollar to be paid, and further stated in that connection that he would not even permit any of the money which he might pay Mr. Buchan for his services in getting them up, to be applied in that way.

Q. That was the last conversation you recollect having with Buchan and Munn in regard to this matter of the policies before the releases were produced?

A. Yes, that is the last I remember of.

Q. I understood you to say on your direct examin-
671 ation that these releases you think you received them from the companies? A. That is my recollection.

Q. You received them by mail?

A. That is my recollection.

Q. From their offices?

A. That is my recollection; my recollection is that the releases were to be sent to Mr. Munn by a mail. My [My] memory is indistinct in regard to that.

By Mr. Hutchings: By Buchan?

A. I am not sure as to that; but I don't recollect havingseen these releases until they were sent to me by the companies. I had not to do with the releases; my employment was simply as an attorney in the case; I had no authority one way or the other to settle the case or employ any one to get up the policies. I had nothing to do with it except that I was there while the matter was being done.

Q. Now, you have spoken about, in regard to where you first saw this note from Mr. Brown to Mrs. Hillmon which has just been introduced in evidence? A. Yes, sir.

Q. You may state the facts and circumstances under which you first saw that note. Will you produce it now, if you have it?

The plaintiff objects to the question as not proper cross-examination; the mere fact was, when he received it.

By the Court: He may state the circumstances concerning the reception of it.

To which ruling of the court the plaintiff then and there duly excepted.

A. We were attempting to introduce the confession of John H. Brown in the deposition and the objection was made that it was secondary evidence. I then went to Mr. Buchan's office to see if he had the original, and he went to a drawer and looked in a drawer to see if he had that and found that paper, and says, "Here is something you haven't seen," or something to that effect.

Q. You may state if it was delivered to you at that time?

A. It was delivered to me at that time.

672 Q. And was that the same time that the deposition of John H. Brown was being taken? A. Yes, sir.

Q. In Wyandotte? A. Yes, sir.

Q. The same deposition which was read in evidence here?

A. Yes, sir.

Q. State whether or not that was the first knowledge you had of the existence of this letter marked Exhibit—whatever it is? A. Yes, sir, that is the first knowledge I had of it.

Q. I will ask you to state if at the time the deposition of John H. Brown was being taken, if we had, I mean by that the attorneys for the defendants, the confession of John H. Brown in our possession?

The plaintiff objects to the question as not proper cross-examination, as calling for the opinion of the witness and as incompetent. The court overruled the objection, to which ruling the plaintiff at the time duly excepted.

A. You speak,—at the time?

Q. Yes, at the time of taking—

A. Mr. Buchan handed it to me I think at that time, when I went over there,—what purported to be it. I don't know whether it was or not.

Q. At what stage of the deposition was that then; do you know whether the deposition was nearly complete or not?

A. My recollection would be that the deposition was half or two-thirds taken.

Q. When was it with reference to the time that Brown had testified in regard to his connection, and the transaction between Buchan and him? A. It was after.

Q. State whether or not at the time you got this exhibit and the other paper, whatever it may have been, if you had

a conversation with Mr. Buchan in regard to what Brown was testifying and had testified to.

The plaintiff objects to the question as not proper cross-examination and as hearsay. The court sustained the objection, to which action and ruling of the court the defendants at the time duly excepted.

673 By a Juror: If the court please, there has been a statement of the witness a good many times with regard to getting up the policies. What do we understand by getting up the policies?

A. That he was to get a surrender of the policies by the plaintiff.

Q. Now, referring again to the coroner's inquest there at Lawrence, you have stated that John Brown testified on that occasion that the body was the body of Hillmon? A. Yes, sir.

Q. Do you remember of his having testified about a third party having been with them, that is, Hillmon and Brown, at what is called the Cowskin on a part of their second journey, about the first day out from Wichita?

The plaintiff objects to the question as not proper cross-examination and hearsay.

By Mr. Barker: I want to state our position in regard to that. We think that, having asked this witness if Brown testified to a certain matter before the coroner's inquest, we are entitled to all that he said at the inquest. They cannot select out a part and exclude us from showing all that he said.

By the Court: I think not, Mr. Barker, no more than if a witness would testify to one fact about a case, you could ask him about everything else, unless they hinged together so that one drew out the other. If he had asked Mr. Green if John H. Brown at the coroner's inquest gave a version of the affair differing from that which is alleged to be in the confession, then you might ask your question.

The Court thereupon sustained the objection, to which action and ruling of the court the defendants at the time duly excepted.

674. Q. At the time the coroner's inquest was being held, was there many or few people there?

A. There was a large number of people there.

Q. You spoke about pictures being brought there. I will ask you what was done with those pictures at the time of the inquest, whether they were in the hands of the bystanders?

A. They were exhibited there and were examined by the bystanders, a large number of them looking at them. They were passed from hand to hand.

Q. I will ask you to look at exhibit number 10, and state whether that picture was produced by any one on that occasion and when, if ever, you first saw that picture. That is, exhibit number 10 in this trial, I mean?

Counsel for the plaintiff objects to the question as not proper cross-examination.

The court sustained the objection, to which action and ruling of the court the defendants and each of them at the time duly excepted.

Q. The pictures that were there—have you any knowledge of what became of them?

A. I have not; so far as I know, they were returned to the plaintiff.

Q. Now, you were interrogated in regard to what certain papers were presented at that time which they claimed to have been found upon the body of Hillmon. You may state what papers those were?

A. There was a discharge—

Q. (Interrupting) What do you mean by that? His army discharge?

A. Yes, sir, Hillmon's discharge as a soldier from the army of the United States.

Q. And what other papers?

A. There was what purported to be a diary kept by John W. Hillmon. There were some, if I recollect right now, there were some old bills of lading, but my memory is more indistinct as to those than the other two.

Q. Do you remember of any letter or letters being there?

A. No.

Q. Now, I will ask you if the army discharge and the book, the diary, had been produced upon any of these trials by the plaintiff or her attorneys?

Counsel for the plaintiff objects to the question because the same is not proper cross-examination.

The court overruled the objection, to which ruling and action of the court the plaintiff at the time duly excepted.

A. They have.

Q. Now, I will ask you what attorneys were present at that coroner's inquest—I will ask you if Mrs. Hillmon was
675 represented by attorney upon that occasion, and if so, by whom?

Counsel for the plaintiff objects to the question because the same is not proper cross-examination.

The Court overruled the objection to which ruling of the Court the plaintiff at the time duly excepted.

A. Mr. Borgalthaus appeared there for her.

Q. Who was Mr. Borgolthaus?

A. Mr. Borgolthaus was a lawyer, living at that time at Lawrence and one of the original attorneys in this suit. He has since moved to Minneapolis, Minnesota.

By the Court: How do you know, Mr. Green, that Mr. Borgolthaus appeared for Mrs. Hillmon when you don't know for whom Mr. Munn appeared.

A. I know that he represented and did appear there for Mrs. Hillmon.

By the Court: I don't mean at the inquest; I mean later. (No response.)

By Mr. Hutchings: You don't know anything about Mrs. Hillmon's employing Mr. Borgolthaus, do you?

A. I wasn't present when she employed him, no sir.

Q. He just simply appeared there and asked questions?

A. He appeared there at the inquest and did ask some questions and she was present at the time.

Q. What do you mean by acting as though he represented her? A. Objecting to questions.

Q. That were asked? A. Yes, sir.

Q. Did he ask questions of any of the witnesses?

A. He did not; yes he asked a question, but—

Q. (Interrupting) Of what witness?

A. I don't remember now which witness.

Q. Now, in relation to these orders which you testified to as having been given to Mr. Wheat for these insurance policies; will you produce those, the orders that were given—that were obtained from Mrs. Hillmon at Leavenworth by Buchan.

A. (Witness hands paper to counsel. Said paper is marked Ex. 19.)

By Mr. Hutchings: We offer this in evidence for the purpose of examining the witness concerning it. (Admitted.) (See next page for exhibit 19.)

Excused.

676 Exhibit K. A. F.

J. B. Lamber, Proprietor. Planters House,

Leavenworth, Kansas, Sept. 15, 1879.

To Mesr. Clough and Wheat, Samuel Riggs and Borgalthaus.

Gentleman:—Please deliver to W. J. Buchan the following insurance policies on the life of my husband John W. Hillmon: Policies Nos. 134418 & 134548 issued by the New York Life Insurance Compy N. Y. for five thousand dollars each; Policy No. 195132 issued by the Mutual Life Ins. Company of N. Y. for ten thousand dollars, and Policy No. 153614 issued by the Connecticut Mutual Life Ins. Co. of Connecticut, and oblige.

S. E. HILLMON,

No. 1, O. P. S.

Order of Mrs. Hillmon for the policies Spt. 15, 1879—
Lawrence, Kans.

Mers. Clough & Wheat,
Saml Rigs & Borgholthaus,
Attys.

Gentlemen:— Please deliver the within numbered policies to the agents of the said companies herein named.

Sept. 20, 1879.
Ex. 17, A. P. B.

W. J. BUCHAN,
Exhibit No. 19.
Oct. '99, W. C. H.,
Judge.

677 The plaintiff next read in evidence, the depositions of

Jacob Frazier,
S. A. Ferguson,
Charles Chadwick,
John W. Upperman,
Harvey M. Davis,

taken at Medicine Lodge, Kansas, on the 10th day of May, 1881, which said depositions are, respectively, in words and figures as follows, to wit:

678 S. A. Ferguson, which is in words and figures as follows, to wit:

S. A. Ferguson, of lawful age being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeth and said that:

1 Q. Do you remember the circumstance of a man being killed near the residence of Phillip B. Briley in March, 1879, Barbour county, Kansas? 1 A. Yes, sir.

2 Q. State what you know if anything in reference to the body of the dead man above mentioned being brought to Medicine Lodge? 2 A. He was brought there.

3 Q. How do you know?

3 A. I was one of the parties that came with it.

4 Q. State if you know when, where and under what circumstances the body was buried?

4 A. He was buried the next day after he was found in Medicine Lodge graveyard. Well there was a hymn sung. Mr. Cornelius led in prayer at the grave.

5 Q. Who is Mr. Cornelius?

5 A. Mr. Cornelius was a Methodist minister living in Medicine Lodge at that time.

6 Q. State whether you saw the body in the camp near the residence of Mr. P. B. Briley?

6 A. I didn't see it in camp.

7 Q. State if you saw it [—]all before it was brought to Medicine Lodge? 7 A. No, sir, I did not.

8 Q. State whether you were in a camp near Mr. P. B. Briley's where the dead body above mentioned was found?
8 A. I was not.
9 Q. State what was done with the body after it was brought to Medicine Lodge on the night of the 19th of March, 1879?
9 A. It was laid in a house right this side of the Index office.
10 Q. State what was done with the body the next morning before burial?
10 A. It was washed, face shaved, dressed and placed in the coffin.
11 Q. Who washed the body?
11 A. Myself and John Upperman.
12 Q. Who shaved its face?
679 12. A. William Walt.
13 Q. State what beard was on the face before it was shaved.
13. Q. His beard was very short; think it was not a black, but a lightish color.
14 Q. State whether it had a mustache.
14 A. Yes, sir.
15 Q. Describe it.
15 A. It was light in color; it wasn't white.
16 Q. State if there was any beard on the chin.
16 A. There was a beard on the chin; it was not [—] long beard I think; don't exactly remember.
17 Q. Aside from the mustache, how old was the beard on the face?
17 A. I would suppose it was about 6 or 7 days since he had shaved.

Cross-examination

By Defendants Counsel, Geo. J. Barker:

18 Q. In March, 1879, where were you living?
18 A. Living on Elm Creek.
19 Q. In Barbour County State of Kansas?
19 A. Yes, sir.
20 Q. In what business were you engaged?
20 A. Farming.
21 Q. And you are living at the same place yet?
21 A. Yes, sir.
22 Q. How far from the residence of P. B. Briley?
22 A. About 4 miles.
23 Q. Do you remember the character of the weather on the 19th or 20th of March, 1879?
23. A It was very muddy and chilly on both of those days.
24. Q Where was this body when you first saw it?

24. A It was in the wagon near the corner of Mr. Iliff's stable at Medicine Lodge, Kas.

25 Q. Do you know whom, if anybody sat up with the remains on the 19th or 20th of March, 1879?

25 A. I do not.

26 Q. Did you? 26. A. No, sir.

27 Q. Where were you on the night of the 19th of March, 1879?

27 A. I can't tell you because I don't know what day of the month we were here.

28 Q. Where did you stay the night before this body was buried?

28 A. In Medicine Lodge, Kas. I think to the best of my recollection, I slept in a stable; Mr. Iliff's stable.

680 29. Q. Who staid with you?

29 A. Mr. G. W. Paddock, to the best of my knowledge, I don't remember of any one else staying with us.

30 Q. What time in the evening before the body was buried did you last see it?

30 A. Between 8 and 9 o'clock, I think, I cannot say the exact hour.

31 Q. Who was with you?

31 A. Mr. William Walt, Mr. G. W. Paddock, and Mr. J. Brown.

32 Q. Where was the body lying then, in what part of the house? 32 A. Lying very near the center of the house.

33 Q. Who occupied that house at that time?

33 A. It was not occupied, no one living in it at that time.

34 Q. How long did you and Mr. G. W. Paddock remain in the house the last time you were there the evening before the body was buried?

34 A. I guess between 5 and 10 minutes.

35 Q. Who was there when you went in?

35 A. No persons in there only those who went in with me.

36 Q. Whom did you and Mr. G. W. Paddock leave there when you went away? 36 A. We left no one there.

37 Q. What time did you next visit that house where the body was and who was with you?

37 A. Suppose it was about 6 or 7 o'clock the next morning. Mr. G. W. Paddock, Mr. William Walt and Mr. John Upperman, I think. This man Brown was with us.

38 Q. Do you know where this man Brown staid that night? 38 A. I don't know.

39 Q. Do you remember whether he staid with you and others at Iliff's stable or not?

39 A. I don't think he did.

40 Q. Are you positive he did not?

40 A. I am not positive he did not stay in the stable.

41 Q. Were you present at the time the body was being washed, shaved, dressed preparatory to its burial?

41 A. Yes, sir.

42 Q. To what extent was the clothing removed from the body?

42 A. A pair of shoes taken off, a pair of socks, a pair of pants, coat, vest, shirt, undershirt and a pair of drawers all taken off and replaced with others.

43 Q. What clothes was he buried in?

43 A. We put a pair of drawers; I can't say positively whether I put a pair of drawers on him or not; put a pair of pants on him, put a shirt on him, can't say whether I put two shirts on him or not. put a pair of socks on him, put a
681 vest on him and coat, I believe a pair of gloves, put a necktie on him. I won't say positive to the best of my recollection that was the manner in which he was dressed at time of burial.

44 Q. You have stated you accompanied body to the grave.

44 A. Yes, sir.

45 Q. State the names of all the persons who was present at the time this body was washed, shaved and dressed?

45 A. Mr. William Walt, Mr. John Upperman, Mr. John Brown and myself. Citizens passed in and out during the time we were washing, shaving and dressing him. I wouldn't or couldn't call any of their names.

46 Q. You are positive regarding Brown being present at that time?

46 A. Yes, sir, he was present. I won't say positive he remained in the house all the time we were washing, shaving and dressing him. He helped me to take the clothes out of the trunk we put on the body.

47 Q. What time did the procession start for the cemetery.

47 A. Between 10 and 11 o'clock in the forenoon as near as I remember.

48 Q. You may state the names of all the persons who went to the cemetery with that body.

48 A. Mr. William Walt, Mr. John Upperman, Mr. Cornelius, Mr. Brown, Mr. Eli Osborn, that is all I remember going with us.

49 Q. Were there any other persons at the grave other than the persons who went with you? 49 A. I think not.

50 Q. Are you positive in regard to that?

50 A. I don't remember of anyone being there but those that went with us.

51 Q. Where did Mr. Cornelius meet the procession?

51 A. I don't know whether he started with us or not.

52 Q. Where did you first see him on that occasion?

52 A. I think it was right along in front of this building about 150 yeards north of the place from which we started towards the cemetery.

53 Q. Was the lid of the coffin fastened on before you started toward the cemetery? 53 A. Yes, sir.

54 Q. Closed down? 54 A. Yes, sir.

55 Q. Was the lid of the coffin removed at the grave before burying? 55 A. No, sir.

56 Q. Through a glass or in any other way was the corpse visible after the coffin was closed? 56 A. No, sir.

57 Q. About what time did the procession return?

57 A. I think about 12 o'clock.

682 58 Q. What was done with the shoes taken from the feet of this body?

58 A. They were left in the house until we returned and then they were put in the trunk with the other things. The same trunk from which the clothing was taken that was put on the body. I had the key of the trunk at the time the shoes were put in.

59 Q. Who unlocked the trunk at the time the clothing was taken out? 59 A. I believe I did.

60 Q. Who did you get the key from?

60 A. I got it from Mr. William Walt.

61 Q. What did you do with the key after you put the [keys] in the trunk? 61 A. I kept it in my pocket.

62 Q. Did you see Mr. G. W. Paddock when he started for home that day? 62 A. Yes, sir.

63 Q. Did you go with him? 63 A. Yes, sir.

64 Q. This man Brown go with him?

64 A. Yes, sir.

65 Q. Take this trunk along? 65 A. Yes, sir.

66 Q. You left Brown and Mr. G. W. Padodock where that day? 66 A. They left me at home.

67 Q. Who was there with Brown and Paddock when they left you at home?

67 A. I don't remember as there was any one with them.

68 Q. How far do you live from G. W. Paddock?

68 A. One-half a mile.

69 Q. Had you ever seen Brown before this occasion?

69 A. No, sir.

70 Q. When did you next see him after he and Mr. G. W. Paddock left you at your house?

70 A. I saw him the next day.

71 Q. Did you see him daily for sometime thereafter?

71 A. I think I did, there may have been one day I didn't see him while he remained there.

72 Q. Did you close the grave after the coffin was put in?

72 A. I helped to do it.

73 Q. Who else was there during all the time that was being done?

73 A. Mr. William Walt, Mr. John Upperman, Mr. Eli Osborn, Mr. Cornelius, Mr. Brown. That is all I remember of being there.

74 Q. Was there a colored man at or about the grave that day? 74 A. I don't think there was while I was there.

683 75 Q. State whether there was or not if you know?

75. A. I do not know.

76. Q. Did you dig the grave? 76. A. No, sir.

77 Q. Did you see it while it was being dug or do you know who did dig it?

77 A. I did not see it while it was being dug nor do I know who did dig it.

S. A. FERGUSON.

Charles Chadwick, of lawful age being by me first duly examined, cautioned and solemnly sworn to testify the truth the whole truth and nothing but the truth, deposeth and said that:

1 Q. State your name, age, residence and occupation?

1 A. Charles Chadwick is my name; age is 60; reside on Elm Creek, Barbour County, Kansas; occupation, farming, and raising a few calves.

2 Q. State if you remember the circumstance of the finding of a dead body near Mr. P. B. Briley's in Barbour County, Kansas, in the month of March, 1879? 2 A. I do.

3 Q. When did you first see that body?

3 A. I suppose it was on the 19th of March, 1879.

4 Q. What time in the day?

4 A. About 9 or 10 o'clock in the forenoon.

5. Q Where did you first see this body?

5 A. On the spring branch up above Mr. Briley's.

6 [A.] Describe the location of the place where you first saw the body?

6 A. The body laid on the east side of the branch.

7 Q. In what position did the body lay?

7 A. On the back.

8 Q. Describe fully the surrounding and location of the place the body was first seen by you?

8 A. The ground was a small valley a little branch, rather uneven on each side, sloping from the east and west both. Some draws running in from each side but none very large, no particular hills. That is as well done as I can do it.

9 Q. State whether an inquest was held on the body after you notified them. 9 A. There was.

10 Q. State what effects were found on the body if any?

10 A. There were some deeds and papers, a pocket book, $25.00 in money, one or two pictures.

684 11. Q. Look at the book now shown you and state whether or not that book was found on the body.

11 A. I couldn't say that was the one but I know he had something like it.

12 Q. State whether anything else was found in the camp?

12 A. There were some cooking utensils, a trunk, valise, blankets and so on.

13 Q. State whether a wagon and horses was found in camp?

13 A. A spring wagon was in camp close by the fire and ponies were close by.

14 Q. State whether you found any firearms there?

14 A. There lay a gun with a short barrel and tolerable big bore.

15. Q. Where was this gun when you first saw it?

Counsel for the defendants object to the answer to the above question because the same is incompetent, irrelevant and immaterial.

By the Court: The objection will be overruled, except as to what Brown said.

To which ruling of the Court the defendants and each of them at the time duly excepted.

15 A. The way I came to see the gun after we had empaneled the jury I had Mr. Brown to show to the jury how the thing happened before we, the jury, went off to one side, and then Mr. Brown went to the wagon took his left hand raised the wagon sheet, drawed the gun and as he drawed it he said the gun went off and killed the man standing by the fire. That is how I come to see the gun.

16 Q. State whether you were a member of that coroner's jury. 16 A. I was.

Cross-examination

By Defendants' Counsel Geo. J. Barker:

17. Q How far do you live from Mr. P. B. Briley's?

17 A. Not quite two miles—right down the branch.

18 Q. Which direction does the branch run?

18 A. Nearly north and south.

19 Q. How far did you live from this camp?

19 A. Not quite 3 miles.

20 Q. When you got to camp that morning who did you find there?

20 A. I found John Chadwick, William Riggins and a young man who worked for Mr. Dray and I think Mr. Castine.

21 Q. Are the above names all the persons you found when you got to the camp in [—] morning?

21 A. To the best of my knowledge they were.

22 Q. Who went there with you?

685 22 A. Jeff Logan, G. W. Paddock, William Walt, James Chadwick, Jeff Chadwick and after we left my house Mr. Potter and Mr. Dray fell in.

23 Q. That was the first time you saw this body was it?

23 A. No, sir.

24 Q. Had you been at that camp before?

24 A. Yes, sir.

25 Q. When? 25 A. The night before.

26 Q. Whom did you find at the camp the night before?

26. A. When we got up there we found nobody but Brown.

27 Q. What time did you arrive at camp that night?

27 A. Seven or 8 o'clock at night.

28 Q. Who went with you?

28 A. William Riggins, John Chadwick, James Chadwick and Jack Chadwick.

29 Q. Are these Chadwicks relatives of yours?

29 A. My sons.

30 Q. How long did you remain there that evening?

30 A. About an hour.

31 Q. Whom did you leave there when you went away?

31 A. John Chadwick, William Riggins a young man who worked for Mr. Dray and Brown.

32 Q. What was the condition of camp then?

32 A. Rather pretty cold.

33 Q. Was it cold weather there?

33 A. Wind blew pretty cold.

34 Q. Do you remember the position of the wagon which way it was facing?

34 A. The tongue rather to the southwest.

35 Q. Which way was the camp fire from the wagon?

35 A. On the west.

36 Q. And the body was lying in that direction; the head?

36 A. On directions I am not first rate after night but I would say though it laid rather to the northeast.

37 Q. How far from the fire?

37 A. Pretty close to the fire, probably 4 feet from the fire at that time; I mean that night.

38 Q. Which was the fire the nearer to the feet or head of the body? 38 A. I can't say which.

39 Q. Do you remember the position of the hands and feet of the body? 39 A. I do.

40 Q. How were the hands lying?

40 A. His right hand lay pretty close to his body, left one extended. His feet pretty close together. His legs lying straight out, the body lying on its back, some little

686 pieces of wood or brush were under the body.

41 Q. What examination of the body did you make that night?

41 A. None whatever. Of course I had to see that hole in his head but I don't call that an examination.
42 Q. Did you observe blood upon the face of the body that night? 42 A. I can't say that I did.
43 Q. Did you the next morning?
43 A. I don't think that I did.
44 Q. Will you give us the names of the persons who composed the coroner's jury?
44 A. Jacob Frazer, Jeff Logan, John Castine, myself, William Riggins, Joseph Dray.
45 Q. From the wagon to the camp fire did the ground descend or was it level?
45 A. It descended some, not much.
46 Q. What time did you leave this camp that morning?
46 A. When we left the camp it was probably about noon.
47 Q. You did not accompany the remains to town?
47 A. No, sir; just as far as my house. I live on the road.

CHARLES CHADWICK.

The hour of 12 m. having arrived, the Court arose and took a recess till 2 o'clock p. m.

Afternoon session. Parties present as before. The plaintiff read in evidence the deposition of Jacob Frazier. It is in words and figures as follows, to wit: (Exhibit A to these depositions is the same as Exhibit 20 at this trial.)

Jacob Frazier, of lawful age, being by me first duly examined and solemnly sworn to testify the truth the whole truth and nothing but the truth, deposeth and said that:

1 Q. State your name, age, residence and occupation.
1 A. My name is Jacob Frazier; age, I am 57 years; I live on Elm Creek, Barbour County, Kansas; about 11 miles from Miles nearly north of Medicine Lodge, Kas.; my occupation is farming.
2 Q. Do you remember the circumstance of a man being found dead in the neighborhood of Mr. P. B. Briley's in March, 1879? 2 A. I do.
687 3 Q. State when and where you first saw that dead body?
3 A. I seen that dead man about the 18th of March, 1879 in the evening about 7 or 8 o'clock on this crooked creek above Briley's about ¾ of a mile I think.
4 Q. When you first went to the place where the dead body was who did you find there?
4 A. Brown I think was all that was there.
5 Q. Who was Brown?
5 A. I don't recollect his initials he was the man at and with the camp.

6 Q. Who went with you to the camp?
6 A. Charles Chadwick, John Chadwick, William Riggins.
7 Q. Where did you find the dead man when you got to the camp?
7 A. I found him laying on the south side of the camp fire I think, his body was laying on the ground.
8 Q. How long did you remain at the camp that night?
8 A. Until about 2 o'clock in the morning.
9 Q. From the time you got to the camp until you left it at two o'clock in the morning, what if any changes had been made in the appearance or position of the body?
9 A. No changes that I could perceive.
10 Q. After you left at 2 o'clock did you return to the camp? 10 A. I did.
11 Q. At what time?
11 A. About 10 o'clock the same morning.
12 Q. How long did you then remain?
Ans. Until 1 o'clock in the afternoon.
13 Q. Did you leave the camp at that time when the body was taken away? 13 A. I did.
14 Q. From the time that you left at 2 o'clock in the morning until you returned about 10 o'clock of the same morning, what if any changes had been made in the appearance or position of the body? 14 A. None that I could see.
15 Q. When you first went to the camp in the evening what if any wounds did you see upon the person of the dead man?
15 A. I see a bullet hole on each side of his head a little behind and above the ear.
16 Q. Were you present when an inquest was held upon the body of the man? 16 A. I was and I was a juror.
18 Q. State who if any person made an examination of the wearing apparel of the dead man and by whose directions such examination was made?
17 A. I made examination, was appointed by Esquire G. W. Paddock who was acting as coroner.
18 Q. State as specifically as you can what articles in the clothing of the dead man and where each article was found?
18 A. I found a pocket-book in his left pants pocket
688 containing $25.00 in money, also a book a small account book in his hip pocket of his pants containing a satchel key, a ladies' photograph inside of it. I found other letters and papers in his vest pockets, and also his inside coat pocket. I believe that is all the articles attached to his person.
19 Q. Look at the book now shown you by S. A. Riggs, attorney for the plaintiff, and state whether or not it is the book which you speak of as having been found in the hip

pocket of his pants and as having contained the satchel key?

19 A. It is, I think, the book.

20 Q. What makes you think so?

20 A. From the appearance of the book and the figures that were in the book when I examined the book, and the pocket that the key was in and the photograph that was in the book. (Notary here at request of plaintiff, marks the book upon one of the fly-leaves exhibit A" and signs upon the same leaf his name and official character.)

21 Q. State what you did with the articles described which were taken from the pockets of the dead man?

21 A. I passed them to William Walt.

22 Q. State what other articles of personal property you found and saw in and about the camp, belonging to the camp?

22 A. I found some cooking utensils 1 satchel to which the key belonged, 1 trunk, some bed clothes, a spring wagon, a pair of ponies, a breech-loading gun. That I believe is all.

23 Q. What became of the articles you have last enumerated, who took possession of them?

23 A. William Walt and Mr. G. W. Paddock.

24 Q. What was done at the coroner's inquest the next mornig?

Counsel for the defendants objects to the question as incompetent irrelevant and immaterial.

The Court sustained the objection to which ruling of the court the plaintiff at the time duly excepted.

689 The further taking of these depositions is adjourned by consent until tomorrow morning at nine o'clock. L. T. Hartman, Notary Public.

May 12, 9 o'clock A. M. The further taking of these depositions is hereby resumed.

Cross-examination

By Defendant's Counsel, Geo. J. Barker:

25 Q. Where were you living in March, 1879?

25 A. Living on Elm Creek, Barbour County, about 11 miles north of Medicine Lodge.

26 Q. How far from the residence of P. B. Briley's and in what direction?

26 A. About 1½ miles about nearly south.

27 Q. How did you happen to go up to that camp that evening?

27 A. Mr. John Chadwick came to my house and told me there was a man shot above Briley's and wanted me to go with him and I went with him.

28 Q. When you got to this camp you found this man Brown there did you? 28 A. Yes sir.

29 Q. Was that the first occasion of your meeting or seeing Brown? 29 A. It was.

30 Q. I wish you would describe fully as to the position of the wagon, the direction in which it was standing, the direction and distance of the camp fire from the wagon?

30 A. Well it was standing with the tongue that is to the southeast, with the side of the wagon, that would be the southwest side of the wagon toward the camp fire. The camp fire was from the wagon between 10 and 12 feet. The camp fire was south of west of the wagon.

31 Q. Where was the body lying with reference to the camp fire and in what direction was the head of the body lying?

31 A. The body was lying southwest of the camp fire nearly south with its head nearly to the east.

32 Q. How far was the body lying from the wagon?

32 A. Well I should judge it from the wagon to the body to be from 12 to 15 feet.

33 Q. Which portion of the body was nearer the wagon?

33 A. I should think the head was a little the nearest, not much to the forepart of the wagon.

34 Q. What position did the body lie with reference to the wagon?

34 A. It didn't lie exactly square with the wagon the head was lying more east than south and the feet was west, so that it did not exactly square with the wagon.

690 35 Q. What was the position of the hands and feet of the body when you first saw it?

35 A. One of the hands, the left was lying extended from the body, the right hand kinder folded across the body and his feet was drawn south of west away from the fire. I think the feet were close together. The legs were kinder pulled around. I wouldn't say whether they were right straight or crooked.

36 Q. Was the camp fire burning when you got there?

36 A. There was some fire burning not very much.

37 Q. Do you remember what the character of the weather was on this day?

37 A. I don't through the day at that time. I [do] the wind was blowing pretty cool from the northwest. It was too cool to be comfortable.

38 Q. What was the position and character of the ground from the wagon in the direction to where the body lay?

38 A. It descended some a little from the wagon to the body. The wagon stood on a little higher ground than where the body law.

39 Q. You may state answer as you can how much of a descent there was between the wagon and the body.

39 A. I should say there was twelve inches or more or probably a little more.

40 Q. On this occasion you remained how long?

40 A. Until about 2 o'clock in the morning and returned about 10 o'clock the same morning.

41 Q. This inquest of which you have spoken was held on the morning after you returned?

41 A. It was.

42 Q. The conversations or statements of the man Brown to which you testified in your direct examination were mad at this inquest held at least as late as ten o'clock the next morning were they not? 42 A. Yes sir they were.

43 Q. What was upon the feet of the body when you first saw it, boots or shoes?

42 A. I can't hardly answer that question in that way because I didn't take any notice to his feet the first time I saw the body. Don't know what he had on at that time. When I first observed the feet and noticed what he had on he had on shoes. That was when I returned at 10 o'clock the next morning.

44 Q. It was quite dark when you got to this camp in the evening was it not? 44 A. It was.

45 Q. It was so dark that you could not see distinctly what there was in and about the camp was it not?

691 48 Q. It was.

46 Q. You made no investigation nor examination of the body and what there was in and upon it that night did you?

46 Q. I looked at the face of the dead body and see there was a bullet hole through the head and made no other examination that night.

67 Q. Did you make any examination of the wagon, trunk or valise that night? 47 A. I did not.

48 Q. Were any examinations or investigations of the character indicated by the above questions made that night by any other person in your presence?

48 A. None that I know of.

49 Q. In what pocket did you find the pocket book of which you spoke in your direct examination?

49 A. His left pants pocket.

50 Q. Where abouts in the pocket did you find it in the top or bottom of the pocket.

50 A. I think it was at the bottom of the pocket. The pocket was very shallow; wouldn't more than hide the pocket book very much.

51 Q. While you were making this examination of the clothing of the deceased, who were standing by so they could observe what you were doing?

51 A. William Walt was and the whole jury might have seen it but I don't remember of any one standing right by and looking on but William Walt.

52 Q. Do you know where Brown was while you were making this examination?

52 A. I do not but suppose he was in camp; saw him after I got through making examination of the body.

53 Q. Where is William Walt now if you know?

53 A. He is in Washington Territory, Louis County, Silver Creek Post Office is his address.

54 Q. When was the last time you saw this man Brown?

54 A. When I got out of the wagon 1-2 a mile east of my residence the same day the inquest was held that I recollect of.

55 Q. Did you examine the contents of the wagon the next morning? 55 A. I did.

56 Q. What did you find in the wagon?

56 A. I found a trunk, bed clothes, valise and a gun. I believe that is all that I found in the wagon.

57 Q. Did you examine the contents of the valise?

57 A. I did.

58 Q. Of the trunk? 58 A. I did.

59 Q. In the trunk what boots or shoes did you find?

59 A. I don't recollect what boots and shoes we did find whether any or not.

692 60 Q. Were there any boots or shoes in the valise or about the wagon?

60 A. I don't think there was in the valise don't recollect of any body what was on the feet.

61 Q. You personally examined the contents of the trunk, valise and wagon for the purpose of ascertaining what there was there or not did you not?

61 A. We examined the trunk, valise and wagon for the purpose of leading us how this man came to his death. I personally took part in this examination.

Redirect Examination

By Plaintiff:

62 Q. State whether or not among the articles you found in or about the camp there were any rubber boots?

62 A. I don't recollect of seeing any loose boots, or shoes on the camp ground.

Recross-Examination

63 Q. Did not this man Brown have a pair of rubber boots the first time you saw him or sometime during the times you saw him at this camp?

63 A. I did not see any on him at any time.

JACOB FRAZIER.

Harry M. Davis, of lawful age being by me first duly examined, cautioned and solemnly sworn to testify the truth the whole truth and nothing but the truth deposeth and said that:

1 Q. State your name, age, residence and business?

1 A. My name is Harry M. Davis; my age is 35 years, my residence is Medicine Lodge, Barbour County, Kansas and am a lawyer by profession, at present justice of the peace.

2 Q. How long have you resided in Barbour County and Medicine Lodge?

2 A. I came to Kansas in 1876 and have resided in Medicine Lodge ever since.

3 Q. Do you remember the circumstances of the dead body of a man being brought into Medicine Lodge from the north on or about the 19th day of March, 1879? 3 A. I do.

4 Q. State whether or not you saw that body and if so state when you first saw it and at what time in the day?

693 4 A. I saw a dead body on the day above mentioned, the first time lying in a wagon, which was standing near Iliffs livery stable. It was in the afternoon, it was late in the afternoon, but I don't know the time.

5 Q. If you saw that body afterwards state where you saw it, when and how often?

5 A. I saw the same body next morning lying in a building on the east side of Main street, Medicine Lodge, 3 doors south of Kansas Avenue and it was the building that had been occupied by the Barbour County Mail it is the first door north of the present Index building. I was in there two or three times that morning.

6 Q. What was the condition of the body that morning as to being prepared for [for] burial or otherwise when you saw it?

6 A. It was prepared for burial lying in a coffin. The face had been shaved and the body dressed.

7 Q. What changes had been made in the appearance and dress of the body from the time you had seen it the evening before?

7 A. The evening before the face was covered with a short growth of beard and the clothes were considerably worn. Next morning the body was dressed in different clothes, the face had been shaved as above described. I guess that is about all the change.

8 Q. State as nearly as you can the color of the hair of the dead man and whether it was straight, curly or wavy?

8 A. The hair was brown when I saw it in the evening, it had a bushy appearance being ruffled next morning it had been combed and appeared glossy and wavy.

9 Q. Was it a dark or light brown?

9 A. It was dark brown.

10 Q. Describe as nearly as you can the color, shape and condition of his beard?

10 A. The color was light brown, several shades lighter than his hair. It was a light beard in body. I should think about 4 weeks old.

11 Q. Describe his beard upon the upper lip if any?

11 A. He had a light mustache, in body.

12 Q. Look at the picture now shown you which the Notary is requested to mark Exhibit B, and attach to this deposition and state whether or not the hair of the body at the time you saw it, after it was prepared for burial had the appearance of the hair in the picture and if not describe as near as you can the difference?

12 A. It had not the same appearance. The difference being as I before stated when I last saw the body, it had a wavy appearance and in the picture it looks to be curly or
694 ruffled which I am not able to determine.

13 Q. State whether or not you ever saw living the body that you saw in the wagon and building as above described by you, if so, state when, where and under what circumstanmes?

13 A. I saw a man in Medicine Lodge in the winter of 1878 I think it was some time in December, represented to be a man

The defendant objects to the witness stating what, or any representations made for the reason that such evidence is incompetent and hearsay.

The Court sustained the objection to which ruling of the Court the plaintiff at the time duly excepted.

14 Q. State whether or not you had any conversation with the man you say you met and saw as above in December, 1878?

14 A. I did.

15 Q. How many and how long conversations did you have with him?

Objected to by defendant for the reason it calls for incompetent and irrelevant testimony.

The Court overruled the objection to which action and ruling of the Court the defendant at the time duly excepted.

15 A. The conversation I had with him personally was not long, simply to make some inquiries, but was with him

in conversation in connection with others at two [at two] or three other times. I don't recollect how long.

16 Q. State your best judgment as to the length of time covered by the conversations in connection with others referred to in your last answer?

16 A. These conversations were had in the office at Iliffs Livery Stable I was in the habit of going in there frequently but have no recollection as to the time covered by any of these conversations.

17 Q. State whether or not at the time you saw the dead body in Medicine Lodge you saw a man called J. H. Brown, if so where and under what circumstances you saw him at that time?

17 A. At the time I went to the wagon there was a man standing near the wagon with Mr. William Walt who said his name was Brown.

18 Q. Did you attend the coroner's inquest held upon that body in Medicine Lodge, if so, how if any way did you participate in such inquest?

18 A. I was requested by the county attorney, B. P. Ayers, to attend the inquest and reduce the testimony to writing which I did.

19 Q. Did you hear the man whom you have described as Brown in a former answer and whom you saw standing near the wagon, examined as a witness at that inquest and did you hear him at that time and in that examination
695 state what his own name was? 19 A. I did.

20 Q. What did he then say his name was?

Counsel for the defendant objects to the question because the same is incompetent, irrelevant and immaterial. The Court overruled the objection to [to] which action and ruling of the Court the defendant at the time duly excepted.

20 A. After he was sworn to testify by the coroner, county attorney asked him to state his name and he said it was J. H. Brown.

21 Q. State whether or not you had ever seen that man who called himself J. H. Brown before the time you saw him standing at the wagon as you have described, if so when and where?

Counsel for the defendants object to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which action and ruling of the Court the defendants and each of them at the time duly excepted.

21 A. I think I saw this man in company with Hillmon in the winter but at that time I don't recollect as having heard his name.

Cross-examination

By Defendant's Counsel, Geo. J. Barker:

22 Q. How long have you lived in Medicine Lodge?
22 A. Between 4 and 5 years.
23 Q. Where did you live prior to coming to Medicine Lodge?
23 A. State of Indiana, Grant county, Fairmount.
24 Q. What business were you engaged in there?
24 A. No business just before I came here.
25 Q. How long did you reside in Fairmount?
25 A. I was born within about 2 miles of there; have lived there at different times until I came west.
26 Q. At what other places did you live besides Fairmount?
26 A. Jonesborough and near Marion, Anderson, Indiana and Indianapolis.
27 Q. From what time until what time did you live in Jonesborough?
27 A. I went to school at Jonesborough, in the spring and summer I think of 1862 or 1863, was afterwards employed by a merchant as clerk and remained there until a short time previous to enlisting in the army.
28 Q. How long did you live in Jonesborough?
28 A. I lived there before and after I went into the army; I don't know how long.
696 29 Q. How many years did you live there?
29 A. I don't know its a good while ago.
30 Q. From what time until what time did you live in Anderson?
30 A. Went to Anderson in March, 1868, lived there until June 1869.
31 Q. What business were you engaged in at Anderson if any?
31 A. First as clerk in a grocery then engaged in buying and shipping produce.
32 Q. For whom did you clerk in the grocery?
32 A. D. H. Patterson.
33 Q. From Anderson where did you remove to?
33 A. Near Marion.
34 Q. From what time until what time did you live at Marion? 34 A. One summer.
35 Q. The summer of what year?
35 A. The summer of 1861 I think.
36 Q. What were you engaged in that summer?
36 A. Farming.
37 Q. From Marion where did you remove?
37 A. To Anderson.

38 Q. From what time until what time did you live in Indianapolis?

38 A. 1866 and 1867. I don't remember what time in 1866, but lived at Indianapolis about one year. I lived in Indianapolis before I lived in Anderson.

39 Q. What business were you engaged in at Indianapolis?

39 A. First I traveled for a wholesale house. Second was employed as route agent on the Daily Evening Commercial.

40 Q. From Indianapolis where did you remove?

40 A. Went to Fairmount.

41 Q. What business were you engaged in at Fairmount during any and all times you resided there?

41 A. Was raised on a farm near Fairmount; have clerked at different times for merchants at Fairmount.

42 Q. In what year did you leave Fairmount permanently?

42 A. The fall of 1876.

43 Q. Did you come direct from there to the state of Kansas? 43 A. I did.

44 Q. What time did you arrive in Medicine Lodge, Kansas?

44 A. I think it was the 18th day of September.

45 Q. In what business did you first engage in when you first came to Medicine Lodge?

45 A. I think the first thing I done was to carry the hod for Charlie Ellis over here in building a brick house.
697 I taught school here the winter of 1876 and 1877.

46 Q. What business did you next engage in?

46 A. I was admitted to law practice in the spring of 1877.

47 Q. Where? 47 A. Barbour county, Kansas.

48 Q. Had you been admitted to the bar previous to that time? 48 A. I had not, sir.

49 Q. With whom did you read law?

49 A. I never read law with anyone. I recited at different times to A. M. Raper, Fairmount, Indiana, and Joseph Smith of Anderson, Indiana and Howell D. Thompson of the same place, was reading in the office of my brother previous to coming here.

50 Q. Did you read in the office of any lawyer here in this state?

50 A. There was no office here when I came. I had access to Whitilaws library also Mr. Ellis' that's all.

51 Q. After your admission to the bar in 1877, in what other business had you been engaged except the practice of law?

51 A. Teaching school, clerking, filling the office of Police Judge and Justice of the Peace.

52 Q. From what time until what time did you teach school since your admission to the bar?

52 A. From some time in October, 1877 to some time in February, 1878.

53 Q. Where did you teach?

53 A. Barbour County District No. 4.

54 Q. Does that include Medicine Lodge?

54 A. No, sir.

55 Q. How far is the school house of District No. 4 from Medicine Lodge?

55 A. I think it about 12 miles.

56 Q. For whom did you clerk here?

56 A. W. W. Standford & Co.

57 Q. In what business?

57 A. General mercantile business.

58 Q. From what time until what time did you clerk for them? 58 A. I have clerked for them at different times.

59 Q. When did you first commence working for them, state as near as you can?

59 A. I have been employed by said firm at different times as extra help; do not recollect the time I first entered their employment.

60 Q. During what portion of the time in the years 1878 and 1879 did you clerk for W. W. Standford & Co.?

60 A. Now I don't recollect, I clerked for them at
698 different times don't think I clerked for them more than a month at any one time.

61 Q. Was your principal busines in the years 1878 and 1879 that of a clerk or attorney?

61 A. That of an attorney.

62 Q. Where was your office during those two years.

62 A. I had no office of my own; wasn't any of the attorneys scarcely had any offices in those days.

63 Q. State as near as you can how many cases you tried during those two years 1878 and 1879 as an attorney?

63 A. Not very many, I don't recollect the number.

64 Q. Is that as near as you can answer the question?

64 A. It is.

65 Q. Did you try a single case as an attorney in the year 1879? 65 A. I think I did.

66 Q. What case?

66 A. I was employed in a case wherein S. A. Ferguson was plaintiff and Geo. Ebersols was defendant. Said case was commenced in Justice Court in the fall of the year 1876 in which I was attorney for the plaintiff before I was regularly admitted to the bar. That case was appealed from Justice Court to District court and was terminated in May, 1880. I was an attorney in said case from the beginning until the end.

67 Q. State what case you tried in 1879.

67 A. I tried the above mentioned case.

68 Q. In that year? 68 A. Yes, sir.

69 Q. State what other case you tried as an attorney in the same year, to wit, 1879.

69 A. I was interested in some other cases but don't think any of them was tried. Our courts were held but once a year at that time and cases were generally continued from term to term.

70 Q. You had Justices of the Peace in this county in 1879, did you not? 70 A. Yes, sir.

71 Q. Did you ever publish or edit a paper in Anderson, Indiana, and if so, from what time to what time?

71 A. Never did. I worked for a man by the name of John O. Hordesly in [in] the campaign of 1868 who edited and published the Anderson Herald. I traveled and solicited for the paper and reported political doings.

78 Q. Did you ever publish or edit a newspaper at any place in Indiana? 72 A. No, sir.

73 Q. Where have you had a law office since 1879?

73 A. On the street, blacksmith shops, carpenter shops, the school house. I tried one case in a livery stable and
699 where my office is at present.

74 Q. Where is your office now?

74 A. Over the "Temple of Fashion."

75 Q. If you tried any other case other than the Ferguson case in 1879, please state what case it was?

75 A. As I said before, I was interested in some cases, but I don't now recollect whether they were tried or continued.

76. Q. You have been giving the plaintiff's attorneys on this case the benefit and advantage of your experience as a lawyer in talking, counseling and advising with them in regard to this case and in regard to the production of evidence during the taking of these depositions, have you not?

76 A. Nothing whatever except in commenting on some of the questions asked by the defendants' counsel.

77 Q. When did you commence that course of conduct in regard to these depositions?

77 A. During the examination of Mr. Paddock evening before last.

78 Q. You have been present during the examination of every witness in this case, have you not?

78 A. Have not, no, sir.

79 Q. When were you absent?

79 A. I didn't hear all of Paddock's direct testimony; I didn't hear any of Ferguson's. I heard a part of Chadwick's and a part of Frazier's.

80 Q. Have you not been present every day evidence has been taken in this case here?

80 A. I have been here a part of the time every day.

81 Q. When were you subpoenaed to appear in this case?

81 A. Haven't been subpoenaed at all, I was notified by Mr. Riggs that he wanted to take my deposition at some time before he left here.

82 Q. And you have been attending here daily so as to enable him to do so, have you not?

82 A. I have not. I told Mr. Riggs that he could call on me at any time that I was not engaged.

83 Q. When did you first talk with either of the attorneys for the plaintiff in regard to this case and in regard to your evidence in this case?

83 A. I think it was last Saturday night I was introduced to Mr. Riggs. He told me what business he was here for at that time. He never asked me what I would testify to until this morning.

84 Q. Have you not since that time been in frequent consultation and conversation with the attorneys for the plaintiff in this case in regard to this cause and in regard to the proceedings here before this notary, that is, since last Sat-
700 urday?

84 A. I have conversed with them about the case but have not counseled with them in any manner whatever.

85 Q. When did you first tell Mr. Riggs he could take your evidence whenever you were not engaged?

85 A. Tuesday morning.

86 Q. To whom did you first disclose what your evidence in this case would be and when was it?

86 A. I think E. W. Iliff was the first man I ever talked with about this case. I can't recollect when.

87 Q. Was it before or since last Tuesday you had this conversation with Iliff?

87 A. Before last Tuesday that I had the conversation with Iliff in regard to my evidence.

88 Q. With what other person except the attorney for the plaintiff in this case and Mr. Iliff have you had conversation regarding your evidence in this case?

88 A. I had no conversation with any other parties that I remember of. I have been asked questions by different persons in regard to the case but don't remember who.

89 Q. Prior to last Saturday state with what persons you had conversation in regard to this case or the main circumstance concerning which you have testified other than the persons before mentioned?

89 A. I may have talked with T. P. Ayers. If I did I don't now remember what was said. I don't remembr any other persons.

90 Q. With whom, if anybody, have you corresponded with regard to this case?

90 A. I have never corresponded with anyone.

91 Q. You never saw the body which you have testified to having seen here in March, 1879, since that time, have you?

91 A. I have not, sir.

92 Q. That was something over two years ago?

92 A. It was.

93 Q. And after the lapse of two years you are now able to swear from recollection to the exact shade of the hair upon the head of that body, the shade and color of the moustache and the length and color of the beard upn his face, are you?

93 A. I remember very distinctly the color of his hair and beard.

93 2d A. The shade of the hair I am positive about, but the beard I don't know whether it would be called auburn or light brown.

94 Q. Is that all the answer you have to make there to the above question? 94 A. It is.

701 95 Q. I will ask you that if after the lapse of two years you are now able from recollection to swear to the exact shade of the hair upon the head of that body?

95 A. I am.

96 Q. Is the same true of the beard and whiskers upon the face of that body? 96 A. It is not.

97 Q. What is the reason you are not able to carry in your mind the shade of one as well as the other?

97 A. For the reason I am not able to determine the exact, I want you to underscore the word exact, shade of light brown or auburn.

98 Q. The question is why cannot you recollect the exact shade of one as well as you can of the other?

98 A. Because the hair was a dark brown, easily to be distinguished from any other color and the beard was several shades lighter but the exact shade I am not able to state.

99 Q. Do you mean to swear that dark brown is more easily distinguished than any other color or shade of brown?

99 A. I do, when it comes to describing an exact shade.

100 Q. Is it more readily distinguished than any other color?

100 A. No more readily distinguished than black or white.

101 Q. Is the color dark brown any more easily remembered or carried in the mind than any other color?

101 A. Not any more than any other plain color.

102 Q. When and where did you first see the picture exhibited to you to-day while you were giving your evidence by Mr. Riggs, one of the attorneys for the plaintiff or a picture similar to it?

102 A. I think it was on last Monday. Mr. Riggs was showing it to some other parties in my presence and I examined and looked at it at that time.

103 Q. At any other time?

103 A. I think I saw it here yesterday on the table. I am not positive about that. I have seen it once since and I think it was here on the table.

104 Q. You first saw the dead body in a wagon near E. W. Iliff's livery stable did you not?

104 A. I first saw the body near Iliff's livery stable. I don't know whether it was E. W. Iliff's or not. I think it was a firm name.

105 Q. Was there more than one man named Iliff engaged here in the livery business at that time?

105 A. There was Lemuel Iliff and his three sons. I don't know who of them owned the stable, have seen them all there doing business connected with the stable.

702 106 Q. Is the Iliff of whom you speak as E. W. Iliff known or called Ezra Iliff? 106 A. Yes, sir.

107 Q. How long did you remain at the wagon on the occasion of your first seeing the body?

107 A. I was there several moments.

108 Q. Do you remember all the parties who were there at the time you was?

108 A. There was quite a number there but I don't remember all.

109 Q. State as many as you do remember?

109 A. I remember Mr. William Walt, this man who he had charge of, Brown, Mr. W. W. Standford, Paddock, Ferguson, Mr. E. W. Iliff. I don't remember any others just now, they were coming and going all the time.

110 Q. Did you recognize Brown before he told what his name was?

110 A. I recognized him as being one of the men I had saw in the winter, but don't remember as having heard his name until then.

111 Q. This body was lying in the bottom of the box of a covered wagon was it?

111 A. Yes, sir, I don't recollect that the wagon was covered.

112 Q. How long did the wagon remain in front or near Iliff's stable before it crossed over the street?

112 A. I don't know, it had been removed when I got through taking the evidence of Brown. I did not see it when it crossed the street.

113 Q. When did you next see the body?

113 A. I saw it the next morning and when I saw it it was prepared for burial.

114 Q. How prepared?

114 A. The face was shaved, hair combed the body dressed and lying in the coffin.

115 Q. Was the lid of the coffin off or only partially turned back?

115 A. My recollection is the lid was lying across the foot of the coffin crossways.

116 Q. How was the body dressed when you first saw it?

116 A. Had on a dark colored coat considerably worn, I think it was a frock coat. Had a pair of overalls on, I don't know whether any pants on the inside or not. Brown overalls I think. I don't recollect the kind of shirt. I don't know about vest, coat was buttoned up. Head was bare.

117 Q. You spoke in your direct examination about the hair upon this body being in a ruffled condition when you first saw it? 117 A. I did.

118 Q. Did you know at that time that the body had been transported in a wagon some ten miles when you saw it, and had been exposed to the open air during all of the night previous? 118 A. I was so told by Mr. William Walt.

703 119 Q. Then the hair was in a natural condition as it would be under such circumstances was it not?

119 A. It was.

120 Q. And the next morning that hair had simply been combed and brushed when you saw it? 120 A. It had.

121 Q. Had it been in your judgment been either oiled or wet in combing?

121 A. It had a glossy appearance, but don't know whether it had been oiled or wet.

122 Q. Now you may state all the differences which you now remember between the appearance of the hair upon the head of the body the last time you saw it and the appearance of the hair in the picture exhibited. You describe them accurately.

122 A. The appearance of the hair when I last saw it was that of having been recently been combed having a wavy tendency and as shown by the picture it looks like it was curled or ruffled.

123 Q. Any other difference?

123 A. I am not able to note any other difference in the appearance.

124 Q. Will you describe the character of the nose on the face of the body as you last saw it in the coffin?

124 A. As I remember it it was rather a prominent nose it [would] what I would call a roman nose.

125 Q. Did the nose turn up at the end or was it what is called a hooked nose?

125 A. I don't remember any turn up or hook it seemd to be slightly rounded in the middle on top.

126 Q. Was the end of the nose higher or lower than it was in the center?

126 A. As I said before the nose was rounded in the middle sloping down toward the mouth and receding toward the eye.

127 Q. Was the nose of the body when you last saw it in the coffin, perfectly straight or did it incline to one side, or the other of the face?

127 A. I don't recollect only to the general appearance.

128 Q. Did you make a critical examination of the features of the body or only a casual?

128 A. I looked at the face two or three times that morning, but not to make any critical examination of any marks or features.

129 Q. Were the eyebrows of the dead body lighter or darker in color than the hair on the head of the dead body?

129 A. I don't remember.

130 Q. Did the dead body have light or heavy eyebrows and were they wide apart or did they nearly approach each other?

130 A. I don't remember anything with reference to the eyebrows.

704 [132] Q. Did the dead body have a short or wide mouth? 131 A. Had rather a large mouth.

132 Q. Now in regard to the chin of the dead body was it long, short, narrow, or broad. Describe it as well as you can.

132 A. My recollection is it was rather a broad chin, but not what I would call a long chin.

133 Q. Was the face of the dead body a long face?

133 A. Yes, it was more than an ordinary face in length from the hair to the chin with a tolerably high forehead.

134 Q. You may describe the color of the hair of this man Brown when you saw him in Medicine Lodge at the time the body was there?

134 A. I can't state positively but think it was a dark color.

135 Q. Can you give the shade?

135 A. I cannot my attention was never called to the color of his hair in particular.

136 Q. Can you give the color of his eyes?

136 A. I cannot.

137 Q. Describe his nose if you are able to?

137 A. I can't describe him more than to give the general appearance of the man.

138 Q. Describe his mouth, large or small?

138 A. I am not able to describe to any particular part of the man accurately.

139 Q. Did he have whiskers, if so what was the color and upon what portion of the face were they?

139 A. I don't remember whether he had whiskers or not.

140 Q. Did he have a high or low forehead?

140 A. I still say I don't remember any particular features of this man Brown.

141 Q. How long were you in taking the statement of Mr. Brown?

141 A. It was not long. I wrote his testimony in a narrative form. I think not more than a half or ¾ of an hour. It was in the office of George Wise, Justice of the Peace.

142 Q. Did you see Brown about Medicine Lodge after you took his statement?

142 A. I saw him the next morning for the last time.

143 Q. Do you remember the names of the persons who passed into the house at the different times you visited the house in which the dead body was the morning you saw it in the coffin? 143 A. I do.

144 Q. State who were with you the first time you went in and saw the body in the coffin? 144 A. Mr. Ed Youmans.

145 Q. Whom did you find there on that occasion
705 state the names of all the persons.

145 A. I don't remember any one except Paddock and this man Brown.

146 Q. Now state who were with you the second time you went in? 146 A. Mr. Ed. Youmans.

147 Q. And whom did you find there on that occasion?

147 A. Mr. Paddock was there, and I believe Mr. Iliff, but I am not sure. There were others coming in and going out. I don't now remember who they were.

149 Q. State who were with you on any other occasion when you visited that place that morning?

149 A. The next time I went in I went in alone.

150 Q. And whom did you find there on that occasion?

150 A. There on that occasion there was quite a number standing around. I don't remember who except Mr. Paddock, as I had a conversation with him.

151 Q. Have you now stated all the occasions when you visited that house that morning?

151 A. I don't remember of going in any other time that morning.

152 Q. You have defective eyesight have you not?

152 A. I have weak eyes.

153 Q. Affected in the same way in 1879? 153 A. Yes, sir.

154 Q. Are you what is called near-sighted?

154 A. No, sir.

155 Q. Simply weak eyes? 155 A. Yes, sir.

156 Q. Did you testify before any coroner's inquest on this body? 156 A. No, sir.

157 Q. State the names of all the witnesses who were examined at Medicine Lodge.

157 A. Mr. J. H. Brown and Mr. Paddock the Justice of the Peace, acting coroner made a statement to the jury with reference to a former inquest but not under oath.

158 Q. Was that all the evidence offered or produced at that coroner's inquest? 158 A. It was.

159 Q. In March, 1879, were you wearing glasses constantly or only part of the time?

159 A. I don't remember, sometimes I wear them more than others owing to how my eyes are.

160 Q. Was that your custom in March, 1879?

160 A. It was.

706 161 Q. Do you remember whether you had your glasses on on each occasion when you visited the house in which the body was in the coffin? 161 A. I do not.

Re-examination.

162 Q. At the coroner's inquest at Medicine Lodge was there or was there not any question of the identity of the dead man raised? 162 A. There was not.

The witness desires to make a statement in explanatory of part of his cross-examination as follows:

I left Anderson in the year 1869, went to my fathers near Fairmount with my wife, who is an invalid, was there and at her fathers near Marion until the time mentioned as living near Marion in the sumer of 1871.

H. M. DAVIS.

The hour for adjournment having arrived the further taking of these depositions is continued until to-morrow morning, May 13 at 9 o'clock a. m.

T. E. HICKMAN, Notary Public.

May 13. Pursuant to adjournment the further taking of these depositions is resumed.

John W. Upperman, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth the whole truth and nothing but the truth deposeth and said that:

1 Q. State your name, age and residence.

1 A. My name is John W. Upperman; my age is 37 years; my residence is Medicine Lodge, Barbour County, Kansas.

2 Q. Do you remember the circumstance of a dead body being brought into Medicine Lodge from the north by G. W.

Paddock a justice of the peace on or about the 19th day of March, 1879? 2 A. I do.

3 Q. State when you first saw that dead body?

3 A. In a wagon on the north side of Iliff & Co's livery stable.

4 Q. Did you see it more than once on that day, if so, where did you next see it?

4 A. I saw it frequently on that day, saw it at the time the coroner's inquest was held upon the body and I afterwards saw it when it was being prepared for burial.

5 Q. State if you know who prepared it for burial?

5 A. I do know. Mr. Samuel Ferguson, William
707 Walt and a man by the name of Emmet Hart and myself, also Mr. Brown, the man who was in company with the dead body when it was brought to town.

6 Q. State if you know at what time of the day or night the body was prepared for burial?

6 A. I disremember exactly, but I think it was in the evening of the day the body was brought in here.

7 Q. What was the appearance as to age of the beard upon the face of the dead man before the body was prepared for burial? 7 A. It was between 2 and 3 weeks old.

8 Q. State if you know who shaved the dead man.

8 A. Mr. William Walt and myself.

9 Q. If you had ever seen in life that body, state when, where and under what circumstances you saw it?

9 A. I saw the gentleman in the winter in November or December. I think in the month of December, at the livery stable of L. Iliff & Co.

10 Q. State who was in his company when you saw him?

10 A. A man by the name of Brown. I forget his initials.

11 Q. State what at the time I mean in November or December, you understood to be the name of the man whom you saw dead afterwards.

The defendants object to the question because the same is incompetent, irrelevant, immaterial and hearsay.

The Court sustained the objection, to which action and ruling of the Court the plaintiffs at the time duly excepted.

12 Q. When did you last see the body of this dead man?

12 A. When placed in the coffin for burial.

13 Q. Did you go to the grave? 13 A. I did.

14 Q. State what if any religious ceremonies were held at the grave.

14 A. There were religious ceremonies. Mr. Cornelius led in prayer after the coffin had been lowered to the grave. Mr. Cornelius was a minister, that is all I recollect of.

15 Q. Were you present afterwards when that body was taken up for removal? 15 A. I was not.

Cross-examination

By Defendant's Counsel, Geo. J. Barker:

16 Q. In what business are you now engaged?
16 A. General day laborer.
17 Q. At any particular kind of work?
17 A. Any and all kinds of work to make my living at.
18 Q. What were you doing in November or December, 1878? 18 A. Working at my trade.
19 Q. For whom?
708 19 A. For D. M. Chapin.
20 Q. Where?
20 A. In the City of Medicine Lodge.
21 Q. What is your trade? 21 A. As a harness maker.
22 Q. How long have you lived in Barbour County, Kansas?
22 A. Nine yeares.
23 Q. How long at this place, Medicine Lodge?
23 A. Nine years.
24 Q. Where did you reside previous to coming here?
24 A. Bloomington, McLean County, Illinois.
25 Q. What year did you leave Bloomington?
25 A. In the year of 1869.
26 Q. Did you come direct to Barbour County?
26 A. I did not.
27 Q. To what place did you remove first?
27 A. That is kinder difficult for me to tell as I was roaming around first in Missouri, then in Texas, from Texas to Kansas on the Chisholm trail driving cattle from thence to Hutchinson, Reno County, Kansas, and from Hutchinson to Barbour County, Kansas.
28 Q. In what county and what place in the county did you reside in Missouri?
28 A. I didn't reside in any County or any place in Missouri. I went through Missouri looking at the country.
29 Q. At what place did you reside in Texas.
29 A. The time I was in Texas I resided at San Antonio.
30 Q. In what County?
30 A. I couldn't tell you to save my life now.
31 Q. How long did you live at San Antonio?
31 A. I was there about three weeks.
32 Q. Were you engaged in any business there?
32 A. I was not at that time.
33 Q. To whom did you drive cattle from Texas?
33 A. A firm by the name of Hood and Hughes.
34 Q. How long after you left Texas before you arrived at Hutchinson? 34 A. About six months.

35 Q. Were you on the trial during all that time?
35 A. Not all the time.
36 Q. What were you engaged in doing?
36 A. Herding cattle after we arrived in the state of Kansas.
37 Q. How long did you stay in Hutchinson?
37 A. I stayed in Hutchinson about a year.
709 38 Q. What year would that be?
38 A. The year of 1871 and part of 1872.
39 Q. Did you keep house there? 39 A. I did not.
49 Q. With whom did you board and reside during your stay in Hutchinson?
40 A. Part of the time with Derrick Updegraff and the rest of the time I was employed by the Santa Fe Railroad working on their engines.
41 Q. With whom did you live in Hutchinson besides Mr. Updegraff.
41 A. I disremember the name of the restaurant keeper with whom I boarded.
42 Q. Did you work at your trade in Hutchinson?
42 A. I did not.
43 Q. How long was it from the time you left Bloomington, Illinois until you located in Medicine Lodge, Kansas.
43 A. About 2 years.
44 Q. Did you have any companion on your trip from Bloomington to Texas? 44 A. I had not.
45 Q. Who were with you on the drive from Texas to Hutchinson—the names of the parties?
45 A. I do not remember the names.
46 Q. Will you state the name of any person who was with you on that cattle drive?
46 A. It has been so long that I have forgotten the names of any of the parties.
47 Q. How do you fix the date of the first time you ever saw this man Brown? From your general recollection, or any particular circumstance?
47 A. The way I fix the date is that it was only about 2 months from the first time I saw him until I saw the remains of the dead man in the wagon with whom this man Brown was in company with.
48 Q. Do you remember the condition of the weather the first time [the first time] you saw Brown—whether it was warm or cold? 48 A. It was cold and stormy.
49 Q. Do you know how Brown was traveling, whether by team or foot? 49 A. He was traveling with a team.
50 Q. Camping out?
50 A. He wasn't camping out when I first saw him.

51 Q. How often did you see Brown from the time you first saw Brown at Iliff's livery stable until the 19th day of March, 1879. 51 A. Some 3 or 4 times.

52 Q. Where did you see him?

52 A. At the livery stable of L. Iliff & Co. and on the srteets of Medcine Lodge.

53 Q. At what other places did you ever see him in Medicine Lodge except at Iliffs livery stable and on the
710 street on the occasion of your first seeing him?

53 A. None that I recollect of.

54 Q. Did you ever meet him in any of the hotels of Medicine Lodge? 54 A. I don't recollect that I did.

55 Q. How long was Brown here on that occasion?

55 A. To the best of my recollection some two or three days.

56 Q. Can you be more definite as to the length of time he was here? 56 A. I cannot.

57 Q. What was you doing during the time Brown was in Medicine Lodge, Kansas?

57 A. To the best of my recollection I was stopping in the harness shop.

58 Q. In whose harness shop? 58 A. Mr. D. M. Chapins.

59 Q. Were you working for Mr. D. M. Chapin in Medicine Lodge at the harness trade during the time this man Brown was in Medicine Lodge on the occasion of your first seeing him?

59 A. Not all the time I assisted Mr. Chapin in repairing work when he was pushed.

60 Q. Were you working for Mr. D. M. Chapin in his harnes shop in Medicine Lodge during any portion of the time that Brown was here during the occasion of your first seeing him? 60 A. Yes, sir.

61 Q. During what portion of that time did you work in the shop of D. M. Chapin?

61 A. It is difficult for me to tell what portion of the time as I only assisted Mr. Chapin when he was rushed with business.

62 Q. Was Mr. Chapin rushed with business during the 2 or 3 days you claim Brown was in this town?

62 A. I could not say that he was particularly.

63 Q. Then why do you swear you worked for Mr. Chapin during the time you say Brown was in this town?

63 A. Because I worked more or less for him a little every day.

64 Q. Then in the months of November and December, 1878, you did not miss working for D. M. Chapin some on each day, did you? 64 A. No, sir, I did not.

65 Q. Where was this work for D. M. Chapin done.

65 A. In Medicine Lodge on Main street in the building now occupied by Mr. Durst as a dwelling.

66 Q. Who was with you at any time you saw this man Brown on the streets of Medicine Lodge, Kans.?

66 A. I could not say that any one.

67 Q. Who was with you when you saw this man Brown at Iliff's livery stable.

68 A. I could not state the name but there was 2 or 3 persons standing around, I think Mr. B. W. Iliff was one of the parties to the best of my recollection, but I cannot say who else.

69 Q. Is Mr. E. W. Iliff the same man known or called Ezra Iliff? 69 A. Yes sir, he is.

70 Q. What time in the day or evening was it you saw Brown at Iliff's livery stable, in November or December of the year 1878?

70 A. The first time I saw Brown at Iliff's livery stable it was when he and Mr. Hillmon first drove the team up there to unhitch. It was in the evening.

71 Q. About what time?

71 A. I should judge between 5 and 6 o'clock it may not have been quite so late.

72 Q. Fix the time of day as definitely as you can?

72 A. I cannot state definitely the time.

73 Q. Where were you when the team came up?

73 A. I was standing in front of Iliff's livery stable.

74 Q. Were you standing in the door of the stable?

74 A. I was not standing right in the door.

75 Q. Were you in or on the outside of the stable?

75 A. I was on the outside standing a few feet from the door.

76 Q. Who was with you then?

76 A. I cannot state positively who was.

77 Q. State as definitely as you can all the pesons you remember being with you?

77 A. There was no one with me particularly, there were several standing around.

78 Q. State who was standing around.

78 A. I cannot state who was standing on the outside beside myself for I do not remember.

79 Q. Can you give the name of any person?

79 A. Not on the outside.

80 Q. Did you go into the stable then?

80 A. I did.

81 Q. Whom of your acquaintances was in the stable?

81 A. Mr. E. W. Iliff, Edgar Faris.

82 Q. Who else?

82 A. I think Lemuel Iliff; I am not positive to that.

83 Q. Were there any others?
83 A. I do not recollect of any others.
84 Q. How long did you remain there on that occasion?
84 A. Probably a half to three-quarters of an hour.
85 Q. Did Faris remain there all the time you did on that occasion?
712 85 A. I think he did.
86 Q. Were you introduced to either of the parties who came up with that team and if so, by whom introduced?
86 A. I was not introduced to either of the parties.
87 Q. Was any person introduced to them while you were there on that occasion?
87 A. Not that I recollect of, if there was I did not see them.
88 Q. State when, if ever, and under what circumstances you had ever before seen either of the persons who rode up in that wagon at that time.
88 A. I had never seen the gentlemen before. Either one of them.
89 Q. When you left that Brown on that occasion, who went with you and where did you go?
89 A. To the best of my recollection there was nobody went with me. If I recollect right I came down to Mr. D. N. Chapin's shop again.
90 Q. To go to work? 90 A. No sir.
91 Q. Are you a single or married man?
91 A. A married man, sir.
92 Q. Were you keeping house at that time?
92 A. No sir.
93 Q. Were you a married man at that time?
93 A. I was not.
94 Q. With whom were you boarding at that time?
94 A. I was boarding with Berrick Updegraff. Then proprietor of the Medicine Lodge Hotel.
95 Q. Did you return to Iliff's livery stable again that night?
95 A. I could not say positive whether I did or did not.
96 Q. When did you next go to Iliff's stable and who was with you?
96 A. I could not state definitely where I did go for I was in and out there all the time when I was not otherwise employed.
97 Q. When did you next see Brown at Iliff's livery stable and who was with you?
97 A. I saw Brown the next day after putting his team in there and conversed with the gentleman at L. Iliff & Co.'s livery stable no one that I recollect of was with me at the time.
98 Q. Who of your acquaintances were present at that time?

98 A. I can't say that there was any, don't recollect of any at any rate.

99 Q. Was his companion present?

99 A. Not at that time.

100 Q. Was Mr. N. W. Iliff present at that time?

100 A. I do not recollect whether he was or was not. I could not say.

101 Q. Was either of the Iliffs present at that time?

101 A. I don't think they were during my conversation with Brown.

713 102 Q. About how long did you remain there at that time?

102 A. I could not state definitely as to length of time.

103 Q. State as definitely as you are able?

103 A. Probably a half an hour.

104 Q. Did you leave the barn in company with any person?

104 A. I did not to the best of my recollection.

105 Q. Now you may state the next occasion when you saw Brown at Iliff's livery stable and how long after the time you have just mentioned?

105 A. The next occasion when I saw Brown at Iliff's livery stable was when his companion lay a corpse.

106 Q. How long was that?

106 A. That was about 2 months to best of my recollection

107 Q. When and whereabouts did you see Brown upon the street after the occasion of your first seeing him at Iliff's livery stable?

107 A. It was the next day about half way between L. Iliff & Co.'s stable and A. N. Shepler's stable.

108 Q. About what time of day was it?

108 A. I could not state the time of day.

109 Q. State as nearly as you can?

109 A. To the best of my recollection it must of been between 8 and 9 o'clock the next day after his driving here with the wagon.

110 Q. In which direction was he going?

110 A. He was going south.

111 Q. Who was with you? 111 A. There was no one.

112 Q. In which direction were you going?

112 A. I was going north.

113 Q. Was it pleasant or was it storming?

113 A. It was storming and cold.

114 Q. Snowing or raining?

114 A. To the best of my recollection it was drizzling rain.

115 Q. Was it not snowing and blowing quite furiously at that time?

115 Q. I do not recollect in regard to the snow, but I know that the wind was coming from the northwest.

116 Q. Are you positive in regard to your statement that it was raining instead of snowing at that time?

116 A. I won't say, as I said before to the best of my recollection it was drizzling rain.

117 Q. But whether it was snowing or raining the wind was blowing quite furiously was it not?

117 A. It was blowing quite brisk from the northwest, yes sir.

118 Q. Did you stop and talk with him at this time?

118 A. I did not.

714 119 Q. Was his companion with Brown on this occasion? 119 A. He was not.

120 Q. Was Brown alone? 120 A. Yes sir.

121 Q. When did you next see Brown?

121 A. I don't recollect seeing him any more until they brought his companion here for burial.

122 Q. When and where except the first night at Iliff's livery stable did you see Brown's companion in the months of November or December in the year 1878?

122 A. It was the next day after they arrived here that I saw him at L. Iliff & Co.'s stable.

123 Q. About what time in the day?

123 A. In the morning.

124 Q. Was Brown there?

124 A. He was not right with his companion at the time.

125 Q. Was that the same time you had about a half an hour's talk with Brown? 125 A. It was.

126 Q. Then his companion was in the stable at that time was he? 126 A. He was.

127 Q. Who else was in the stable at that time?

127 A. Mr. Edgar Faris, E. W. Iliff and I won't say positive as to Lemual Iliff.

128 Q. Anybody else?

128 A. None that I know of.

129 Q. In what part of the stable were you and Brown the rear or front? 129 A. The front.

130 Q. Who were with you and Brown?

130 A. No one sir.

131 Q. When you and Brown were in the front of the stable where was Brown's companion, and who were with him?

131 A. Brown's companion was about [hald] way down the length of the stable. There was no one with him at the time.

132 Q. About how long was the stable?

132 A. Between 40 and 60 feet deep.

133 Q. Was there any office to that stable?

133 A. There was.

134 Q. You and Brown in the office? 134 A. No sir.

135 Q. At this time where were E. W. Iliff & Edgar Farris?

135 A. They were taking care of the horses and cleaning out the stable.

136 Q. You remember who of these parties left the stable before you did at that time?

715 136 A. To the best of my recollection, Mr. E. W. Iliff and Mr. Edward Farris rode through the door going to Spring Creek to water their horses.

137 Q. You left before they returned?

137 A. To the best of my recollection I did.

138 Q. When and where did you next see Brown and his companion or Brown's companion alone?

138 A. When Brown's companion was brought here for burial to the best of my recollection.

139 Q. State when and where, in the months of November and December, 1878, you saw Brown's companion on the streets of Medicine Lodge, Kansas?

139 A. I saw him, I think it was the month of December, on the street in front of L. Iliff & Co.'s livery stable assisting Brown in unhitching the team.

140 Q. At what other time and place did you see Brown's companion on the streets of Medicine Lodge, Kansas, in the months of November or December, 1878?

140 A. I did not see Brown's companion on the street to the best of my recollection at any other time after that during the months of November or December, 1878.

141 Q. Describe definitely how this man Brown was dressed the first time you saw him commencing with his hat?

141 A. To the best of my recollection he was dressed in dark, black hat and dark coat some would call it brown, pants of brown ducking, overalls and a pair of boots.

142 Q. [Did] you remember what kind of boots, whether leather or gum boots?

142 A. To the best of my recollection they were leather boots.

143 Q. Are you positive he wore a hat instead of a cap?

143 A. I will say yes in regard to that.

144 Q. Are you positive it [is] a black hat?

144 A. To the best of my recollection I said it was a black hat.

145 Q. Was his coat a sack coat or frock coat, was it plain in color or plaid coat?

145 A. To the best of my recollection it was a frock coat and plain in color.

146 Q. Is your recollection distinct that his coat was of the cut and color you have mentioned?

146 A. Well I don't say it was very distinct because I did not make a minute description of it. What I stated before was my best recollection.

147 Q. Is your recollection distinct that Brown wore overalls on that occasion? 147 A. It is.

148 Q. And that they were of the color you have mentioned? 148 A. To the best of my recollection.

149 Q. Describe the kind of shirt Brown wore?

149 A. I could not do it.

150 Q. Would you say what kind of a shirt he wore; a blue flannel shirt?

716 150 A. I could not tell what kind of a shirt he wore whether it was a white shirt, black shirt, blue shirt, green shirt.

151 Q. Did Mr. Brown wear an overcoat on that occasion, if so, what kind of a coat was it, was it a smooth or shaggy coat?

151 A. I do not recollect whether he wore an overcoat or not.

152 Q. Did Mr. Brown wear whiskers at that time and if so upon what portion of his face?

152 A. To the best of my recollection Mr. Brown had a mustache upon his face.

153 Q. Short or long mustache?

153 A. A short mustache.

154 Q. Light or heavy?

154 A. To the best of my recollection it was a medium mustache, neither light nor heavy just an ordinary mustache.

155 Q. Was his mustache as heavy as Mr. Riggs'?

155 A. Probably a shade heavier.

156 Q. What was its color describe it accurately?

156 A. To the best of my recollection it was a brownish hue.

157 Q. What shade of brown? 157 A. A brownish hue.

158 Q. Is that as near as you can describe the color [—] his mustache? 158 A. To the best of my recollection it is.

159 Q. Upon what other portion of his face, did he wear whiskers? 159 A. On his cheeks.

160 Q. Describe as accurately as you can the shape of the beard upon his cheek?

160 A. The beard on his cheek had not been shaven for two or three weeks, probably a longer time could not say definitely.

161 Q. Did he have what is called chin whiskers?

161 A. Not that I recollect of.

162 Q. Was his mustache longer than the beard upon the rest of his face? 162 A. It was.

163 Q. How would his mustache compare with his hair in color? 163 A. It was a shade lighter than his hair.

164 Q. Do you remember the color of Brown's eyes?
164 A. I do not.
165 Q. The shape of his nose? 165 A. I do not.
166 Q. You remember whether Brown's hair was wavy, curly or straight?
166 A. To the best of my recollection it was straight.
167 Q. Do you recollect distinctly that Brown's hair was straight? 167 A. I don't say that I do.
168 Q. Do you remember how Brown's companion was dressed the first time you saw him? 168 A. I think I do.
169 Q. You may state what kind of a coat he wore
717 then? 169 A. A dark colored coat.
170 Q. Sack or frock? 170 A. A sack coat.
172 Q. Was it a coat of plain color or plaid?
172 A. To the best of my recollection it was plain.
173 Q. Are you positive in regard to that?
173 A. To the best of my recollection I am.
174 Q. Now in regard to his vest what kind of a vest did he have on? 174 A. I could not tell.
175 Q. Now in regard to his pants?
175 A. He had on a pair of overalls when I first seen him but I won't say positive whether blue drilling or brown drilling.
176 Q. Are you positive he had on overalls instead of a pair of dark woolen pants?
176 A. To the best of my recollection I am.
177 Q. Have you a distinct recollection that he had on overalls the first time you saw him?
177 A. To the best of my recollection I am.
178 Q. Have you a distinct recollection that he had on overalls the first time you saw him? 178 A. Yes sir I am.
179 Q. Describe the kind of shirt he wore?
179 A. I cannot.
180 Q. Did he have on an overcoat the first time you saw him? 180 A. Not to my recollection.
181 Q. Describe how Brown's companion wore his beard the first time you saw him?
181 A. He had a mustache on his upper lip and the beard on the rest of his face had just newly started out from the face probably a week old.
182 Q. Was his mustache longer than the beard upon the rest of his face? 182 A. Yes sir.
183 Q. Was the beard upon the other portions of his face than his upper lip of the same growth? 183 A. Yes sir.
184 Q. Are you positive as to that? 184 A. Yes sir.
185 Q. Now what was the condition of the beard upon the face of the dead body as compared with the beard you have just described. That is, the first time you saw the dead body?

185 A. The mustache was the same I described in the first place and the beard upon the other part of the face was from 4 to 5 weeks' growth.

718 186 Q. Was that all the difference?

186 A. Yes sir. The beard was darker on the side of the face than on the upper lip.

187 Q. State the color of the eyes of Brown's companion?

187 A. I could not state the color of the eyes did not pay any attention to them.

188 Q. Describe accurately the kind and shape of the nose of this man Brown's companion if you remember?

188 A. He had what we would call a Roman nose. Higher in the center and tapering to the point of the nose.

189 Q. Is your recollection of the appearance of his nose distinct? 189 A. Yes sir.

190 Q. Is your statement in regard to the character of the nose based upon your recollection as you saw him in Medicine Lodge, Kansas, in November or December 1878?

190 A. Yes sir it is.

191 Q. Is your statement based entirely upon that recollection? 191 A. Yes sir.

192 Q. To whom did you first disclose the fact, that you knew anything about this case? 192 A. To no one.

193 Q. With whom have you talked in regard to this case except the attorneys for the plaintiff?

193 A. I talked with no one on the subject until I conversed with the attorneys for the plaintiff?

194 Q. Have you and Mr. E. W. Iliff ever talked about this case?

194 A. Not until I saw Mr. Riggs' attorney for the plaintiff.

195 Q. When did you and Mr. E. W. Iliff have a talk about this case? 195 A. Last Tuesday.

196 Q. Where?

196 A. At the billiard room of Mr. E. W. Iliff.

197 Q. Who was present?

197 A. While we was talking Mr. Ness Iliff and a young fellow playing billiards there. Mr. E. W. Iliff and I were sitting back on a seat during our conversation.

198 Q. When did you first have conversation with the plaintiff's attorneys in this case or either of them?

198 A. Last Monday morning.

199 Q. Where?

199 A. At the Updegraff Hotel, Medicine Lodge Hotel rather.

200 Q. Were you acquainted with Mr. Riggs prior to that time? 200 A. I was not.

201 Q. How did you happen to go to the hotel to see him?

201 A. Byron P. Ayers came to me and said a gen-
719 tleman at the hotel wished to see me, and I went with Mr. Ayers to the said hotel, he then and there introduced me to said Mr. Riggs.

202 Q. Referring to the first time you ever saw Brown's companion whom you have called Hillmon in November or December 1878, was he wearing boots or shoes at that time?

202 A. I could not say positively.

203 Q. Describe what kind of a chin this companion of Brown's had whether a long chin, broad or sharp?

203 A. It wasn't what you might call a long chin or very sharp chin. It was what I would call a medium-sized chin on any man.

204 Q. Is that as accurately as you can describe the chin?

204 A. Very near I think as accurately as I can describe it.

205 Q. Did he have a long face or short face from the eyebrows downward to the point of the chin?

205 A. He had a tolerable sized face for a man of his age. Tolerable long.

206 Q. Do you mean by tolerably long, longer than the ordinary face of a man of his size?

206 A. No sir I do not.

207 Q. State what you do mean by being tolerably long from his eyebrows down?

207 A. I mean the biggest part of his face is down next to his mouth. That is what I call a tolerably long face.

208 Q. Did he have high or low cheek bones?

208 A. Tolerably high.

209 Q. Was he narrow or broad across his face a little above his eyes? 209 A. He was narrow.

210 Q. Now what do you mean by tolerably high cheek bones?

210 A. I mean medium, where a man's cheek bones protrude forward is what I call high cheek bones.

211 Q. Was the nose of this companion of Brown's straight or did it incline to either side of his face?

211 A. To the best of my recollection it was straight.

212 Q. Did it have the appearance of ever having been broken? 212 A. Not that I could discover.

213 Q. Was this dead body the first time you saw it in a covered wagon? 213 A. No sir it was not.

214 Q. Did you see it on more than one occasion the night it came in? 214 A. I did.

215 Q. When first?

215 A. First in a wagon on the north side of L. Iliff's & Co.'s Livery Stable.

216 Q. Then where? 216 A. In the coroner's room.

217 Q. When?

720 217 A. South part of town.
218 Q. What time of the day or night did you see it there? 218 A. In the afternoon.
219 Q. About what time?
219 A. In the neighborhood of two o'clock when I first saw it in the wagon. In the room between 2 and 3 o'clock in the afternoon.
220 Q. The first time you saw it in the room who was in there?
220 A. There was quite a crowd, some 20 or 30 persons when I first seen the body in the room.
221 Q. Do you remember them all?
221 A. I could not state who all. They were coming and going all the time.
222 Q. How long did you remain there then?
222 A. Some two hours.
223 Q. When did you leave there and who left with you?
223 A. I left there after the body was washed and dressed preparatory for burial. I left in company with William Walt. I could not state definitely what time I left.
224 Q. How long were you preparing the body for burial?
224 A. As near as I can answer that question it would be about an hour we were washing and dressing the body.
225 Q. Did you return there again that evening?
225 A. I did.
226 Q. With whom? 226 A. By myself.
227 Q. At what time? 227 A. Just before dusk.
228 Q. Whom did you find there at that time?
228 A. I found several persons there.
229 Q. State who they were.
229 A. Mr. William Walt, Samuel Ferguson, Emmet Herst, John Mosely. I couldn't state definitely if there was anyone else.
230 Q. Was the body in the coffin at that time?
230 A. No, sir.
231 Q. Was it washed and dressed? 231 A. Yes, sir.
232 Q. How long did you remain this time?
232 A. Not to exceed a half an hour.
233 Q. What time was it when you left there on this occasion? 233 A. A little after dusk.
234 Q. When did you next return there?
234 A. The next morning.
235 Q. Did you testify at the so-called inquest at this body? 235 A. I did not.
721 236 Q. Did you see Brown around here several days after the inquest?
236 A. I saw him until after the body was buried here in town.

237 Q. Did you observe when the body was first brought in how the feet were clothed? 237 A. I did.
238 Q. How?
238 A. A pair of shoes and a pair of brown stockings on.
239 Q. Did you observe what was done with those shoes?
239 A. Yes, sir.
240 Q. What was done with them?
240 A. They were put in the trunk at the time the dead body was buried.
241 Q. Do you remember who was present at the time they were put in the trunk? 241 A. Yes, sir.
242 Q. Who?
242 A. William Walt, Mr. Brown, Mr. Ferguson that's all.
243 Q. Have you had exhibited to you by any one or have you seen what was claimed to be a picture or photograph of that dead body in a coffin during the present week?
243 A. I have seen the portrait purporting to be the dead body lying in a coffin lying on the table here yesterday.
244 Q. Have you been subpoenaed to appear as a witness before this notary?
244 A. I have not been subpoenaed, have been notified, my name was in or on a subpoena.
245 Q. Was any subpoena served upon you?
245 A. No, sir.
246 Q. When and by whom were you notified that your name was on a subpoena?
246 A. Last Monday morning by Mr. Riggs, attorney for plaintiff in this case.

JOHN W. UPPERMAN.

722 The plaintiff next read in evidence the following deposition of Clark Gilmore, taken at Medicine Lodge, Kansas, on May 10, 1881, before C. T. Hiekman, Notary Public, Barbour Co., Kansas:

Clark Gilmore, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeth and said that:

1 Q. State your name, age, residence and occupation.
1 A. My name is Clark Gilmore; my age is 65 years; I live in Barbour County, Medicine Lodge, Kansas; my occupation is a day laborer.
2 Q. How long have you lived in Barbour County, Kansas?
2 A. Seven years.
3 Q. Do you remember the circumstance of the dead body of a man being brought into Medicine Lodge from the north by Esquire Paddock about the 19th of March, 1879?

3 A. I remember seeing the body.

4 Q. State where the dead body was when you first saw it, and what time of day you first saw it?

4 A. I saw it right on Main street in the building on the left-hand side as you go south. I don't know what time of the day it was, but it was late in the day a little while before sun down.

5 Q. Was it before or after the coroner's inquest upon it when you first saw it? 5 A. I cannot say.

6 Q. How many times did you see it on that day?

6 A. Only once.

7 Q. At the time you saw it was it washed and shaved preparatory for burial? 7 A. No, sir.

8 Q. State whether or not you saw it on the next day after it was brought in here? 8 A. Yes, sir.

9 Q. How often did you see it on that day?

9 A. Only once.

10 Q. State, if you know, who dug the grave in which that body was buried? 10 A. Yes, sir, I did.

723 11 Q. State whether or not you were present when the body was buried? 11 A. No, sir.

12 Q. How long after this body was buried were you next at that grave?

12 A. I don't know, some 9 or 10 days.

13 Q. State whether or not you were at the Medicine Lodge, Kansas, cemetery on the day the body was buried at any time after it was buried? 13 A. No, sir.

14 Q. With whom, if anybody, did you go to the grave at this time which you fix as 9 or 10 days after the burial?

14 A. I went there with some men who came to examine and take him up.

15 Q. If you remember, state the names of these men or any of them?

15 A. Doctor Davis is all the one I remember.

16 Q. How many of them were there?

16 A. Four I think, there might have been more I can't say.

17 Q. Who uncovered the grave?

17 A. I did mostly, some of the others helped me.

18 Q. Can you describe any of these men, if so, do it?

18 A. There was one of them was a chubby sized man, the other was a common-sized man with dark whiskers a kinder of a long face to the best of my recollection.

19 Q. What Doctor Davis was this you speak of give his intitials if you can?

19 A. I don't know more than Doctor Davis, he lives here in town.

20 Q. Is he a brother of Harvey M. Davis?

20 A. Yes, sir.

21 Q. State whether or not at that time the coffin was opened? 21 A. Yes, sir.

22 Q. Did you see the face of the body at that time?

22 A. Yes, sir.

23 Q. State what examination was made of the body at that time and by whom such examination was made?

23 A. A gentleman spoke of his having been vaccinated. The doctor opened the sleeve and found the place where he was vaccinated.

724 Q. What doctor? 24 A. Doctor Davis.

25 Q. State whether or not the other men of whom you've spoken were standing by? 25 A. Yes, sir.

26 Q. Were these other men residents of Medicine Lodge, Kansas, or strangers? 26 A. Strangers.

27 Q. State whether or not the body was taken away at that time from that cemetery. If so, by whom?

27 A. Yes, sir. It was Mr. Brown, I reckon his name was. Myself accompanied him.

28 Q. Anybody else with you? 28 A. No, sir.

29 Q. State whether or not the body taken up from the cemetery and examined as you have stated was the same body which you had before seen as you have testified in a building on the left hand side of Main street going south in Medicine Lodge, Kansas? 29 A. Yes, sir, it was.

30 Q. Where was that body the last time you saw it and who had the custody of it?

30 A. It was when I put it in the wagon and it was brought down to town. I don't know what become of it.

31 Q. State what, if any, mark you saw upon the arm of the body at the time Doctor Davis cut the sleeve as you have stated? 31 A. None but the scar or scab.

32 Q. On what arm, if you know, was that scar or scab and what part of the arm?

32 A. On the left arm just above the joint of the arm. (Witness here points to the elbow joint of his left arm.)

33 Q. State whether or not you had ever seen in life that body? 33 A. Yes, sir.

34 Q. Where? 34 A. At Mr. Iliff's livery stable.

725 35 Q. State when as nearly as you can?

35 A. Well, it was about Christmas or after Christmas or somewhere about that time.

36 Q. To what Christmas do you refer?

36 A. Well, I don't know whether it was two or 3 years ago. I can't tell.

57 Q. How long was this Christmas before the time you saw the dead body? 37 A. I don't know, sir.

38 Q. State in months as nearly as you can?

38 A. I can't do it, because I can't tell how long afterwards it was.

39 Q. How often did you see the man at that time?

39 A. Oh, I can't tell, several times though in passing around. I will say though 4 or 5 times probably oftener.

40 Q. How far is your residence from Hiff's livery stable?

40 A. About 40 foot from the stable.

41 Q. State who if anybody you saw at that time which you say was about Christmas, with the man whom you afterwards saw dead? 41 A. Brown.

42 Q. Was it the same Mr. Brown that you have testified to as taking away the dead body or another?

42 A. The same one.

43 Q. What did you understand at this time you describe as about Christmas to be the name of the man who you afterwards saw dead?

Defendants and each of them object to the questions as calling for hearsay evidence; objection sustained; plaintiff excepts.

Cross-Examination by Defendants' Counsel, Geo. J. Barker.

45 Q. Where were you born? 45 A. In Kentucky.

46 Q. Did you come direct from Kentucky here?

46 A. No, sir.

47 Q. Where did you live just before coming to Barbour County, Kansas?

47 A. Hillsdale County, Hillsdale City, Mich.

726 48 Q. How long did you live there?

48 A. Nine years.

49 Q. In what year did you leave there? 49 A. 1874.

50 Q. Come direct from there to Barbour County, Kans?

50 A. Yes, sir.

51 Q. What year did you leave Kentucky? 51 A. 1863.

52 Q. With whom did you last live in Kentucky?

52 A. David Lee.

53 Q. With what other masters did you live there?

53 A. Jimmy Gilmore.

54 Q. What year were you born? 54 Q. Can't answer.

55 Q. Born in slavery? 55 A. Yes, sir.

56 Q. Do you remember in what month or what year you first saw this dead body you have spoken of? 56 A. No, sir.

57 Q. You would not undertake to give the year in which you said it? 57 A. No, sir.

58 Q. Have you had talk with other persons about this case? 58 A. No, sir, no particular talk.

59 Q. Have you had a talk with Mr. E. W. Hiff about it?

59 A. None, he just told me he expected I would be called on.

60 Q. When was that?

60 A. It was day before yesterday when I started to my work.

61 Q. Had you had any talk with him before that?

61 A. No, sir.

62 Q. When did you tell him or anybody else you knew anything about this case?

62 A. I don't know, it was a street talk. I didn't stay on the street and [that] I know is when I am passing and
727 hear people talking.

63 Q. Do you state you have had no other talk with anybody but Mr. E. W. Iliff about this case?

63 A. Nothing but persons passing and talking about nothing in particular only people passing and talking about it.

64 Q. Who else spoke to you about coming up here as a witness beside Iliff? 64 A. No one.

65 A. Where did you say the body was the first time you saw it?

65 A. It was down the street south from here on the left hand side of the street.

66 Q. Was it in the house? 66 A. Yes, sir.

67 Q. Did you go in the house? 67 A. Yes, sir.

68 Q. Did you go in the house more than once?

68 A. Not that evening.

69 Q. When did you next go in?

69 A. Very early next morning.

70 Q. Who was there next morning when you went in?

70 A. Mr. Brown for one and Mr. Upperman.

71 Q. Anybody else? 71 A. Not that I remember of.

72 Q. Was that the last time you saw the body before it was buried? 72 A. Yes, sir.

73 Q. You state you were not present when the body was buried? 73 A. I was not.

74 Q. Do you know where you was working at that time?

74 A. Yes, sir, I dug the grave, I went up soon in the morning before I eat my breakfast.

75 Q. After that where did you go?

75 A. Came down town here.

76 Q. What were you doing the balance of the day if you remember? 76 A. Not anything.

728 77 Q. Was the body washed, dressed and shaved the first time you saw it? 77 A. No, sir.

78 Q. Do you remember how it was dressed the first time you saw it?

78 A. No, sir; I don't remember more than the clothes was not changed.

79 Q. How long were you in there that time?

79 A. Probably a half an hour.

80 Q. Do you remember whether the body had on boots or shoes? 80 A. No, sir; I do not.

81 Q. When and where did you first see the men you have spoken about having been at the grave with you?

81 A. At the Hotel here.

82 Q. When was that?

82 A. Well it was at the time we went up to the graveyard, I can't tell what time.

83 Q. Had some of those men been about Medicine Lodge, Kansas, a day or two before the day you went to the grave and opened it?

83 A. Not according to my recollection at present.

84 Q. You remember Brown do you not? 84 A. Yes, sir.

85 Q. Do you remember the man who came down with him on or about the time the grave was opened?

85 A. Came down with him who?

86 Q. With Brown.

86 A. I cannot say that they all came together. I don't know.

87 Q. Don't you remember that Brown and a companion of his was about town a day or more before the grave was opened? 87 A. I do not remember.

88 Q. How many persons were at the grave at the time it was opened?

88 A. Only four to the best of my recollection. There might of been more five counting myself.

89 Q. Well, Doctor Davis was one of them?

89 A. Yes, sir.

90 Q. Mr. Brown was another, was he not?

729 90 A. Yes, sir.

91 Q. Do you know who the others were?

91 A. No, sir; I do not.

92 Q. Did you hear their names or the names of any of the others?

92 A. I don't recollect any of their names; I might of heard them.

93 Q. Would you remember the names of any of them if you should hear them?

93 A. I don't know that I would.

94 Q. Do you remember a man by the name of Baldwin being there?

94 A. I wouldn't wish to say, not knowing.

95 Q. Describe as near as you can the other men you remember being there the time the grave was opened?

95 A. One of them was fleshy, heavy set man, common height and sandy complexion to the best of my knowledge the other one was a common height man rather a large frame man but not so fleshy with dark whiskers. I can't give any account of the others.

96 Q. How did the last man you describe wear his whiskers?
96 A. I wouldn't wish to undertake to describe that.
97 Q. How did the short man wear his whiskers?
97 A. I won't undertake to say for I am not positive.
98 Q. How did Brown wear his whiskers?
98 A. I am not certain that he had any.
99 Q. Did Brown have any whiskers at the time he was at the grave when it was opened?
99 A. I can't say he did.
100 Q. Can you swear he did not?
100 A. No, sir; I can't swear.
101 Q. Will you swear he did not wear reddish whiskers at that time? 101 A. No, sir; I won't.
102 Q. Could you say that he did?
102 A. No, sir; I wouldn't.
103 Q. Do you swear sir that there was any man there at that time who had red whiskers?
730 103 A. Not positive that there was. It seems to me that there was but I don't know.
104 Q. Describe the man who had red whiskers, if any there was?
104 A. I can't do it. I won't positively say there was one.
105 Q. Describe the color of the hair of the man you have described as the chunky man.
105 A. It is of a sandy complexion.
106 Q. Are you positive in regard to that?
106 A. I won't be positive, but that is the best of my knowledge.
107 Q. Will you swear that the chunky man did not have black hair? 107 A. I will not sir.
108 Q. Then is it not a fact that you do not now remember whether his hair was sandy or black?
108 A. At the best of my knowledge it was sandy. I wouldn't swear to it.
109 Q. Now what was the color of the hair of the man you have described as a large frame man?
109 A. It was black.
110 Q. Was the man whom you have described as the large frame man the largest man there?
110 A. No, was not as heavy set man as the other one.
111 Q. But was he the tallest man there?
111 A. I think he was.
112 Q. Do you testify positively now that the tallest man there at the time the grave was opened had black hair?
112 A. I will not positively but I think it was.
113 Q. And on what portion of his face did this man wear whiskers at that time?

113 A. As near as I can remember it didn't seem to me that he shaved at all.

114 Q. Would you say then that he wore whiskers all over his face?

114 A. Pretty much all over it; there might of been some bare places such as on cheek bones.

115 Q. How was he dressed at that time?

731 115 A. I think he had on a black coat and it rather seems to me he had on grayish pants but I will not say he had on either one.

116 Q. Did he have on an overcoat?

116 A. I don't recollect that he did sir.

117 Q. Did or did not that man have on an overcoat?

117 A. I am not able to say; don't know whether he had it or not.

118 Q. Is it not a fact that that man had on at that time what is called a linen duster? 118 A. I don't believe he had.

119 Q. State, if you know, whether he did or not.

119 A. I do not know, it was not the time of the year to the best of my knowledge for such a thing.

120 Q. Describe if you can how the chunky man was dressed at that time? 120 A. I cannot.

121 Q. Can you swear positively whether he had on an overcoat or linen duster at that time?

121 A. I will not swear either way I don't think he was naked.

122 Q. Is the best description which you can give of the way that chunky man was dressed at that time is that he was not naked?

122 A. I have no recollection not thinking I would ever be called upon.

123 Q. Describe accurately how the man Brown was dressed at the time he was present at the opening of the grave you have mentioned; if you can.

123 A. I think his pants were black and his coat but it don't strike me his vest was. I won't be positive.

124 Q. Are you positive that Brown had on a black coat and black pants at that time? 124 A. I am not sir.

125 Q. Did he or did he not wear an overcoat on that occasion? 125 A. I cannot say sir.

126 Q. Did not Mr. Brown have on at that time what is called a blue soldier overcoat with a cape to it?

126 A. Not to my knowledge.

127 Q. Did he not when he first went out to the

732 grave and did he not take it off before assisting you in opening the grave?

127 A. I have no recollection of it.

128 Q. Can you swear positively that he did not wear such a coat? 128 A. No, sir, I can't.

129 Q. Is it not a fact that there were several other persons present at the time this grave was opened besides these you have mentioned?

129 A. I have no recollection of there being any other persons.

130 Q. Are you positive there were no other persons present? 130 A. No, sir, I am not.

131 Q. With whom did you go out to the cemetery on that day?

131 A. With the same men I have named, there might have been others, but I don't know of.

132 Q. Did you walk or ride out? 132 A. I rid out.

133 Q. In whose wagon?

133 A. The one that went from here I cannot say whose it was.

134 Q. Who drove the team? 134 A. Mr. Brown.

135 Q. Was it not a team from Mr. E. W. Iliff's livery stable? 135 A. I do not recollect.

136 Q. Can you now swear in what month or year that grave was opened? 136 A. No, sir.

137 Q. State as near as you can how long you and the persons you have mentioned were at the grave at the time it was opened?

137 A. Well, we were there probably an hour, mebbe a little longer, probably not so long, can't say.

138 Q. Did you make any examination of the body there at the grave yourself?

138 A. No, sir, nothing more than opening the sleeve a little larger than what it was, tearing the sleeve.

139 Q. There were several sleeves to tear was there not, before you could get to the arm? 139 A. There was not.

140 Q. Was there not a coat sleeve and a shirt sleeve
733 both to open?

140 A. I do not believe sir that we opened only the shirt sleeve.

141 Q. Did not the body have a coat on?

141 A. I do not remember about the coat it looks reasonable that it ought to have, but I do not remember.

142 Q. Can you now testify positively whether the dead body did or did not have a coat on at the time the grave was opened?

142 A. I will not, sir. I will not with a certainty.

143 Q. Can you now testify positively whether the dead body did or did not have a coat on at the time the grave was opened? 143 A. I cannot.

144 Q. Now is it not a fact that you tore open the coat sleeve, and that Doctor Davis then came forward, opened the

shirt sleeve and the other men huddled around and you stepped back towards the grave and did not see that naked arm at all?

144 A. I beg to be excused it is a question no such a mess was acted out at all.

145 Q. This man whom you have mentioned as Doctor Davis is a physician, is he not? 145 A. So he is called.

146 Q. You were neither a physician nor surgeon at that time, were you? 146 A. I was not, sir.

147 Q. You had no special interest in the proceedings out there had you? 147 A. No special, I had not.

148 Q. And do you still swear that you instead of Doctor Davis tore open or cut the shirt sleeve of that body on that occasion?

148 A. I am not a swearing man on that question.

149 Q. Did all the men who went to the cemetery at the time the grave was opened come away from the cemetery together? 149 A. No, sir.

150 Q. Which ones came first?

150 A. The three strange men and Doctor Davis came together do not know which was foremost.

151 Q. Who did you come away from there with?

734 151 A. I came with Mr. Brown and the corpse.

152 Q. Were you riding in the wagon both of you?

152 A. Yes, sir.

153 Q. At what place in Medicine Lodge did you stop?

153 A. I got out of the wagon by the well at Mr. Iliff's stable.

154 Q. How close is that well to Mr. Iliff's stable?

154 A. About 12 foot, maybe a little further or not quite so far.

155 Q. Did you leave Brown with the wagon there?

155 A. Yes, sir.

156 Q. You assisted in taking the corpse out there?

156 A. No, sir.

157 Q. Whom did you see at the stable when you got out of the wagon? 157 A. Those 3 men.

158 Q. Anybody else? 158 A. I don't think there was.

159 Q. Was Mr. E. W. Iliff at the grave on the occasion of its being opened?

159 A. No, sir, not to the best of my knowledge. I have no knowledge of his being there at all.

160 Q. Was Mr. E. W. Iliff at the stable when you returned from opening the grave?

160 A. Not in my recollection.

161 Q. State as near as you can what time of the day it was when you got back to Iliff's stable from opening the grave? 161 A. It was sundown?

162 Q. State what did Brown do with the wagon and corpse when you stopped at Iliff's stable?

162 A. I don't remember as I didn't see it no more after that.

163 Q. Did he drive into Iliff's stable at that time?

163 A. Not in my presence, nor in my recollection.

163 Q. When did you next see Brown?

163 A. I have never seen him since that I know of.

164 Q. When did you again see the three men of whom you have spoken? 164 A. Never have seen them any more.

165 Q. I believe you have stated that you had seen
735 this dead body when it was living but that you could not state in what year or month you saw it, is that so?

165 A. Yes, sir.

166 Q. Do you remember how it was dressed the first time you saw it living?

166 A. I would not undertake to state that at all.

167 Q. Could you describe the features of the man whom you saw here living? 167 A. I think I can.

168 Q. Can you describe them from recollection?

168 A. Yes, sir, it is all the way that I can.

169 Q. Have you talked with any one in regard to the appearance of that man? 169 A. Yes, sir.

170 Q. And can you tell whether you saw the man living in 1876 or 1880, positively? 170 A. No, sir, I cannot.

171 Q. Can you describe accurately the appearance of this man Brown, the first time you saw him and his features?

171 A. Not positive.

172 Q. Do you think you could describe any feature of his accurately? 172 A. No, sir.

173 Q. Who was with you the first time you saw this man Brown and where was it?

173 A. To the best of my recolectilon I think he was in the stable cleaning down his horses, I won't say for certain that was the first time. I don't recollect of any one going there with me.

174 Q. At whose stable? 174 A. Mr. Iliff's.

175 Q. Mr. E. W. Iliff's stable? 175 A. Yes, sir.

176 Q. He, Brown, was a stranger to you at that time, was he not?

736 176 A. Yes, sir, he was.

177 Q. How long was you there that time?

177 A. I haven't any idea, sir.

178 Q. When did you next see Brown how long after that?

178 A. I have no idea at all. I live so close there it might of been 15 minutes and it might have been an hour.

179 Q. Iliff kept a public livery and feed stable at that time did he not and it was not an unusual thing for you to see strangers there was it?

179 A. Yes, sir, he did; no, sir, it was not.

180 Q. You may state all the persons who were present in the stable the first time you saw Brown.

180 A. I haven't any knowledge of any one being there but himself he was cleaning off his horses.

181 Q. At what other place in Medicine Lodge did you see Brown?

181 A. I have no recollection only just around about the stable.

182 Q. State as near as you can how many weeks or months Brown remained around about that stable?

182 A. Well about 2 weeks mebbe not quite so long.

183 Q. Are you positive he was not there to exceed a month? 183 A. No, sir, I am not.

184 Q. He might have been there as long as two months might he not? 184 A. He might.

185 Q. You was in and about that stable nearly or quite every day was you not during that time?

185 A. I can't say that I was there every day.

186 Q. Was you there nearly every day during that time?

186 A. Yes, sir.

187 Q. You saw many strangers in and about that barn during that time did you not coming and going?

187 A. Yes, sir.

188 Q. You saw a good many more strangers in and about that barn during that time than you can remember did you not? 188 A. Yes, sir, I did.

737 189 Q. About how many years was it from the time you saw Brown at the barn the time you speak of until you saw him with the dead body state as definitely as you can?

189 A. It wasn't a year.

190 Q. In what year then sir did you first see him at the barn state if you can? 190 A. I can't do it.

191 Q. Was this man whose dead body you claim to have seen in Medicine Lodge staying with Brown in and about Hiff's livery stable all of the time on the occasions of your first seeing Brown there?

191 A. I don't know that he was there all of the time.

192 Q. Was he there all the time that Brown was there?

192 A. Yes, sir.

193 Q. What other strangers were there about the stable during the time that Brown was there?

193 A. I am not able to tell you.

194 Q. Mention one of them.

194 A. I won't undertake it so many comers and goers.

195 Q. Describe one of those strangers who was there during the time that Brown was if you can? 195 A. I cannot.

196 Q. You are yet living at the same place close to Hiff's livery stable are you not? 196 A. I am sir.

197 Q. And have you been in there frequently during the past two months? 197 A. Yes, sir.

198 Q. Have you seen plenty of strangers in there during that time? 198 A. Yes, sir.

199 Q. Describe accurately if you can any stranger that you saw in Iliff's livery stable during the past month?

199 A. I will not undertake it for I have passed by asked no questions and inquire after no names.

200 Q. Can you describe any stranger you have seen
738 in Iliff's livery stable during the past month?

200 A. No, sir.

201 Q. Can you describe any stranger whom you've seen in Iliff's livery stable during the past week?

201 A. No, sir.

202 Q. You may describe now as accurately as you can this man Brown when you first saw him commencing with the color of his eyes and the color and shape of his beard state if you can?

202 A. I can't say anything concerning the color of his eyes and I don't know that he had a beard.

203 Q. Describe the shape of his chin if you can?

203 A. I cannot, sir.

204 Q. State if you have any recollection whatever in regard to the shape and form of his chin?

204 A. I have not, sir.

205 Q. Have you any recollection in regard to his nose?

205 A. No, sir, I haven't.

206 Q. Do you remember whether it was a long nose, short nose or pug nose?

206 A. No, sir, I do not remember any thing about it.

207 Q. Can you state positively in regard to the color of his hair? 207 A. No, sir.

208 Q. Have you any recollection whatever in regard to the color of Brown's hair the first time you saw it?

208 A. No, sir.

209 Q. Have you any recollection in regard to the color of Brown's hair the first time you saw it? 209 A. No, sir.

210 Q. Can you state whether Brown's hair was straight or curly? 210 A. No, sir, I can't.

211 Q. Now, sir, you may describe accurately if you can the color of the eyes of this man whose dead body you claim to [of]seen in Medicine Lodge, Kansas, the shape and color of his beard and whiskers the last time you saw him living
739 state if you can?

211 A. Well I don't think he had a black eye or a blue eye it seems to me it was a kinder of a brown I wouldn't wish to undertake to describe his beard and whiskers.

212 Q. Do you say you can describe the color and shape of his beard and whiskers?

212 A. No, sir, I did not say it.

213 Q. If you can state the color and shape of the beard of the man just mentioned the first time you saw him living please do so.

213 A. I would rather not undertake it for I should partly have to guess at it.

214 Q. Do you swear positively he had any whiskers of any kind the last time you saw him living?

214 A. No, sir, I don't.

215 Q. Tell us what kind of a chin this man had, whether a long chin, sharp chin, broad chin, or short chin?

215 A. To the best of my knowledge he had a long chin.

216 Q. Quite a long chin? 216 A. Yes, sir.

217 Q. Now in regard to being a sharp or broad chin?

217 A. I don't think it was a sharp chin and pecked.

218 Q. You recollect the shape of his chin very distinctly do you?

218 A. I do not any more than he was inclined to be a long faced man, high cheek bones and high forehead, seems to me he was inclined to be I call it dish-faced. High cheek bones and low below the cheek bones.

219 Q. You recollect this appearance of the man from the first time you saw him do you? 219 A. Yes, sir.

220 Q. Now sir describe accurately the color of this man's hair the last time you saw him living.

220 A. I should call it a dark brown but not black.

221 Q. Was it straight or curly?

221 A. It was neither one to the best of my knowl-
740 edge it was what I call wavy-like.

222 Q. You are positive in regard to the shade of this hair are you? 222 A. Yes sir.

223 Q. And you are positive are you not that it was neither straight or curly, but wavy? 223 A. Yes sir.

224 Q. And this description you are able to give from your recollection of this man the last time you saw him living?

224 A. Yes sir.

225 Q. Where in what year in what month of the year did you ever see this man with his hat off?

225 A. I can't tell you anything more than what I have told you. It was somewhere not far from Christmas can not tell what time.

226 Q. Where?

227 A. It was in Mr. Iliff's office where there was a mill.

228 Q. Who was present state all the parties?

228 A. Well there was Mr. Ez Iliff, his father. That is as far as I'll attempt to say, for I don't know.

229 Q. What time was it, night or day, you saw him there? 229 A. Day.

230 Q. Did the other persons have their hats off?
230 A. I cannot say that they had.
231 Q. Do you remember whether they did or did not have their hats off?
231 A. No sir I won't say whether they had or hadn't.
232 Q. State any other time or place when you saw that man living with his hat off and who were present on each occasion when you thus saw him?
232 A. I see him with it off 2 or 3 times at the same place and once at my bars no one when he was at my bars was present. Mr. Ez. Iliff and his father and probably Ness Iliff were present at other times when I saw him with his hat off.
233 Q. At each time you saw him with his hat off, except at your bars was Mr. Ezra Iliff present? 233 A. Yes sir.
234 Q. State as near as you can the number of
741 months it was from the first time you saw him with his hat off until the last time you saw him with his hat off while living?
234 A. I think it was all inside of one month.
235 Q. Are you positive that it did not equal two months from the first time you saw him with his hat off until the last time you saw him with his hat off while living?
235 A. I am positive it was inside of two months.

The hour for adjournment having arrived the further taking of these depositions is adjourned until May 14th at 8 o'clock a. m.

HICHMAN, Notary Public.

Pursuant to adjournment the further taking of these depositions was resumed at 9 o'clock a. m. May 14th, A. D. 1881.

236 Q. The time you saw the dead body at the house was Mr. E. W. Iliff present? 236 A. I don't think he was.
237 Q. Where did this body lay in a small room or in a large room of the house?
237 A. It was a considerably sized house. There was no partitions in the house at all.
238 Q. On which floor was it, the first or second?
238 A. The first floor.
239 Q. On what was the body lying or resting the first time you saw it?
239 A. I cannot tell what it was on, no I can't tell it was on some kind of a scaffold I don't know more than I suppose it was on two chairs or something up off the floor.
240 Q. Were there a great many people in there when you went in or only a few? 240 A. But few.
241 Q. Can you now state all who were in there?
241 A. Mr. Upperman for one. There was one man more that I can't call the name of and I can't call him more than Bill somebody.

742 242 Q. When did you next go into that room while the body was there and who was with you?

242 A. Very soon next morning and went alone.

243 Q. You did not remain with the body in the room over night did you? 243 A. No sir.

244 Q. Was the grave closed after it was opened on that day? 244 A. Yes sir.

245 Q. Who closed it? 245 A. I did.

246 Q. Who was there while you were closing the grave?

246 A. Mr. Brown.

247 Q. Anybody else? 247 A. No sir.

248 Q. Observe the color of my, George J. Barker's, hair and tell the exact shade of it?

248 A. I don't know of anything to compare it with.

249 Q. Can you give the exact shade of my hair?

249 A. No sir, I can not for there was no color ever come under my notice like it.

250 Q. Do you swear that you have had no conversation in regard to the appearance of this dead man except with Mr. E. W. Iliff? 250 A. I do.

251 Q. Have you had any conversation with either of the attorneys for the plaintiff in this case in regard to what you could testify in this case? 251 A. No sir I have not.

252 Q. Are you acquainted with Byron Ayers an attorney?

252 A. Yes sir.

253 Q. Have you had any conversation with him in regard to this case? 253 A. No sir.

254 Q. Has this dead body been the subject of a good deal of conversation between you and Mr. E. W. Eliff?

254 A. No sir it has not.

743 255 Q. About how many times do you say you and he have talked about it since it happened?

255 A. Oh I don't know, not so many nohow.

256 Q. Now sir you may describe accurately the shape of the nose of this man while living, which you claim to have seen dead in Medicine Lodge, Kansas?

256 A. I beg to be excused.

257 Q. Will you describe it as well as you are able?

257 A. Yes sir.

258 Q. Proceed.

258 A. To the best of my knowledge he had a tolerable high nose, through here (here witness places his thumb and forefinger across the bridge of his nose), and tolerably long.

259 Q. Was it sharp or blunt at the end?

259 A. It weren't to say sharp but reasonable. It was not really a blunt nose.

260 Q. Your description of the features of this man are given from your recollection of his appearance in life and not

from anything that has been told you or you have heard said concerning him is it?

260 A. Myself to the best of my own knowledge.

261 Q. Is the description from your own recollection of his appearance in life or from what has been told you about him?

261 A. Of my own recollection, to the best of my knowledge.

262 Q. At the time Mr. Iliff told you you would be a witness in this case what if anything was said about the compensation you would receive? 262 A. Not anything.

263 Q. Has there been any subpoena or other paper served on you in this case? 263 A. No sir.

264 Q. What were you engaged in doing Tuesday?

264 A. Waiting on a brick mason.

265 Q. And you came up here to give your testimony
744 at the request of Mr. Iliff and nobody else did you?

265 A. I didn't have Mr. Iliff's request.

266 Q. State who did request you to come up here and give your evidence? 266 A. Mr. John Upperman.

Redirect Examination

268 Q. What you mean by your last answer is that John Upperman came to you on yesterday and notified you that you were then wanted to give your testimony is it not?

268 A. Yes sir, that is what I mean.

CLARK X GILMORE. (his mark.)

Attest: C. T. HICKMAN.

745 The plaintiff next read in evidence the deposition of E. M. Byerly, taken at Medicine Lodge, Kansas, May 10, 1881, which is in words and figures as follows, to wit:

E. M. Byerly of lawful age being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeth and said that:

1 Q. State your name, age and place of residence?

1 A. My name is E. M. Byerly, my age is 34 years, my residence Medicine Lodge, Kas.

2 Q. How long have you resided in Medicine Lodge, Kansas?

2 A. I have resided here about 2 years. I have spent most of my time here for most 3 years.

3 Q. State by whom you are now employed if by any one?

3 A. By Van Dyke & Co.

4 Q. What business are they engaged in?

4 A. They are merchants.

5 Q. What position do you hold under them?

5 A. A clerk and bookkeper.

6 Q. Were you in Medicine Lodge, Kansas, in March, 1879?

6 A. Yes, sir.
7 Q. What business were you engaged in at that time?
7 A. I was teaching the public school.
8 Q. State as near as you can on what road if any running out from Medicine Lodge, Kansas, the school house where you were teaching was situated at that time?
8 A. On the main road running north.
9 Q. State if you remember the circumstance of a dead body of a man being brought into Medicine Lodge, Kansas, by Esquire Paddock from the north about the 19th of March, 1879?
9 A. I shall have to answer that question with a negative, I believe, no, sir.
10 Q. State if you remember seeing the dead body of a man in a wagon standing on the streets of Medicine Lodge, Kansas, about the 19th of March, 1879?
10 A. I saw a dead body of a man in a wagon off the street but not on the street.
11 Q. Now, state where in Medicine Lodge, Kansas, you saw the dead body above mentioned?
11 A. It was west of the printing office. The printing office was then in the building now occupied by the bank.
12 Q. Where was the body with reference to Iliff's livery stable?
12 A. It was in the wagon near the northwest corner of the stable.
13 Q. State if that was the first time you saw the dead body? 13 A. It was.
14 Q. State whether you saw it afterwards, if so where?
14 A. I saw it twice in the same place.
15 Q. State whether you saw the face and features of that body on these occasions? 15 A. I did.
746 16 Q. State whether you ever saw that body in life, and if so how long before the time last mentioned above and when and where?
16 A. I saw him before, passing out of town in a wagon, the exact length of time before I could n't say.
17 Q. State to the best of your recollection how many days before you saw the dead body?
17 A. Well, it was two or three days.. Well, I don't know as I would want to be limited to from two to three days, but would say from one to four days.
18 Q. In what direction was the wagon going?
18 A. North.
19 Q. State whether you knew where Mr. Dray on Elm Creek, Barbour County, Kansas, lived at that time?
19 A. I do not.
20 Q. State if you know where he now lives? 20 A. I do.

21 Q. State whether this wagon spoken of above was raveling on the road leading in the direction where Mr. Dray ow lives?

21 A. It was on the road leading in that direction but the oad to where Mr. Dray lives branches off from the main raveled road a short distance from where I saw them.

22 Q. State whether any other person was in that wagon eside the man whose body you afterwards saw?

22 A. There was.

23 Q. How many others were they?

23 A. Only one that I saw.

24 Q. State whether you ever saw that other man after- ards? 24 A. I did.

25 Q. When and where?

25 A. I saw him at the same time I saw the corpse stand- ng by the wagon in which the corpse was laying.

26 Q. State whether you ever saw the person whose dead ody [—] mentioned prior to seeing him when he passed out of own in the wagon?

26 A. I think that I have but I am not positive.

27 Q. When and where?

27 A. I cannot answer as to time now, nor am I posi- ive as to location. I am not positive in the matter at all, the ircumstance simply looked familiar to me.

28 Q. State to the best of your recollection how long be- ore it was before you saw the dead body?

28 A. I can't make any statement as to time, the faces were simply familiar to me, that is all the recollection I have.

47 Cross-Examination by Defendants' Counsel, Geo. J. Barker.

29 Q. How far was the school house where you were teach- ng from Medicine Lodge, Kansas?

29 A. It stands in the north part of the town. I had ref- rence to the city.

30 Q. How far is that school house from Iliff's livery table, about? 30 A. About 40 or 50 rods.

31 Q. How far was the school house from the road?

31 A. The traveled track passed within 15 or 20 feet from he school house.

32 Q. Where were you when you saw this wagon first at the me it passed the school house?

32 A. I believe I was in the school house at the time.

33 Q. Do you remember how the weather was at that time, hether pleasant or cold?

33 A. I think not very cold. I haven't a very good recol- ction of weather at that time.

34 Q. On which side of the school house does the road pass? 34 A. On the west.

35 Q. Is there a door in the west side of the school house?

35 A. No, sir.

36 Q. Then did you see the wagon from the door or window of the school house? 36 A. From the window, I think.

37 Q. From which window?

37 A. There were three windows on the west side; I am not sure, not positive from either window.

38 Q. Was school in session at the time?

38 A. I think it was.

39 Q. It was a covered wagon was it not?

39 A. I think with one bow up, that is my recollection.

40 Q. What was the color of the cover of the wagon, light or dark?

40 A. I do not remember positively, I think it was light.

41 Q. Which bow to the wagon was up?

41 A. About the second or third from the front end.

42 Q. The cover extended over the bow or bows which were up did it not?

42 A. I don't know how to describe that exactly, it appears as if the first bow had been placed back to the second place and the other bows dropped. I suppose the wagon showed but one bow standing.

43 Q. And the cover to the wagon was stretched over this one bow and extended back over the wagon did it not?

43 A. Well, I would not describe it exactly that way.

44 Q. Describe it as it was in your own language.

44 A. Well, fastened to this bow and dropped in the wagon behind the bow.

45 Q. Did not the cover extend over the end of the wagon behind? 45 A. I think not, but I am not sure.

46 Q. Was not the hind end of the cover fastened either to or around the hind end of the wagon box?

748 46 A. I am not sure as to how that was.

47 Q. Your best judgment or recollection as to it?

47 A. That the wagon sheet had been carelessly dropped down with the bows out behind.

48 Q. You are quite positive are you not that the cover was not open behind as it was in front?

48 A. No, sir, there was no bows standing behind.

49 Q. Was there any means of seeing under the cover from the hind end of the wagon? (Question withdrawn by the defendant.)

50 Q. Was there any opening to the hind end of that cover through which a person could readily see into the wagon?

50 A. I think not.

51 Q. Were the men when you saw them riding on a seat immediately in front of the mouth or opening of the cover?

51 A. Yes, sir.

52 Q. Were both men riding upon the same seat?

52 A. Yes, sir.

53 Q. Was the cover to this wagon fastened to this bow or thrown over it hanging down in front of the bow?

53 A. It was, I think, fastened to the bow, appeared to be the front bow set back.

54 Q. Do you remember whether this was a still or windy day?

54 A. I think it was not very windy, am not positive in regard to the matter.

55 Q. Was this bow a high or low bow?

55 A. It is my recollection that it was not very high.

56 Q. At what rate of speed did the wagon pass the school house?

56 A. A moderate walk, I suppose, not rapidly.

57 Q. Did you stop the exercises in your school to look at this wagon while it was passing?

57 A. I am not positive that school was in session.

58 Q. What time in the day should you say it was?

58 A. I think that it was sometime during the forenoon, I am not positive.

59 Q. During what hours was your school in session?

59 A. From 9 o'clock to 12, and from 1 o'clock to 4.

60 Q. Any recess?

60 A. Yes, sir, about half past ten o'clock and about half past 2 o'clock.

61 Q. Recess for how long? 61 A. 10 minutes.

62 Q. Were the exercises of the school suspended entirely during recess? 62 A. Yes, sir.

63 Q. Where was this wagon with reference to the school house when you first saw it?

63 A. It was passing along the road.

64 Q. In front of the school house?

64 A. No, sir, passing along the side of the schoolhouse.

65 Q. How large is this school house?

749 65 A. I think about 24x30 feet one story.

66 Q. There was a public road running by the house at that time over which a great many teams passed were there not? 66 A. Yes, sir.

67 Q. Teams were passing that school house not only daily but many times a day was there not?

67 A. Yes, sir; there were many teams passing the school house.

68 Q. This team did not stop in passing the school house did it? 68 A. No, sir.

69 Q. Can you describe accurately how those men were dressed at the time they passed the school house?

69 A. No, sir.

70 Q. I believe you stated the only time you saw the dead body was while it was lying in the wagon in Medicine Lodge, Kas., is that a fact?

70 A. That is a fact. I saw the body twice only each time it was in the wagon.

71 Q. Do you remember the condition of the body as to being covered, the appearance of the hair as to having been exposed to the wind the first time you saw it?

71 A. I think the body was covered the first time I approached the wagon. The hair as well as I remember looked somewhat rough and disordered.

72 Q. Was it lying upon the face and forehead?

72 A. I am not certain as to that but think it was brushed back out of the face. The face showed plainly.

73 Q. Was it lying upon the forehead?

73 A. I think not.

74 Q. The body was in a wagon in which it had been brought a long distance was it not?

74 A. The body was in the wagon, I believe in which it was brought in.

75 Q. How long did you remain there that time at the wagon? 75 A. Only a very few minutes.

76 Q. Were there many other people there standing around the wagon? 76 A. No, sir.

77 Q. Was the wagon standing near to the sidewalk?

77 A. No, sir.

78 Q. About how far distant from the side of the street?

78 A. Somewhere from 60 to 70 feet.

79 Q. Was the wagon covered? 79 A. No, sir.

80 Q. Do you remember whether it was lying in a deep or shallow wagon box?

80 A. I think it was a deep wagon box.

81 Q. And lying in the bottom of the body of the wagon?

81 A. Yes, sir; the box of the wagon.

750 82 Q. Who went there with you?

82 A. I do not remember, I think there were two or three of the small school boys with me.

83 Q. About what time of the day was it when you first went there?

83 A. It was immediately after dismissing school I think in the evening.

84 Q. When did you next return to the wagon and who was with you?

84 A. I do not remember the exact time perhaps a half hour or an hour. I think no one accompanied me at that time.

85 Q. How long did you remain this second time?
85 A. Probably ten or fifteen minutes.
86 Q. At the wagon all this time gazing at the corpse?
86 A. No, sir.
87 Q. You made no critical examination of this body at either time you was at the wagon did you? 87 A. No, sir.
88 Q. The body had not been washed and dressed preparatory for burial when you first saw it had it? 88 A. No, sir.
89 Q. You were not present and did not testify before any coroner's inquest on this body did you?
89 A. No, sir; I was not present at the inquest and did not testify.

E. M. BYERLY.

731 The plaintiff next read in evidence the deposition of Ely Smith, taken at Medicine Lodge, Kansas, May 10, 1881, which is in words and figures as follows, to wit:

Eli Smith, of lawful age, being by me first duly examined and solemnly sworn to testify the truth, the whole truth and nothing but the truth deposeth and said that:

1 Q. State your name, age, residence and occupation?
1 A. My name is Ely Smith, my age is 35 years, my residence is Medicine Lodge, Barbour County, Kansas, and my occupation is that of a druggist.
2 Q. How long have you resided in Medicine Lodge, Kansas? 2 A. Upwards of 5 years.
3 Q. During what years if ever were you the Post Master at Medicine Lodge, Kansas?
3 A. I was commissioned Post Master in 1876 and I kept the office until sometime in the year 1880.
4 Q. Describe as accurately as you can the location of the Post Office in Medicine Lodge, Kansas, during the year 1879?
4 A. At that time the postoffice was located on North Main street, the east side the last building in that row.
5 Q. How far from the corner of the street south of it?
5 A. 35 or 40 feet.
6 Q. State whether or not a man by the name of John W. Hillmon received from you as Post Master at Medicine Lodge, Kansas, during the winter of 1878 and 1879, mail matter which came to that address to that post office?

Counsel for the defendants object to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which action of the Court the defendants and each of them at the time duly excepted.

6 A. As to the John W. I don't know a man who claimed to be named Hillmon did receive some letters. It was during that time as near as I can recollect.

7 Q. About how many times did you deliver mail matter directed as above to the man whom you say claimed to be named Hillmon?

Counsel for the defendants object to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which action of the Court the defendants and each of them then and there duly excepted.

7 A. Once possibly twice.

8 Q. State as nearly as you can the first time you delivered mail matter to him.

Counsel for the defendants object to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which action of the Court the defendants and each of them then and there duly excepted.

8 A. Well it was during cold weather consequently
752 it must [of] been winter time at any rate the weather was very disagreeable. That is as near as I can come to it.

9 Q. State whether or not you saw this man to whom you delivered mail matter about the streets of Medicine Lodge, Kansas, or in Medicine Lodge during any number of days about the time you first delivered him mail matter?

9 A. I saw him on two different days in Medicine Lodge, Kansas.

10 Q. Were these days consecutive or were they separated by some space of time? 10 A. I don't know.

11 Q. Where else in Medicine Lodge, Kansas, beside the Post Office did you see him?

11 A. I saw him go from the office to about the middle of the street, first south.

12 Q. What did he do there? 12 A. Got into a wagon.

13 Q. State whether any one beside himself was in that wagon? 13 A. I think there was.

14 Q. How many others?

14 A. I think there was one other.

15 Q. In what direction did that wagon go?

15 A. I don't know.

16 Q. In what direction were the horses headed?

16 A. Northeast.

17 Q. Describe the road on which they were, stating the general direction it follows and state the part of Barbour County to which it leads from Medicine Lodge.

17 A. The team there was on First Avenue north. The direction of the road is north by northeast. There are several roads branching from the main road which would take a person to almost any part of the north side of the county.

18 Q. State whether the road in which they were standing passes by the public school building in Medicine Lodge, Kansas, as you go north upon it? 18 A. It does.

19 Q. Do you remember the circumstance of the dead body of a man being brought from the north into Medicine Lodge on or about the 19th day of March, 1879, and an inquest being held upon that body?

19 A. Only as I have been so informed by others.

20 Q. You were in Medicine Lodge at that time were you not? 20 A. Yes, sir.

21 Q. State whether or not your information was obtained at the time of the circumstance referred to or afterwards?

21 A. At the time.

22 Q. With reference to this fact of the dead body being brought into Medicine Lodge, Kansas, how long before that time was it that you had last delivered mail matter to
753 the man that you say claimed to be called Hillmon?

22 A. I don't remember.

23 Q. State your best recollection or judgment.

23 A. My judgment is it was from 2 weeks to a month.

24 Q. State if you know from what post-office this mail matter which you delivered as aforesaid came from originally.

24 A. My recollection of it is it came from Lawrence, Kansas, to Wichita, and from Wichita here.

Cross-examined

By Defendant's Counsel, George J. Barker:

25 Q. Your knowledge of where these letters came from was derived or obtained from the postoffice stamps on the letters was it not? 25 A. Yes, the post marks.

ELI SMITH.

* * * * * * * * *

754 The plaintiff next read in evidence the deposition of Derrick Updegraff taken at Medicine Lodge, Kansas, October 29, 1881, which is in words and figures as follows, to wit:

Direct Examination of Derrick Updegraff:

Q 1. State your name, age, and place of residence?

A. 1. Derrick Updegraff; age 70; residence, Medicine Lodge, Barbour County, Kansas.

Q. 2 How long have you resided in Barbour County, Kansas? A. 2. Something over eight (8) years.

Q. 3. In what business were you engaged during the latter part of the year 1878? A. 3. I was keeping a hotel.

Q. 4. Do you remember the circumstance of a dead body being brought into this town in the month of March, 1879?

A. 4. Yes, sir.

Q. 5. Did you see that dead body? A. 5. I did.

Q. 6. Did you ever see that person before, if so, when did you first see that person in life, if so, when and where?

A. 6. I saw him here in Medicine Lodge sometime about Christmas.

Q. 7. Who was in company with him? A. 7. Mr. Brown.

Q. 8. At what place in Medicine Lodge did you see them?

A. 8. At Medicine Lodge Hotel, and at Iliff's stable.

Q. 9. Where did they get their meals?

A. 9. They got them at my house at the hotel.

Q. 10. How long did they stay with you?

A. 10. Near a week.

Q. 11. State the names of both of these men.

Counsel for the defendants object to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which action of the Court the defendants and each of them then and there duly excepted.

A. 11. They called themselves Hillmon and Brown.

The defendants and each of them moved to strike out the answer of the witness as incompetent, irrelevant immaterial and hearsay.

The Court overruled the motion to which action of the Court the defendants and each of them then and there duly excepted.

Q. 12. When did you next see these men who called themselves Hillmon and Brown?

A. 12. Sometime in the forepart of March; maybe between the 12th and 15th.

Q. 13. How long before the circumstance of a dead body being brought into the town of Medicine Lodge that you have spoken about, was it that you last saw Hillmon and Brown?

A. 13. Three or four, maybe five days.

755 Q. 14. State if you recognized the dead body and if so whose body was it?

The defendants and each of them object to the answer to question 14 being read, because the same is incompetent, irrelevant, immaterial and hearsay.

The Court overruled the objection to which action of the Court the defendants and each of them then and there duly excepted.

A. 14. I recognized the dead body as the man they called Hillmon.

Q. 15. Where did you see these men at the time you speak of as being some three or four or five days before you saw the dead body?

A. 15. At Mr. Iliff's barn; I think they were in front of the door.

Q. 16. What were they doing?

A. 16. They were not doing anything. They talked a little bit to me.

Q. 17. Repeat that conversation as near as you can?

The defendants object to the question as incompetent, irrelevant, immaterial and hearsay.

The Court overruled the objection to which action of the Court the defendants and each of them then and there duly excepted.

A. 17. I think they were inquiring where they could find a cattle ranch.

Q. 18. State whether or not they were accompanied by any other person or persons? A. 18. I saw none.

Q. 19. State if you know how long Hillmon and Brown remained in Medicine Lodge at that time?

A. 19. I could not hardly tell how long they were; I don't think very long.

Q. 20. State if you saw them when they left Medicine Lodge? A. 20. I think not.

Q. 21. State if you know how they were traveling at this time? A. 21. They were traveling in a two-horse wagon.

Q. 22. Did you see them in the wagon?

A. 22. I think when they drove up only one of them was in the wagon. I went up to them and shook hands and talked a little while.

Q. 23. Did you see the dead body of Hillmon more than once? A. 23. Yes, sir.

Q. 24. Did you examine its face and features closely?

A. 24. As one of the jurymen I examined it as closely as I could.

Q. 25. Explain what you mean as one of the jurymen?

A. 25. We held an inquest over here in Medicine Lodge, Kansas, I along with the rest examined the body closely.

Q. 26. State if you ever saw that body after the holding of the inquest? A. 26. I never did.

Cross-examination of Derrick Updegraff

By George J. Barker, Esq., one of the Attys. for the Defendant:

Q. 1. When were you 70 years old?

756 A. 1. April 1st, 1881.

Q. 2. In what year did you remove to this, Barbour County? A. 2. In the spring of 1873.

Q. 3. Have you resided here ever since?
A. 3. Yes, sir.
Q 4. Do you know Samuel A. Riggs, Esq.?
A. 4. I do, I have a slight acquaintance with him.
Q. 5. Was he at your place last spring?
A. 5. He was at the hotel here.
Q. 6. Did you have a conversation with him about this case? A. 6. Yes, sir.
Q. 7. Did he show you any pictures?
A. 7. He did not.
Q. 8. Do you fix the date when you first saw these two men simply from memory? A. 8. Not altogether.
Q. 9. How do you fix the date then except from your memory?
A. 9. Partly from memory probably. I should never have thought of the thing in the world again if it had not been talked about.
Q. 10. Then independent of what you have heard about this case can you testify positively as to the time when these parties were here the first time? A. 10. I think I can.
Q. 1. Have you been keeping hotel for the past three years? A. 11. No, sir, not all of the time.
Q. 12. Can you testify postively as to what year you first saw these parties? A. 12. Yes, sir.
Q. 13. Can you tesitfy positively as to what month in the year you first saw these parties? A. 13. Yes, sir.
Q. 14. Did these men lodge at your house, I mean in 1878?
A. 14. No.
Q. 15. Do you know where they did lodge? A. 15. No.
Q. 16. Did you see these men when they came into Medicine Lodge in 1878? A. 16. I could not say.
Q. 17. At that time both of these men were perfect strangers to you were they not? A. 17. They were strangers.
Q. 18. Had you ever seen them or either of them before that time? A. 18. Not to know them.
Q. 19. Where did you first see them?
A. 19. I saw them at the stable.
Q. 20. At whose stable? A. 20. Mr. Iliff's.
757 Q. 21. Do you remember in what time of the day it was? A. 21. I think it was in the evening.
Q. 22. Is it not a fact that they spent a very small portion of their time at the hotel?
A. 22. Very little time, only while eating.
Q. 23. You did not wait upon the table at that time while they were eating did you?
A. 23. Most of the time.
Q. 24. Did you see one of those men during that time as frequently as you did the others?

A. 24. They were both together generally.
Q. 25. Did they not spend most of their time with Mr. E. W. Iliff or about his stable?
A. 25. I suppose they did. I could not tell you.
Q. 26. State the name of one person who was a guest at your hotel in 1878 during the time you claim Hillmon and Brown were there? A. 26. Byron P. Ayers.
Q. 27. Give us the name of another one?
A. 27. John Upperman.
Q. 28. These were regular boarders were they not, and resided here in town? A. 28. Yes.
Q. 29. Describe as accurately as you can the personal appearance of this man Brown, commencing with the chin, mouth, nose and other features?
A. 29. He had chin whiskers I think, maybe they were sheared off slightly. I don't think he had a very square chin; neither very sharp nor very square. I don't think I ever examined his chin very much. As I recollect he had just a common mouth, that is as good description of the mouth as I can give. I don't think there was anything uncommon about his nose, it was just fair size.
Q. 30. State if you have described as accurately as you can the nose of this man Brown?
A. 30. I don't like to describe a man's nose. I have described it as accurately as I can.
Q. 31. What was the color of his eyes?
A. 31. I think they were grey, I would not be certain.
Q. 32. Describe his forehead whether high or low, sloping or full; describe it as accurately as you can?
A. 32. I think he had a medium high forehead. This is as accurate as I can describe it.
33 Q. State the color of his, Brown's, hair?
33 A. He had dark hair is about all I know about it.
Q. 34. Are you positive he had dark hair instead of sandy?
A. 34. I am not positive.
35 Q. You saw Brown at the time of the coroner's inquest did you not? A 35. I did, yes sir.
758 Q. 36. Did Brown have what we call a long or short face?
A. 36. He had a rather medium face in length.
Q. 37. Brown remained around here after the inquest did he not?
A. 37. I think he was here a day or two. I know he was here after the burial. The funeral was in the evening and he was here the next day.
Q. 38. Did you see Brown after the burial?
A. 38. I think I did once.
Q. 39. Where did you see him?

A. 39. At Iliff's (E. W.) stable.

Q. 40. How long was this after the burial?

A. 40. It might have been one, two or three hours, I would not say.

Q. 41. Was it on the same day of the burial?

A. 41. Yes sir.

Q. 42. Did you see Brown on any day after the burial?

A. 42. I don't think I did.

Q. 43. How do you know then that he was there the day after the burial?

A. 43. I don't know it at all only from hearsay.

Q. 44. Brown testified before the coroner's inquest did he not? A. 44. Yes, sir, I think he did.

Q. 45. You knew at the time of holding the inquest that Brown claimed to be the person who killed the person over whose body you were holding the inquest at the time did you not? A. 45. Yes sir.

Q. 46. Was Byron P. Ayres present at this inquest?

A. 46. Yes sir.

Q. 47. Ayers was county attorney of this county at that time was he not? A. 47. Yes sir.

Q. 48. Who else was examined on that occasion beside Brown? A. 48. I don't think there was any one.

Q. 49. At the time of this inquest where was the dead body lying?

A. 49. On Main street between First and Second avenues.

Q. 50. Where was the body lying when the jury looked at it?

A. 50. When they first looked at it it was in the wagon.

Q. 51. Was that before or after Brown had been examined as a witness? A. 51. Before.

Q. 52. Where was the body lying when you first saw it?

A. 52. In the wagon.

Q. 54. Was this coroner's inquest held on the same day the body was buried? A. 54. The night before.

Q. 55. Did you see the body after it was washed and dressed and prepared for burial? A. 55. I did not.

759 Q. 56. When you first saw the body did you observe blood upon its face?

A. 56. There was some blood on its face.

Q. 57. Did you observe to see the wound upon the face or head of the body? A. 57. I did.

Q. 58. You may state who was present on the second occasion when you claimed to have seen Hillmon and Brown.

A. 58. I don't think there was any one.

Q. 59. If you can remember of anybody being present state who it was?

A. 59. It runs in my mind no one was present.

Q. 60. About what time in the day was this?
A. 60. In the after part of the day.
Q. 61. Where was it?
A. 61. In front of E. W. Iliff's stable.
Q. 62. When did you next see these parties?
A. 62. I saw them that evening, talked considerably with Mr. Brown.
Q. 63. Where did you see Mr. Brown that evening and who was present?
A. 63. Right at the door of the stable. Iliff's stable. No one was present.
Q. 64. Well did you see him again that night?
A. 64. I did not.
Q. 65. Did you see him, Brown, the next morning?
A. 65. I did not.
Q. 66. Did you see Brown's companion the next morning?
A. 66. I did not see either of them.
Q. 67. Now did Brown come to Iliffs stable?
A. 67. I think Brown got out of the wagon and walked across the street to the stable. I think it was Brown I would not be certain.
Q. 68. Do you remember how Brown was dressed on that occasion? A. 68. I do not.
Q. 69. Do you remember how his companion was dressed?
A. 69. I don't remember how either was dressed.
Q. 70. Is it not a fact that you did not know one from the other?
A. 70. Hardly knew one from the other when they came up.
Q. 71. With whom beside Mr. Riggs and the other attorneys in this case have you talked concerning this case?
A. 71. None.
Q. 72. You remember the appearance of the features of the dead man very distinctly do you not?
A. 72. Not very distinctly.
Q. 73. Describe the features of the face of this dead body as accurately as you can commencing with the chin, state whether he had a long or short chin?
A. 73. I think he had a moderate chin, well, you might call it a common chin. That is as accurately as I can describe the chin.
760 Q. 74. Now describe his mouth including the upper lip and mustache. A. 74. I could not do it.
Q. 75. Do you remember whether he had a moustache or not? A. 76. I do not.
Q. 77. Did you observe his teeth?
A. 77. Not sufficiently to describe them.

Q. 78. Did he have a long face or a short face from the top of his forehead to his chin?

A. 78. I would say it was a little over common length.

Q. 79. Now as to the width of his face did he have a wide face or a narrow face? A. 79. Rather narrow.

Q. 80. Was the lower part of his face thin or broad?

A. 80. About common, neither broad nor sharp.

Q. 81. Now how was it as to the upper portion of his face?

A. 81. Rather inclined to have high cheek bones, rather a full forehead may have sloped back some.

Q. 82. Describe as accurately as you can the nose of this dead body?

A. 82. I never saw anything uncommon about his nose.

Q. 83. Tell us as near as you can what kind of a nose it would be called? A. 83. I have no name for it.

Q. 84. Describe as accurately as you can the color of the hair of this dead body, and whether it was straight or curly?

A. 84. I can't do it.

Q. 85. You may state how Brown wore his whiskers on what you claim to have been the second occasion of your seeing him? A. 85. I don't know that he had any.

Q. 86. Have you any recollection as to that matter?

A. 86. I have none.

Q. 87. Can you tell whether on the same occasion his companion had any whiskers and if so how he wore them?

A. 87. I don't recollect of any whiskers only on his chin.

Q. 88. On the occasion last referred to did Brown have a moustache? A. 88. If he had it was very short.

Q. 89. Did he have any moustache whatever?

A. 89. I don't know that he had.

Q. 90. Did his companion at that time wear a moustache?

A. 90. I have no recollection of any moustache.

Q. 91. Do you remember the condition of the weather in December, 1878? A. 91. It was very hard.

Q. 92. How was it from the 10th to the 20th of March, 1879? A. 92. I don't remember.

761 Q. 93. From your knowledge of this country and its inhabitants neither Brown nor his companion were citizens of this county and never resided here to your knowledge?

A. 93. To my knowledge they never resided here.

Q. 94. Did either Brown or his companion lodge at your house on any occasion or any time?

A. 94. They never did, only took their meals there.

DERRICK UPDEGRAFF.

762 Plaintiff next read the following deposition of Alonzo Fuller, taken at Lawrence, Kansas, June 30, 1885:

Alonzo Fuller of a lawful age being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeth and saith that:

Q. State your name, age, residence and profession?
A. Alonzo Fuller, my age is 67 years; I reside in Lawrence, Kansas, and am a physician and surgeon.
Q. How long have you been engaged in the practice of medicine and surgery? A. Ever since January, 1842.
Q. State the condition of your health as to your ability to attend the sitting of the United States Circuit Court at its present term at Leavenworth, Kansas?
A. My health is not good, but am infirm caused by a slight stroke of paralysis two years ago, which has been followed by nervous prostration, the latter is greatly increased by any unusual excitement. I am troubled very much from insomnia, which is aggravated by new or strange surroundings. I do not regard it prudent to go from home and I am advised by physicians with whom I have consulted that it would be unsafe for me to attend the sitting of the United States Court at Leavenworth.
63 Q. Do you remember an inquest held upon a dead body claimed to be the body of John W. Hillmon, said inquest being held by Dr. Richard Morris as coroner of Douglas county, Kansas, sometime in the spring of 1879?
A. Yes.
Q. State whether or not at or about the time that inquest you made any examination of the dead body the subject of the inquest, if so, at what instance did you make such examination and with what other physicians and surgeons, if any, did you act?
A. I did make an examination of the dead body, but do not remember now whether I made it at the request of the coroner or of the insurance companies' agents—It was, however under the control of the coroner. Dr. V. G. Miller, Dr. J. H. Stuart, acted with me—I do not recollect whether Dr. Mottram acted with us or not, but he came in and was present part of the time.
Q. State what kind of an examination of the body you made?
A. We examined first as to external appearances, as to any marks on the body—marks of identification or scars or other peculiarities of any nature. We examined the body very minutely and carefully in that regard. We stripped the body, laid it out on a board and examined it on all sides and in all places. We used a magnifier to examine the body for scars.
Q. State what, if any scars, marks or other identifying peculiarities, if any, you found upon the body?

A. We found no marks or scars, except a vaccination mark, a double mark from which the scar had not peeled off. The body was remarkable because of its freedom from scars.

Q. State whether or not there were any scars upon the calves of the legs or either of them? A. There was not.

Q. Was your examination close enough to enable you to say positively that there was no visible scar on the calf of either leg? A. Yes.

Q. If a scar resulting from the bite of a dog by which a portion of the flesh had been torn away had been upon either leg, would you have seen it? A. I think we would.

Q. Did you notice or examine the nose of the dead body?

A. I did.

Q. State what its apeparance was at the time and what if any evidences of injury to that organ you discovered?

A. The nose was not exactly in the median line of the face, but was a little one-sided, the point was turned a little. There was some discoloration on the side of the nose; decomposition had set in there. The nose had the appearance of having been injured during life at the point where decomposition had set in.

764 Q. State if you know whether or not the portion of the flesh of the arm containing the vaccination marks was removed from the arm; stating in this connection all you know of your own knowledge in relation thereto.

A. It was removed from the arm—a square piece of skin was removed from the arm, the marks being in the center of it. I saw it afterwards at the office of Dr. J. H. Stuart in Lawrence.

Q. State if you know whether Dr. J. H. Stuart was at that time professionally retained to any one of the insurance companies having policies on the life of J. W. Hillmon?

A. He was examiner for I think the New York Life Insurance Company.

Q. At the time you made the examination of the body of which you have spoken had the piece of skin containing the vaccination marks been removed?

A. It had, but Dr. J. H. Stuart had informed me that he had removed it, and showed me the piece to account for the appearance of the arm at that place.

And further deponent saith not.

A. FULLER.

765 The plaintiff next read in evidence the deposition of Nathan Priest, taken at Medicine Lodge, Kansas, Oct. 29, 1881, which is in words and figures as follows, to wit:

Direct Examination of Nathan S. Priest:

Q. 1. State your name, age and place of residence.
A. 1. Nathan S. Priest; 32 years old; reside in Reno county, Kansas.
Q. 2. State where you resided during the months of March and April in the year 1879?
A. 2. I resided in Barbour County, Kans.
Q. 3. State if you remember the circumstance of a man being killed on Crooked Creek in Barbour County, Kansas, in the spring of 1879.
A. 3. I recollect of hearing of it, yes.
Q. 4. State if you remember of meeting a wagon near that locality and at about that time?
A. 4. Yes, I think I do.
Q. 5. Describe the place where you met that wagon.
A. 5. I met it on the old Griffin trail west of the head of spring creek. That would be I should judge perhaps a mile east of the head of what is known as Crooked Creek.
Q. 6. Describe if you can the team and the occupants of the wagon? A. 6. I don't know as I can do it.
Q. 7. How many persons were there in the wagon?
A. 7. Two to the best of my recollection.
Q. 8. Which direction were they moving?
A. 8. They were treveling west.
Q. 9. How long was this before the killing of the man above mentioned?
A. 9. It was only a short time before I understood the man was killed. It might have been a day or such a matter.
Q. 10. State if you ever recognized that team, wagon or either the men at any time afterwards.
A. 10. To the best of my recollection I recognized the team, also one man to the best of my recollection.
Q. 11. Where did you see the team and one man?
A. 11. On Elm creek about three miles below the mouth of Crooked Creek at the residence of S. Ferguson.
Q. 12. About how long did they remain at Ferguson's?
A. 12. To the best of my recollection ten days or two weeks.
Q. 13. How far from Ferguson's did you live at that time?
A. 13. About three-quarters of a mile.
Q. 14. In what business were you engaged at that time?
A. 14. I was in the stock business.
Q 15. What were you doing at that time?

A. 15. I was riding the range principally.

Q. 16. How often did you pass Ferguson's house during that time?

A. 16. Several times, I passed mostly every day.

766 Q. 17. State if you ever had any conversation with this man at Ferguson's?

A. 17. I think I have. Only short conversations with him.

Q. 18. When you saw this wagon on the old Griffin trail describe it as to whether it had on wagon bows and wagon cover.

A. 18. To the best of my recollection it had on wagon bows, and I think the sheet was over two or three of the hind bows.

Q. 19. Describe how and where these two men were sitting in the wagon at that time?

A. 19. I don't recollect. They were not sitting under the cover.

Q. 20. State if you can what kind of a seat they were sitting on? A. 20. I can't do it.

Q. 21. Were they sitting in the bottom of the wagon bed?

A. 21. To the best of my recollection they were not.

Q. 22. How much of the wagon bed was covered by the cover?

A. 22. To the best of my recollection it would be a third or half.

NATHAN S. PRIEST.

767 The plaintiff next offered in evidence the testimony of W. W. Standiford, given upon the trial of 1895, which is in words and figures as follows, to wit:

Direct Examination of W. W. Standiford.

Q. Mr. Standiford, state your name?

A. W. W. Standiford.

Q. Where do you reside?

A. Medicine Lodge, Barber county, Kansas.

Q. Where did you reside in the years 1878 and 1879?

A. Medicine Lodge, Barber county, Kansas.

Q. What was your business at that time?

A. I was selling goods; handling a little stock.

Q. What is your business now? A. Handling stock.

Q. How long did you reside in Barber county prior to 1879?

A. Well, I am not very good on dates; I think about—I think I went to Medicine Lodge in 1876 or in the spring of 1877.

Q. Did you know one G. W. Paddock who was a justice of the peace in that county? A. I did.

Q. Do you remember the circumstances of a dead body being brought into Medicine Lodge in the month of March, 1879 by G. W. Paddock? A. Yes, sir.

Q. State whether or not an inquest was held upon that body by Squire Paddock in Medicine Lodge? A. It was.

Q. State whether or not you were a member of the coroner's jury at that inquest? A. I was.

Q. Where in Medicine Lodge did you first see that dead body?

A. In a wagon northeast corner of Iliff's stable on Main street.

Q. Who was with the body when you first saw it?

A. Well, there was quite a number; but I remember Mr. Paddock, Mr. Ferguson and a man by the name of Walt and others that I couldn't name; I know there was quite a number there.

Q. When did you first look at that body and where was it when you first looked at it? At its features.

A. You mean out in the wagon?

Q. When you first looked at the body, the features of the body, when was it you first did that?

A. I was called there by Mr. Ferguson or Mr. Paddock who said there was a dead man—

Q. You need not state what was said.

By the Court: When did you look at it?

A. As soon as I got to the wagon.

Q. State to the jury whether or not you had ever seen that body in life? A. My best recollection is that I had.

Q. When?

A. Sometime in the month of December, 1878.

Q. Where? A. In my store.

Q. What was the name of the person whose body that was, in your judgment?

Counsel for the defendants object to the question as
768 incompetent, irrelevant, immaterial and hearsay.

The Court sustained the objection, to which ruling of the Court the plaintiff at the time duly excepted.

A. John W. Hillmon. (This answer not read.)

Q. At the time you saw that body, calling your attention to the persons who were present, either then or during the inquest, did you see a man by the name of John H. Brown?

A. I saw a man that they called Brown but I couldn't say as to his initials.

Defendants move to strike out the answer to the last question as hearsay.

The Court overruled the motion, to which ruling of the Court the defendants, and each of them, at the time duly excepted.

Q. Did he testify; did the man Brown testify at the coroner's inquest? A. Yes sir.

Q. When you saw the man John W. Hillmon in your store, state whether or not you saw the man Brown?
A. I did, the man that they called Brown.

The defendants object to the answer to the last question as incompetent, irrelevant, immaterial and hearsay.

By the Court: I think that ought to be admitted with this qualification: That the jury should not take it as evidence that the name of the man was Hillmon, but it is allowed simply for the purpose of calling attention to the man about whom the testimony is being given and not as evidence of his name.

To which ruling of the Court the defendants and each of them at the time duly excepted.

Q. Were they together?
A. They were not right together; when he went to go out of the store he spoke and called this man Brown—
Q. You need not state anything that was said.
Q. Did they come into the store together?
A. I couldn't say.
Q. Did they go out of the store together? A. They did.
Q. State how frequently you saw this man Hillmon upon the streets in Medicine Lodge at that time in December?

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: The objection is overruled with the statement to the jury that it should not be considered that the witness is testifying that the man's name was Hillmon; that the name is used for the purpose of calling attention to some particular man who it is claimed was with Brown.

To which ruling of the Court the defendants and each of them at the time duly excepted.

A. I couldn't say; I saw the man before he had come into the store; I recognized him as a stranger that afternoon. I passed him a time or two in going to Iliff's stable; it seemed to be headquarters.
Q. After he had been in your store or before?
A. Before; I knew him as a stranger; identified him
769 as a stranger, and afterwards he came into the store; I couldn't say when I met him and passed him but I saw him once afterwards.
Q. Had you a conversation with him in the store?
A. I did.
Q. How long a time did that conversation occupy?
A. Well, sir, it was a good while ago and I couldn't say.
Q. To the best of your judgment?
A. I would say probably ten minutes; maybe longer.

Q. Mr. Standiford, without stating what was said between you and the man Hillmon, state what the subject of the conversation was between you?

Objection. Question withdrawn.

Q. Mr. Standiford, you may state what Mr. Hillmon said in that conversation if anything, as to where he was going, and what his intentions were when he left Medicine Lodge?

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: So far as the use of the word Hillmon is concerned, the same direction will be made to the jury as before—that the use of the word Hillmon in the question and answer shall not be construed to mean that that man was Hillmon.

To which ruling of the Court the defendants and each of them at the time duly excepted.

Q. He said he wanted to talk to me about a stock ranch; he was hunting a stock ranch.

Q. Go on and state all that was said by him about that matter?

The defendants object to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which ruling of the court the defendants and each of them at the time duly excepted.

A. A place to handle stock; and we had quite a conversation in reference to how men handle stock and he asked—

Q. No, just state what he said about what his intentions were; what inquiries he made of you?

The defendants object to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which ruling of the Court the defendants and each of them at the time duly excepted.

A. Hunting a place to handle stock.

Q. State what, if anything, he said with reference to his intention of going farther than Medicine Lodge to hunt a stock ranch? A. He did.

770 Q. State what he said?

A. He made inquiry of two or three places that was west and southwest of Medicine Lodge of me with reference to location.

Q. A little louder?

A. He made an inquiry of me, two or three places, Hackberry Springs, for instance, that was south; it was southwest and west of Medicine Lodge, asking me the best road there etc., and the surrounding country around it?

Q. State what, if anything, he said in that conversation with you about his intention of going further to hunt a stock ranch?

A. He said he was out looking for a stock ranch and was going to take quite a trip before he settled, and wanted to satisfy himself of the location.

Cross-Examination of W. W. Standiford,

By Geo. J. Barker:

Q. I didn't get your name, I beg your pardon, what is your full name? A. W. W. Standiford.

Q. W. W. Standiford? A. Yes sir.

Q. You still reside in Medicine Lodge, do you Mr. Standiford? A. Yes sir.

Q. You have resided there continuously since that time?

A. I think 1876 or spring of 1877; I have been away
771 part of the time, but still that was my home; I was three years out west in Clark county during that time.

Q. During what years were you in Clark County?

A. I couldn't say.

Q. State as definitely as you can what years you were in Clark County?

A. '88, '89 and '90, I think; that is the best of my recollection.

Q. At what place in Clark County were you, Mr. Standiford? A. At Englewood.

Q. At Englewood? A. Yes, sir.

Q. That was your address there, was it? A. Yes, sir.

Q. You were engaged in the stock business out there?

A. Partly.

Q. In what other business were you engaged?

A. In merchandising.

Q. You were engaged in merchandising in 1888, three years out there you were engaged in merchandising?

A. Either three or four years; I think I was there that long; I would not pretend to say accurately.

Q. Was your family with you up there at Englewood?

A. When I first went there I had no family except two boys; they remained at Medicine Lodge at my home; I married during that time and that was my second marriage, and then my family went to Englewood.

Q. And then you removed back to Medicine Lodge, where you now live? A. Yes, sir.

Q. Where did you live before you went to Medicine Lodge?

A. I lived in Miami County.
Q. Miami County, this state? A. Yes, sir.
Q. What was your postoffice address down there, Mr. Standiford? A. Osawatomie.
Q. How long did you live down there near Osawatomie?
A. We came there, my father moved to Miami County in 1855.
772 Q. That was your postoffice address, Osawatomie?
A. No, sir, not all the time.
Q. What was your postoffice address when you lived in Miami County?
A. Stanton; a little town called Stanton in the same county.
Q. Afterwards, you moved to Osawatomie? A. Yes, sir.
Q. What business did you engage in there?
A. Why, I helped—hired to some parties to buy and put up stock with them, and farming.
Q. Your father lived down there, did he?
A. No, sir, my father lived northeast of the town of Stanton; he didn't live at Osawatomie.
Q. Is he living there yet? A. My father is dead.
Q. Now, you state, as I understood you, you think in 1878 you first saw this man Hillmon? A. Yes, sir, I think so.
Q. You are quite positive in regard to that, are you?
A. My best recollection that the man that came to me and said his name was John W. Hillmon was that time.
Q. Did he say his name was John W. Hillmon or John Hillmon or Mr. Hillmon?
A. He gave me the name of John W. Hillmon.
Q. You remember that distinctly, do you, at this lapse of time, that he gave you his full name?
A. I asked him where he was from, and then he gave me his full name.
Q. Now, what time would you say that was in December, 1878, that you first saw him?
A. I wouldn't undertake to give the exact dates, but it was the last half of the month; it must have been.
Q. You think it must have been the last half of the month?
A. Yes, sir.
Q. At that time, you say he was making his headquarters at Iliff's livery stable?
A. I think so, that was my inference of the matter.
Q. That is where he seemed to congregate, was it?
A. Yes, sir.
Q. There at Mr. Iliff's stable? A. Yes, sir.
Q. Did you have any conversation with him there at Mr. Iliff's stable—not what you said, now, but whether you had any conversation with him at Iliff's stable?

A. No, sir, I did not.

Q. Now, Mr. Standiford, do you remember the condition of the weather in December, 1878, there at Medicine Lodge?

A. I don't know; I couldn't do that.

Q. Let me call your attention; is it not a fact that the last half of December, 1878, and the fore part of January, 1879, the weather was extremely cold in Medicine Lodge?

A. I think so, I ain't sure, but that is my recollection that we had some cold weather, very cold weather for that climate.

Q. For that locality, wasn't it unusually cold about that time? A. I couldn't say as to that.

773 Q. Do you remember now in regard to the fact whether or not at that time there was snow on the ground? A. I wouldn't pretend to say.

Q. You could not say in regard to that whether there was snow on the ground at that time or not? A. No.

Q. I understand you up to that time you had never seen this man Hillmon; up to that time you had no recollection of ever seeing him? A. No, sir.

Q. That was your first knowledge of the existence of such a man as Hillmon? A. When he came into the store.

Q. When he came into the store? A. Yes, sir.

Q. Medicine Lodge at that time, in 1878, was a sort of a frontier town, was it not? A. Very much so.

Q. There was a good many strangers, a good many cattle men coming and going, wasn't there?

A. Yes, sir, quite a number; there wasn't a great many but quite a number.

Q. It was not an uncommon thing to see a stranger in Medicine Lodge in those days, was it?

A. No, it was small, and we generally noticed them.

Q. You noticed whoever was in town; there was usually a good many people coming and going there, cattle men?

A. Quite a number; they was generally cattle men.

Q. The county at that time was just settling up, in 1878 and 1879, was it not?

A. Settling up slowly, yes, sir, just commenced.

Q. Just commenced to settle up at that time?

A. Yes, sir. It was just beginning to move up in the way of cattle business.

Q. What kind of a store were you carrying on at that time?

A. General stock.

Q. Well, general merchandise?

A. Yes, sir, general merchandise.

Q. Where was your store situated there with reference to Iliff's stable? A. Situated on the same side of the street.

Q. About how far distant?

A. I don't believe it is more than a quarter of a block.

Q. Don't think it is more than a quarter of a block?
A. It might have been.
Q. How wide were the blocks? A. I don't remember.
Q. How far would that make it, a quarter of a block?
A. That is eighty feet between us and his stable. Let me get at it in my own way. I think that is an 80-foot street running east and west; he was on the corner; I was in the building over on the next corner down that way; it would be about a block.
Q. I will ask you about how many feet, Mr. Standiford, it is not very material? A. I couldn't say.
774 Q. You can give some idea whether it was one hundred feet or five hundred feet, couldn't you, you have lived there all these years? A. Yes, sir.
[Q.] By the Court: Give your best judgment.
A. It was inside of five hundred feet.
Q. How many times did you see these parties around there?
A. I think, I could not say positive, but I noticed them on two different occasions and on different days, I think.
Q. You are positive you saw them on two different occasions? A. Yes, sir, in the store.
Q. You think, then, they stayed there two or three days; would that be the best of your recollection in regard to it?
A. I don't know how long they did stay; didn't see them leave.
Q. You didn't see them when they left Medicine Lodge?
A. No, sir.
Q. You don't know of your own knowledge what direction they went when they left Medicine Lodge? A. No, sir.
Q. But you noticed that they left there, in other words, you did not see them around there again? A. I missed them.
Q. You missed them? A. Yes, sir.
Q. But at what time you missed them you couldn't say?
A. No.
Q. Could you say whether it was before or after Christmas that you missed them? A. I could not.
Q. Couldn't say with reference to that? A. No, sir.
Q. Then your recollection is that you saw them on two or three different occasions? A. Yes, sir.
Q. Now, where they lodged: Did you have any knowledge in reference to that matter? A. How is that?
Q. Have you any knowledge as to where they lodged when they were there at Medicine Lodge? A. I do not.
Q. Do you know how they came there? I mean of your own knowledge. Did you see them when they rolled in?
A. I did not.
Q. And you didn't see them when they went out?
A. No, sir.

Q. Did you see their wagon?
A. I don't remember that I did.
Q. Don't remember that you saw their wagon, and all you remember is seeing those two strangers there in town?
A. They bought some goods and said they had a wagon.
Q. They said they had a wagon? A. Yes, sir.
Q. Do you remember when that was, the first time you saw them or the second time? A. The first time.
Q. And then you have stated that you missed them?
A. Yes, sir.
Q. But you can't state when that was? A. No, sir.
Excused.

775 The plaintiff next read in evidence the testimony of F. P. McAllister, given upon the trial in 1895, which is in words and figures as follows, to wit:

Direct examination of F. P. McAllister.
Q. State to the jury your name, place of residence and occupation.
A. F. P. McAllister, liveryman, live in Lakin, Kearny county, Kansas.
Q. How long have you lived there and been engaged in that business? A. About eight years.
Q. Where did you reside before you went to Lakin?
A. In Barbour county.
Q. In what part of Barbour county did you reside?
A. A mile and a half south of Medicine Lodge.
Q. How long did you live in Barbour county?
A. About six years. How long have I lived there?
Q. How long did you live in Barbour county?
A. 15 years.
Q. Dd you reside in Barbour county in the years 1878 and 1879? A. I did.
Q. Did you know at that time a justice of the peace there by the name of Squire Paddock? A. I did.
Q. State to the jury whether you remember the incident of Squire Paddock having brought into Medicine Lodge the body of some person said to have been shot in the month of March, 1879? A. Yes, sir; I seen that body.
Q. Where did you see it?
A. On the street about half a block south of Iliff's livery stable.
Q. What was done with the body there?
A. I helped to take it out of the wagon and put it in a house.
Q. Do you remember what house it was taken to?
A. Yes, sir; the house was vacant at that time; it had been used for a printing office.

Q. Do you know by what newspaper? A. The Index.
Q. Did you examine—did you look at the face of that corpse? A. I did.
Q. I will get you to state to the jury whether you had seen the person whose corpse was there, in his lifetime?
A. Yes, sir; I thought I had seen the man's face.
Q. Now, where had you seen him?
A. Some place on the streets there in Medicine Lodge.
Q. Do you remember when it was with reference to the time that he was brought there dead that you had seen him alive in Medicine Lodge?
A. No, sir; I can't tell the time.
Q. Well, about what length of time would you say?
A. Oh, it was from a month to two months before that.

Cross-examination of F. P. McAllister

776 By Mr. Barker:
Q. You said you are in the livery business now at Lakin; were you in the same business at Medicine Lodge?
A. No, sir.
Q. What business were you engaged in there?
A. In the stock business.
Q. You lived there for quite a good many years?
A. Yes, sir.
Q. I understand you saw a body brought in there, or Mr. Paddock have a body there? A. Yes, sir.
Q. And it was your impression that you had seen the man sometime in life; that was the impression which it made upon you? A. Yes, sir.
Q. You had no special acquaintance with whoever it might have been? A. No, sir.
Q. At that time, along in 1878 and '79, there were quite a good many strangers in and about Medicine Lodge, were there not, people coming and going, looking for lands, etc.?
A. Well, not a great many, but a good many.
Q. But a good many more than there was at a later time; a good deal livelier down there in '78 and '79 than it is now? Have you been there recently? A. I have been there.
Q. That is the fact, is it not?
A. The stock business was bringing in a good many people.
Q. A good many strangers coming in and going out?
A. I should say a good many; not a great many.
Q. Considerable many? A. Considerable many.
Q. Not as many, for instance, as there would be at Wichita; Wichita was a good deal larger place than Medicine Lodge in '78 and '79 wasn't it? A. Yes, sir.
Q. There wouldn't be as many strangers coming and going at Medicine Lodge as there would be at Wichita? A. No, sir.

Q. Still there were quite a good many, weren't there?
A. Well, there wasn't so a man wouldn't remember any strange face that he seen.
Q. Do you remember seeing anybody else there besides Paddock? A. Yes, sir.
Q. Now, when and where? You think you had seen this man, but you couldn't tell, I understood you to say, but you had an impression that you had seen him on the streets of Medicine Lodge? A. Yes, sir.
Q. But when that was or where it was, I believe you said you was unable to state? A. That is correct.
Excused.

777 The parties agree that Levi Baldwin is not within the jurisdiction of the Court.

The plaintiff read in evidence the testimony of Levi Baldwin, taken upon the trial of 1895, which is in words and figures as follows, to wit:

Levi Baldwin a witness produced by the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Samuel A. Riggs, Esq., counsel for the plaintiff, testified as follows, to wit:

Q. Your name is Levi Baldwin? A. Yes, sir.
Q. Where do you reside, Mr. Baldwin?
A. I reside in Socorro county, New Mexico.
Q. What is your business? A. Stockman.
Q. Where did you reside from 1872 up to 1879, or 1880?
A. Leavenworth county, Tonganoxie.
Q. How far from the city of Lawrence?
A. About nine miles.
Q. What was your occupation at that time?
A. Farming and stock.
Q. Do you know the plaintiff in this case, Mrs. Sallie E. Hillmon, now Sallie E. Smith? A. Yes, sir.
Q. How long have you known her?
A. Ever since she was a child.
Q. Is she in any way related to you, if so, in what way?
A. Yes, sir.
Q. What is the relationship? A. Second cousin.
Q. State to the jury whether or not you knew John W. Hillmon in his lifetime? A. Yes, sir.
Q. When did you become acquainted with him?
A. Probably in about 1872, 1871, I think.
Q. At the time you became acquainted with him what was he doing?
A. He was in charge of cattle of Major Houston, I think, or Keeler; I think it was Houston.

Q. Where was he herding those cattle at that time?
A. He was herding them on my place.
. In Leavenworth county, Kansas? A. Yes, sir.
. For how long a time did you meet him or come in
tact with him in those years, 1871 and '72, during what
iod of time?
. I don't remember the length of time but it was some-
e—
. After that where did Hillmon go if you know?
. I don't remember; I think he went into Colorado.
By the Court: What time was that, Mr. Riggs?
. In 1871 or 1872.
. When did you next see him as near as you can remem-
r?
. Oh, I don't know; it might have been a year or two.
. When, where did you see him and what was he doing?
. I think he had been mining; I don't remember now
out that; it has been—
. No, after his return, if you know, state what he did.

By Mr. Barker: I move to strike out his statement that had been mining beause it is not responsive to the question proper.
By Mr. Riggs: We have no objection.
. After his return, Mr. Baldwin, stae if you know what
siness he was engaged in, after his return from Colorado?
. At one time after he returned he was buying stock, and
ipping it to Kansas City, and feeding some down close by
ansas City.
. During what period of time was he doing this?
. What do you mean, what year?
. No, about how long a time would those operations
ver? A. Oh, probably six months; maybe a year.
. During that period how frequently did you see him?
. Oh, I could not tell you.
. Your best judgment in the matter?
. Every month or two; I don't remember about that.
. State when, if ever, he made his home at your house
r lived at your house?
A. He made his home at my house while he was in
79 charge of the Major Houston cattle or the Keeler cattle;
I think it was the Houston cattle.
. When was he in charge of the Keeler cattle, if you re-
nember?
. I think it was after; I don't know that he was at all, but
t seems to me that he was in charge of Houston's cattle, and
Keeler's too, but I think the Keeler cattle was the first that
e was in charge of, and the first time that I knew him.
Q. How long did he make his home at your house?

A. Well, sir, I can't tell you; I can't tell you but I would say three months, maybe all summer.

Q. When next after the business that you spoke of as buying cattle and feeding stock down near Kansas City, did you next see Mr. Hillmon?

[Q.] Why, I think after he had wound up that business he went west again.

Q. How long was he gone? A. I don't remember.

Q. To your best recollection in the matter?

A. Probably two years.

Q. Probably two years? A. Yes, sir.

Q. About what year did he return to the vicinity of Lawrence or your place?

A. Well, I don't remember that; the dates, I can't fix them.

Q. Do you know when he was married? A. Yes, sir.

Q. When was he married?

A. I think it was November about 1878.

Q. About how long was it before his marriage that he returned to the vicinity of Lawrence the last time?

A. I think it was September, I think it was.

Q. You think what was in September?

A. The time he returned before he was married.

Q. Do you remember the circumstance of his buying hogs about Lawrence? A. Yes, sir.

Q. When was that?

A. I think that was in 1878, maybe it was before that; I don't remember the date but I know he bought stock there.

Q. At that time he was buying hogs about Lawrence,
780 how frequently did you see him?

A. Oh, probably every week or two.

Q. Were you present at his marriage? A. Yes, sir.

Q. Where did that take place? A. In Lawrence.

Q. At whose house? A. Judson's.

Q. Do you know of his going south after his marriage?

A. Yes, sir.

Q. Do you know who went with him? A. Yes, sir.

Q. Who was it? A. John Brown.

Q. When last before Hillmon and Brown left Lawrence to go south on this trip, did you see them?

A. I don't remember.

Q. Well, about how long is your best recollection upon that point?

A. Probably two or three days, I don't remember the time or date or how long before.

Q. When next did you see John W. Hillmon?

A. Probably in two or three weeks after that.

Q. Where did you then see him?

A. I think it was in Lawrence; I don't remember.

Q. Two or three weeks after he went away with Brown?
A. I think that is right.
Q. Well, did you see him again in life after that time?
A. I don't think I ever did.
Q. Where next after that did you see him?
A. Next after that I saw him in Lawrence or at my place, I don't remember now which it was; I can't give those dates. The last time I saw him alive, is that the question? The next time after that I saw him?
Q. Yes? A. In Medicine Lodge.
Q. Where?
By the Court: Where was it you saw him alive?
A. I don't remember whether it was at my place or at Lawrence, Kansas.
By the Court: About when was that; I did not quite understand you; that is the reason I ask.
A. Well, I can't just give the date, but I would say probably it was two or three weeks before his death.
781 Q. Two or three weeks before his death?
A. should judge so.
Q. Where did you next see him or his body?
A. At the Medicine Lodge cemetery.
Q. State to the jury how you happened to be in Medicine Lodge at that time?
A. I went at the request of Mrs. Hillmon.
Q. For what purpose?
A. To see the state of affairs. She requested me to go.
Q. Who went with you? A. My brother Alva.
Q. Do you remember about what time you went to Medicine Lodge? A. The latter part of March, I think.
Q. Of 1879? A. Yes, sir.
Q. After you went there, who, if anybody, came there from Lawrence?
A. Colonel Walker, Mr. Wiseman and another gentleman, I didn't know his name then, I think, but Tillinghast, I believe it was. I don't remember any others.
Q. How long had you been in Medicine Lodge when you first saw them there?
A. Probably about a day or day and a half, about a day and a half I guess to the best of my recollection.
Q. You say that you saw there the body of John W. Hillmon. State to the jury the circumstances under which you saw that body, and who was present when you saw it, detail the facts to the jury.
A. These parties from Lawrence was present and a physician, and a party I think I had taken one or two out; I was going to fence, I was going to put a fence around the grave down there and I think them parties was there, and also

those parties that came from Lawrence, my brother and myself, a negro man that took out some lumber; one or two of them; I don't remember which ones. I believe that is all.

Q. Who disinterred the body, if any one?

A. Why the parties that came from Lawrence; they requested it, to the best of my remembrance.

Q. State what was done there, now, by these persons?

A. The grave was opened and the corpse taken out and the coffin opened and examined.

782 Q. What examination was made at that time and who made it?

A. Why we had a physician, I think. I don't know, I don't remember who opened the coffin.

Q. Well, what examination of the body was made there?

A. It was opened and we all examined it, looked at it, and Walker made a remark that—

Q. You need not state for the present anything that was said. State what was done?

A. Well, the casket was opened or the coffin, and the body looked at.

Q. Well, what further was done by way of examination of the body or parts of the body?

A. The sleeve was opened, and noticed his vaccination to see whether he was vaccinated.

Q. The coat sleeve you mean? A. Yes, sir.

Q. Who opened the coat sleeve?

A. I don't remember whether it was—

Q. What was the purpose of opening the coat sleeve?

Objection.

By the Court: Just what you saw done.

Q. When the coat sleeve was opened, what did you see?

A. I saw that it had been vaccinated.

Q. Well, what was the appearance of the arm?

A. Well, I don't just remember, I think it was irritated, and showed it had been vaccinated.

Q. Vaccine sores on it? A. Yes, sir.

Q. What then was done, Mr. Baldwin?

A. The casket was closed and parties said to bury it right there.

Q. Don't state anything that parties said.

A. The casket was closed.

Q. And then what? A. Prepared to bury it again.

Q. Very well. Did you carry out that intention?

A. No, sir.

Q. What was done then with the body?

A. It was taken on a wagon and taken back to Medicine Lodge.

Q. How long was the casket opened there at the grave so that the body was exposed to view?
783 A. Oh, probably half an hour, or three-quarters of an hour; I don't remember that, the time.
Q. Whose body was in that casket? A. Hillmon's.
Q. John W. Hillmon's? A. Yes, sir.
Q. Did you see that body afterwards at Lawrence?
A. Yes, sir.
Q. State whether or not, or what changes if any, took place in that body from the time you first saw it at Medicine Lodge and the time you saw it at Lawrence?
A. Yes, sir, it was changed.
Q. Describe to the jury the changes as you noticed them.
A. Well, it didn't look as fresh as it did at Medicine Lodge, or as natural to me.
Q. After the body was taken to Medicine Lodge what was done with it?
A. I think it was put in a room there, and kept until the next day is my remembrance.
Q. What time in the day was it that it was taken from the cemetery to Medicine Lodge?
A. I would judge it was about ten o'clock; somewhere along there; it was in the forenoon.
Q. What time did the body reach Medicine Lodge in the day? A. I don't remember now.
Q. How long did it remain at Medicine Lodge?
A. Until the next morning, I think.
Q. What was then done with it?
A. It was taken in a wagon and taken to Hutchinson, Kansas.
Q. In what wagon?
A. I think it was the wagon that belonged to Hillmon.
Q. Who accompanied the body from Medicine Lodge to Hutchinson? A. John Brown and my brother Alva, I think.
Q. Was this the John Brown that you say had left Lawrence with Hillmon to go south? A. Yes, sir.
Q. How long was the body in transportation from Medicine Lodge to Hutchinson? A. I think two days from the—
Q. About what is the distance from Medicine Lodge to Hutchinson as nearly as you can remember?
A. Probably 80 or 100 miles, somewhere along there.
784 Q. There was no railroad between those points?
A. No, sir.
Q. I believe you said it was two days in transportation, you think? A. Yes, sir.
Q. What time did the body reach Hutchinson; I don't mean what day but what time of day?

A. In the afternoon of the second day after we started, I believe.

Q. Where was the body taken from Hutchinson?

A. Taken to Lawrence, Kansas.

Q. How? A. By rail.

Q. On the Santa Fe road? A. Yes, sir.

Q. State who went upon the same train that conveyed that body to Lawrence from Hutchinson?

A. I think the whole party that was in Medicine Lodge.

Q. What time did the body reach Lawrence?

A. The next morning.

Q. After the body reached Lawrence, where did you next see it? A. Saw it in Bailey & Smith's, undertakers.

Q. Was that the same body that you had seen at Medicine Lodge? A. Yes, sir.

Q. Did you see it the first or second day after it reached Lawrence? A. I don't remember.

Q. What is your best recollection?

A. I think the first day, probably.

Q. Mr. Baldwin, about what was John W. Hillmon's height? A. Near six feet, I would judge.

Q. What was the color of Hillmon's hair, Mr. Baldwin, if you know? A. Brown.

Q. Well, what was its texture, what was its quality as to fineness or coarseness? A. Fine, I think.

Q. What was its character as to being straight or otherwise? A. At times it was wavy.

Q. Look at the picture now shown you which is plaintiff's exhibit No. 18, and state of what person that is a picture, if you know? A. That is a picture of John W. Hillmon.

Q. State whether or not that picture was ever in
785 your possession and ownership? A. Yes, sir, I think so.

Q. For how long a time was it in your possession?

A. I don't know.

Q. Well, as near as you can recollect?

A. Two or three years probably.

Q. Who gave it to you? A. Hillmon.

Q. What did you do with it when it pased out of your possession?

A. I don't remember who got it now; I think Mrs. Hillmon.

Q. Look at the picture now shown you which is plaintiff's exhibit No. 19, and state of what person that is a picture, if you know.

A. It is the same; it is of the same person.

Q. Were you at the cemetery when the pictures of the corpse were taken at the Lawrence cemetery when the pictures of the corpse were taken? A. No, sir, I think not.

And in answer to cross-interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendant, the witness testified as follows, to wit:

Q. You stated Mr. Baldwin, that you formerly lived in Leavenworth county, Kansas? A. Yes, sir.

Q. From what time to what time did you live there?

A. I lived there from probably about 1869 until 1880, maybe 1881.

Q. Living on a farm? A. Yes, sir.

Q. Do you remember the number of the farm on which you were living the section? A. No, sir.

Q. The numbers? A. No, sir.

Q. How long had you been in Kansas before the plaintiff came to Kansas?

A. Oh, I don't know anything about that.

Q. Didn't Mrs. Hillmon settle substantially in your neighborhood when she first came to Kansas to live?

A. Or, yes, I misunderstood you. I don't remember what year they came in.

786 Q. Can you fix it with reference to the time you came? They came some time after you came.

[—] I can't fix my own time, sir.

Q. Don't you know about when she came?

A. Probably in about 1872; I could not tell the time.

Q. She and her mother came together?

A. Yes, the whole family.

Q. Did they move on a farm? A. Yes, sir.

Q. What farm was that known as?

A. I don't remember.

Q. How far was that farm from your farm, and in which direction? A. North.

Q. How far distant from your farm?

A. Probably three or four miles.

Q. In the same county? A. Yes, sir.

Q. How long did Mrs. Hilmon live on that farm within three or four miles of you?

A. Well, I don't remember now how long.

Q. Well, she lived there several years, did she not?

A. Yes, sir, I think so.

Q. Now, you spoke about some relationship; I wish you would explain just what that relationship was?

A. Her mother's father and my father were own brothers.

Q. She and her mother lived on this farm near you for several [year] years, did she not? A. Yes, sir.

Q. And during that time she worked at your house, did she not? A. Yes, sir.

Q. I mean by she, Mrs. Hillmon? A. Yes, sir.

Q. She was there a good deal for several years was she not? A. Yes, she was there frequently.

Q. Well, she worked at your house for several years, did she not, off and on, I mean? A. Yes, sir.

Q. And then you say in 1871 or 1872, Hillmon came there, did he not? A. About 1871, I think Hillmon came there.

Q. At that time you say he was herding cattle for Houston or for somebody else on your land, is that correct?

A. Yes, sir.

Q. And was boarding at your house? A. Yes, sir.

787 Q. And he and Mrs. Hilmon were boarding there or living at your house at the same time did they not?

A. I don't think Mrs. Hillmon was there during that time; that is I don't remember about it but I don't [thin] think so.

Q. You don't remember in regard to that? A. No, sir.

Q. Did you have a neighbor, a one-legged man, a man who had lost one leg, living close by you? A. I don't remember.

Q. Do you remember a man of that kind living anywhere in the neighborhood? A. Yes, sir.

Q. Anywhere between Lawrence and your place? I say, do you remember of a man of that kind living anywhere between Lawrence and your place?

A. Yes, sir, I knew a colored man, I had him, he worked for me.

Q. I am not asking you about a colored man; this was a white man I am telling you about. I am asking you if you remember a gentleman who had lost a part of one of his legs; did you know such a man? A. I don't remember now.

Q. Wasn't there a man of that kind living in that neighborhood? A. I don't remember.

Q. Don't you remember a man of that description living anywhere between your place and Lawrence? A. No, sir.

Q. Well, then, you stated in regard to Hillmon herding cattle for Major Houston, and living at your house. How long was he engaged in that business, do you know?

A. No, sir, I don't remember.

Q. What other business was he engaged in over there, if you remember? A. During that time?

Q. During any of that time he was living or staying over in that neighborhood; what other business, if any, was he engaged in besides herding cattle for Major Houston or anybody else?

A. I don't remember as he was doing anything else.

Q. Did he ever work for you on the farm by the month?

A. Yes, he has helped me; I don't remember how long.

Q. He worked for you on the farm?

A. I don't know as he worked at farming; I remember his helping me fence.

788 Q. He was in your employ, was he not?
A. I guess I paid him, sir.
Q. I am not asking you about that. I ask if he was in your employ? A. I don't remember.
Q. Don't remember whether he was or not?
A. Whether he was or not.
Q. You say you remember of his helping you build fence?
A. Yes sir.
Q. In what year was that he helped you build fence?
A. I couldn't tell you.
Q. Couldn't tell anything in regard to that. Now, with the exception of herding cattle for these various parties and helping you build fence, what other business, did you know of his being engaged in at that time up to 1872, or 1873?
A. I don't remember.
Q. Don't remember of his being engaged in any other business; do you? A. No sir.
Q. He was engaged in the ordinary business of herding cattle on horseback; do you know the salary or wages that an ordinary herder received at that time?
A. No sir I don't remember that.
Q. Don't know what wages a man of that kind commanded for services of that kind? A. There was—
Q. Then you say he left that country sometime and went away, did he? A. Yes sir.
Q. Can you tell what year that was in? A. No, sir.
Q. Don't you know how long he was gone?
A. No, I can't tell just how long he was gone.
Q. Do you know about how long he was gone?
A. Well, I might approximate.
Q. Let us get some idea how long he was gone, that is, he was absent from the state, if you know, so far as you do know, in regard to his being absent from the state?
A. I should judge he was gone probably two or three years.
Q. Then there was an interim of two or three years that you didn't see him? A. Yes sir.
Q. Did you hear from him during that time?
A. I think I did.
789 Q. Have you got the letters which you received from him during that time? A. I don't know that I have.
Q. Do you know whether you have or not?
A. I don't think I have.
Q. Well, then, when did you next see him after the interim of two or three years; where did you next see him?
A. I can't tell where I saw him.
Q. Can you tell when you next saw him?
A. I saw him after he came back.
Q. Have you any recollection of having seen him from the time he went away either along in 1872 or 1873, whatever time

he did go away, until you saw him shortly before he was married? A. Oh, yes.

Q. You saw him before that, did you? A. Yes sir.

Q. What year was that and where did you see him?

A. I can't tell you that, sir.

Q. Can't tell anything about that. [When] was he doing when you saw him then?

A. I just can't tell what he was doing or where I met him.

Q. Can't tell what he was doing? Then you say you did see him along in September, before he was married; that is a fact, is it not? A. Yes sir.

Q. Now, had you seen him for a year before that time, before September, 1873? A. I don't know as I had.

Q. Then, during September, 1878, did you see him frequently or only occasionally?

A. I don't remember just at that time, but then I saw him frequently; I was very well acquainted with him.

Q. I ask you if you saw him frequently in September, 1878?

A. Well, I don't remember about that.

Q. You can't tell the court in regard to that?

A. I presume I did.

Q. Where did you see him then?

A. Probably in Lawrence.

Q. You met him in Lawrence? A. At the fair, I guess.

Q. You think at the fair. You were living then out on the farm and he was then living in the city of Lawrence is that a fact?

790 A. I was living on a farm; I don't know where he was living.

Q. Don't remember where he was living, in Lawrence, or where he was living? A. No sir.

Q. Are you acquainted with one John H. Brown?

A. Yes sir.

Q. Do you remember when and where and under what circumstances you became acquainted with him?

A. I think I saw Brown at my place, about the time they was going into Colorado.

Q. That was several years before September, 1878, was it not? A. Yes sir.

Q. Where did you see him on that occasion; at your house, I understood you to say?

A. Well, I can't tell you that positive.

Q. You saw him did you? A. I saw him.

Q. Who was with him at that time? A. Hillmon.

Q. Did you see him more than once about that time?

A. I don't think I did at that time; I don't think I saw him but once.

Q. You don't think you did?

A. I don't remember now about that.

Q. Then, when did you next see this man Brown?
A. Well, that might have been several years after that; I don't remember now about that; I can'tgive you this positive.
Q. Well, give us the dates the best you can when you next saw Brown after the time you saw him when they were leaving for Colorado?
A. I think it was—I don't know that I ever saw him after that until about the time they went south again.
Q. About the time they went south again? When was that; fix that time as definitely as you can?
A. That would be 1878 or 9.
Q. Where did you see him on that occasion?
A. I don't remember that; I think Lawrence.
Q. Who was with him? A. I think Hillmon.
Q. Hillmon was with him on that occasion? A. Yes sir.
Q. Was that the last time you had seen him? A. No.
Q. When after that did you see him; I want you to fix the date as definitely as you can?
[—] The next time, to the last time I saw him was in Medicine Lodge.
791 Q. That is the next to the last time you saw him? A. Yes sir.
Q. You saw him in Medicine Lodge? A. Yes sir.
Q. And then you saw him in Lawrence, didn't you?
A. I saw him in Lawrence, but that was the next time.
Q. Now, when was the next time that you saw him after having seen him in Lawrence?
A. I saw him in Medicine Lodge.
Q. Then you saw him in Lawrence, did you not, after you returned from Medicine Lodge? A. Yes sir.
Q. You all came back together? A. Yes sir.
Q. After you saw him at Medicine Lodge, you saw him at Lawrence? A. Yes sir.
Q. You saw him at Lawrence at the time of the coroner's inquest, did you not? A. Yes sir.
Q. Saw him around there and talked with him, did you not? A. I don't remember about that.
Q. Now, I want to get at the next time you saw him after having seen him in Lawrence; when was the next time you saw him? A. I don't remember.
Q. How many times after having seen him in Lawrence at the coroner's inquest, had you seen John H. Brown?
A. Well, sir, I couldn't tell you.
Q. Do you remember of having seen him in Missouri?
A. Yes sir.
Q. Then, after you saw him in Lawrence, you saw him in Missouri, did you not? Question objected to and not answered.

Q. I was asking you at what place in Missouri you saw him? A. I think it was at his brother's place.

Q. Near what place or at what place?

A. I don't remember now; it is not very farm from Wyandotte.

Q. Is that the best answer you can give as to the place where you saw Brown in Missouri?

By Mr. Riggs: He says the place was not very far from Wyandotte.

Q. Locate it more definitely, if you can; Mr. Baldwin.

792 By the Court: Give the town or particular place.

A. I don't just remember the place.

Q. Do you think it was at his brother's?

A. I think it was his brother's place. I don't remember.

Q. Have you any means of fixing that date, sir?

A. No sir.

Q. How long was it from the time you had seen him in Lawrence until you saw him in Missouri?

A. I don't remember that.

Q. Well, about how long was it; you can give some idea of it, can't you?

A. No, I don't remember how the weather was now, whether it was hot or cold. I believe it was warm weather.

Q. I ask you to fix as definitely as you can, how long it was from the time you saw Brown at the coroner's inquest until you saw him in Missouri. A. I don't remember.

Q. Was it thirty days?

A. It might have been; it might have been more.

Q. Fix it as definitely as you can?

A. It might have been three [monts] months; I don't know.

Q. It might have been three months; is that as definite as you can be with reference to it?

A. I can't tell you sir.

Q. Who was with him on that occasion, just for the purpose of identifying the time that you saw him?

A. I don't remember that.

Q. Did you see anybody else with him at all?

A. I don't remember that I did.

Q. When did you next see Mr. John H. Brown?

A. I don't remember that.

Q. Fix it as definitely as you can, sir the next time that you saw John H. Brown? A. I don't remember.

Q. Do you remember the fact of his being at your house, sir, after that? A. Yes sir, I think it was after that.

Q. Well, don't you know it was after that; I say, don't you know it was after that? A. I think it was.

Q. I will ask you if you aint—

A. You can't get what I don't know myself.

793 Q. You say then you don't know whether it was before or after that? A. I think it was after.

Q. You don't know then positively whether he had not been at your house between the time that you saw him at the coroner's inquest and the time you saw him in Missouri; and when I speak of your house I mean your residence in Leavenworth county?

A. He might have been out there.

Q. Might he not have been to your house between the time you saw him at the coroner's inquest and the time you saw him in Missouri?

A. Well I don't remember about it, sir.

Q. You can't tell whether this visit of his to your house was before or after your seeing him in Missouri?

A. No, I don't remember.

Q. I want you to answer that question yes or no.

A. Well, I can't tell that, I can't more than I have; I don't remember about it; I don't want to; I might do it.

Q. You don't remember whether this visit of Mr. Brown's to your house was before or after the time that you saw him in Missouri? A. No sir.

Q. Now, did Mr. John H. Brown go with you to any place when you saw him in Missouri: Did he go with you to visit any place? A. I don't remember.

Q. Don't remember anything in regard to that? A. No.

Q. Do you remember whether you brought him with you on that occasion to Kansas City?

A. He was with me in Kansas City at one time I think.

Q. When was that that he was with you in Kansas City? (No answer.)

Q. Now, when you went to Missouri, didn't you find John Brown and get him to go with you to Kansas City?

A. Yes sir.

Q. Now, when was that, Mr. Baldwin?

A. I don't know when that was I don't know what month it was in, probably in September.

Q. Probably in September?

A. I don't know; don't know the date.

Q. You can't tell the month that was in? A. No.

794 By the Court: That was in September, 1879?

A. Yes sir.

Q. You think it was in September, 1879, do you?

A. I think so; I can't tell.

Q. Where did you take him in Kansas City? To whose office, for the purpose of refreshing your memory?

A. I don't know whose office.

Q. You took him to somebody's office in Kansas City, didn't you? A. I guess so.

Q. How did you go from the place where you found him to Kansas City, by rail, or by team?

A. I don't remember that.

Q. Can't you tell whether you on that occasion traveled with a private conveyance or whether you rode upon the railroad?

A. I think I rode on the railroad; I suppose I rode down on the railroad; I don't remember about it.

Q. What road did you take, did you bring him in on or come in with him on when you came to Kansas City?

A. I don't remeber that.

Q. How long did you remain, did he remain in Kansas City with you? A. Well, sir, I don't know that.

Q. Well, about how long?

A. Well, it may be a few hours.

Q. Would that be your best recollection it was a few hours? A. Yes sir.

Q. Is that as definite as you can be with reference to it?

A. Yes.

Q. Where did you go then, if you know?

A. I don't remember.

Q. Where did you go?

A. I expect I went home; I don't remember that. Don't know where I did go.

Q. You don't remember whether you went home or went to Lawrence, Kansas? A. No, I don't remember now.

Q. Did you meet any one while down there at Kansas City; you need not state whom; I ask you if you did meet any one in Kansas City during the time John Brown was down there with you? A. Yes sir.

Q. Then you say you don't remember whether you returned to your home in Leavenworth county, or you came to Lawrence, Kansas? A. No sir I don't.

795 Q. You remember the time of the coroner's inquest, do you? A. Yes sir.

Q. Do you remember when you last saw John H. Brown, and where you saw him on that occasion; I mean the occasion of the coroner's inquest?

A. No sir, I don't think I remember.

By the Court: This was the coroner's inquest at Lawrence?

By Mr. Barker: The coroner's inquest at Lawrence.

Q. Do you remember where he stopped, at what hotel he stopped?

A. I think he stopped—I ain't certain about that but I think he stopped at the Lawrence Hotel.

Q. Do you remember at what hotel you stopped?
A. No, I don't remember that.
Q. Didn't you stop at the Lawrence House also?
A. Probably.
Q. Don't you know with reference to that? A. No sir.
Q. Do you remember whether he and you occupied the same om at the hotel or not? A. I don't think we did.
Q. Do you remember in regard to that? A. No sir.
Q. Don't remember whether you and Brown occupied the me room at the hotel or not? A. No sir.
Q. I will ask you when you last saw him, in which direc- n he was going at the time of the coroner's inquest?
A. Oh, I don't know anything about that.
Q. I will ask you if you didn't see him about four or five clock in the morning, and if you didn't accompany him to e depot?
Objection as not proper cross-examination. Overruled.

Recess to 2 P. M.

AFTERNOON SESSION.

Q. Mr. Baldwin, since the recess, since the adjournment r dinner, have you talked with both Mrs. Hillmon and her ttorneys in regard to this case?
A. I talked with Mr. Wheat, and Mr. Riggs in regard to it, in regard to this evidence.
06 Q. Now, we were speaking, before we adjourned, in regard to the inquest there at Lawrence; we were speaking in regard to that occasion. Do you remember on what day f the month the body got there? A. No, sir.
Q. Do you remember in what month it was?
A. I think it was in the month of March.
Q. You think it was the month of March?
A. The last of March, I think.
Q. That is your best recollection in regard to the date. I nderstood you to say that those remains were sent or deliv- red to Bailey & Smith, undertakers? Am I correct about that?
A. Yes, that is where they were sent.
Q. Bailey & Smith at that time were the principal under- akers in the city of Lawrence, were they not?
A. I think they were the only ones; I don't remember.
Q. And their place of business was on Massachusetts street n the city of Lawrence, was it not? A. Yes, sir.
Q. Massachusetts street is the principal street of the city f Lawrence? A. Yes, sir.
Q. And was at that time? A. Yes, sir.
Q. Do you know how long those remains were at Bailey & Smith's, about how long they were there?

A. Probably two days; I don't remember the time.
Q. Don't remember that, but that would be your best recollection would it? A. Yes, sir.
Q. During that time you busied yourself about the inquest considerably, did you not? A. I was there.
Q. Do you remember John Eldridge? A. Yes, sir.
Q. Did you talk with him in regard to the inquest?
A. I don't think I did.
Q. Is it not a fact that you asked John Eldridge to go over and see the remains and told him where they were and how he would find them? A. I don't remember about it.
797 Q. Don't remember that fact?
A. I presume I done it.
Q. You presume you did it? A. Yes, sir.
Q. You remember Ed. Canavan? A. Yes, sir.
Q. Do you remember of talking with him in regard to it and soliciting him to go over and see the remains?
A. I don't remember.
Q. Did you not do that?
A. I wouldn't say positive but I think probably I did
Q. Do you remember a good many others you talked to, asked them to go over and see the remains?
A. No, sir, I don't remember.
Q. Do you know one Abe Dixon? A. Yes, sir.
Q. Do you remember of talking with him and asking him to go and see the remains?
A. I don't think I saw Abe during that time. I don't remember now; I think Abe was on his place.
Q. I ask you whether you did or did not?
A. I don't remember in regard to that.
Q. You went down where the remains were?
A. Yes, sir.
Q. How many times did you go where the remains were during the time they were there at Bailey & Smith's?
A. I don't know.
Q. Well, about how many times?
A. Well, probably I might have went two or three times; I don't remember.
Q. You was in there three or four times?
A. I might have and I might not so many.
Q. Did you know where Mrs. Hilmon liver at that time?
A. Yes, sir.
Q. At the time of the inquest? A. Yes, sir.
Q. Where did she live then?
A. I think she lived at Judson's still.
Q. I know, but whereabouts was that?
A. I don't know what street it was on.
Q. Well, about how many blocks was is from the court-house? A. Four or five I guess.

798 Q. Four or five blocks? A. Yes, sir.
Q. Do you remember about how many days that inquest was in session there? A. I would say about two days.
Q. That would be your recollection that the inquest was in session about two days?
A. That the body was held there for about two days?
Q. I ask you if that is your recollection in regard to that?
A. Yes, sir.
Q. Now, you have testified that you were present, I believe at the time of Mrs. Hillmon's marriage? A. Yes, sir.
Q. That took place in the city of Lawrence, did it?
A. Yes, sir.
Q. Well, do you remember the fact of Hillmon and Brown going off to the southern part of the state after the marriage with Mrs. Hillmon? A. I remember about their going.
Q. Do you remember the day they started?
A. I do not.
Q. Were you in the city of Lawrence on the day on which Hillmon and Brown started on their trip, their first trip through southern Kansas? A. I don't think I was.
Q. I will ask you if you were not at the house that day and did not go with them to the depot when they took the train?
A. I don't think so; I have no recollection of it.
Q. Have you any recollection either one way or the other in regard to it? A. No, I don't remember anything about.
Q. You don't remember in regard to it?
A. Not particularly, I don't think I went with them; that would be what I think about it.
Q. That would be your impression in regard to it?
A. Yes, sir.
Q. When had you seen Hillmon and Brown before they started on that trip?
A. I had seen them not a great while before they went.
Q. They were both out to your place shortly before they left upon that trip? A. I don't think Brown was.
Q. Was Hillmon out there shortly before he started upon that trip?
A. Yes, sir probably, I don't know how long before he was there.
Q. About how long before he started on this trip was he at your place in Leavenworth county?
799 Q. Well, it might have been two weeks or it might have been only one week.
Q. You would say it was one or two weeks before he started on this trip? A. Yes, sir.
Q. You say, if I understand you correctly, Mr. Baldwin, one or two weeks before Mr. Hillmon started down on this trip, he was at your place in Leavenworth county?

A. I think so.
Q. Who was with him on that occasion?
A. I don't remember.
Q. How did he come out there? A. I don't remember that.
Q. Was his wife there? A. I don't know as to that.
Q. Were you not in town between that time and the time Mr. Hillmon left? A. Probably so.
Q. Probably, and when you came in town, you went over to his place, did you not?
A. Generally I went; sometimes I did and sometimes not.
Q. Now, do you remember in regard to the character and condition of the weather at the time they started upon this trip? A. No, sir.
Q. Don't you remember that it was cold weather?
A. No, I don't.
Q. Do you remember in regard to the winter of 1878-9, whether it was a cold winter or a pleasant winter?
A. I think it was about an average winter.
Q. About an average winter?
A. Yes, sir, I guess so.
Q. Don't you remember about its being very cold or very warm then?
A. No, sir, I don't remember anything very severe about it.
Q. Do you remember whether or not there was an unusual amount of snow that winter, whether we had an unusual amount of sleighing during the winter of 1878-9?
A. I don't remember.
Q. You stated that they went on a [that] trip?
A. Yes, sir.
Q. Have you any letters which you received from Mr. Hillmon while he was on that trip the first time out?
A. I don't think I have; I don't know as I ever had.
Q. Did you ever look for any letters that you received?
A. No.
800 Q. Do you know whether you have or not?
A. No, I don't.
Q. Have you any with you? A. No, sir.
Q. How long was Mr. Hillmon gone on that trip?
A. Oh, probably two or three weeks.
Q. That would be your best recollection?
A. Two or three weeks.
Q. Then, what time in the winter would you say that he returned from that trip? A. Well, I don't know that.
Q. Fix it as near as you can, Mr. Baldwin?
A. Probably in two or three weeks after he left, that he returned.
Q. I know, but fix the time as near as you can when that would be? A. Well, I couldn't come very near that.

Q. When he returned from the trip, was he at your place in Leavenworth County? A. That I don't remember.

Q. Don't remember whether he came there or not. Is it not a fact that he and his wife came out there after he had returned from the first trip? A. It might have been.

Q. What do you say in regard to that?

A. Well, I don't say I know, but I presume they was.

Q. You presume they were? A. Yes, sir.

Q. Were you in town during that time, I mean during the time that he was here after his return in Lawrence, in that vicinity, after his return from the first trip?

A. Well, I presume it was, but I don't remember that either.

Q. Do you remember in regard to the condition of the Lawrence bridge at that time, whether it was up or down, whether they were using the bridge or the ferry at Lawrence at that time?

A. They was using the ferry at one time, but I don't remember what time that was; I remember something about the bridge being out of repair.

Q. I am asking at this time, the time that Hillmon went away and came back, during that season, if they were running the ferry across the river at Lawrence, or using the bridge?

A. I don't remember.

801 Q. How long did Hillmon remain when he came back after the first trip? A. I can't tell you.

Q. About how long?

A. I can't tell you; it might have been three or four days, it might have been a week or two; I don't remember about it.

Q. Three or four days or a week or two? A. Yes, sir.

Q. Was he at your place more than once during the time that he was in Lawrence on that occasion?

A. I don't think he was; I don't know as he was once, but I think he was there after he made them trips, one time.

Q. Now, for the purpose of fixing it in your memory, is it not a fact that during the time he was returned, and while he was at your place, you exchanged clothing with him?

A. I exchanged clothes with him.

Q. I did not ask you in regard to that.

A. I don't know whether that was in Lawrence, or whether it was at my house.

Q. I ask you if it was not during the time that he was back after his first trip south with Mr. Brown that at your place you exchanged clothing with him?

A. Well, sir, I don't remember that time.

Q. Well, you remember the circumstance, don't you?

A. I remember exchanging clothing with him because—

Q. Do you remember where that took place?

A. I do not, sir.

Q. Do you not remember, or do you remember, that it was after his return from the southwest after his first trip?

A. I don't remember about that.

Q. Couldn't remember in regard to that; can't remember whether it was before he went or after he came back the first time? A. No, sir.

Q. You never exchanged clothing with him but once, did you? A. Not that I remember of.

Q. You remember that circumstance, do you?

A. Yes, sir.

Q. Wasn't it in the winter of 1879 that you exchanged clothing with him?

A. Yes, sir, somewhere close about there.

802 Q. In the winter of 1879, was it not? Now, Mr. Baldwin, after his first trip down there?

A. I can't tell you that, sir. I don't remember.

Q. Can't say in regard to that; that is as near as you can fix it, is it? A. Yes, sir.

Q. Now, do you remember what kind of clothes you let him have, what it was, coat and pants or vest and coat, or what? A. Coat and vest, I think.

Q. You think you exchanged coats and vests with him, do you? A. Yes.

Q. Do you remember what kind of a coat and vest you let him have? A. Coarse business suit, I think it was.

Q. A large plaid suit?

A. Yes, sir, if I remember right it was a plaid suit.

Q. A plaid coat and vest? A. Yes, sir.

Q. I will ask you if you exchanged trousers with him?

A. I think not.

Q. You think you only exchanged coats and vests?

A. Yes, sir.

Q. Of course, that transaction was before you went to Medicine Lodge? A. Yes, sir.

Q. Do you remember what kind of a coat and vest you let him have? A. That is what I have been telling you.

Q. Excuse me, sir; I am wrong. What kind of a coat and vest you got from him?

A. I got a dark coat; I think it was black.

Q. Got a black coat? A. And vest.

Q. And vest did you? A. Yes, sir.

Q. Do you know where those clothes are?

A. I guess they wore out.

Q. You wore them out, did you? A. I think so.

Q. That is your recollection in regard to that?

A. Yes, sir.

Q. Do you remember where you got this suit that you exchanged, that you let Mr. Hillmon have? A. Yes, sir.

Q. Where did you get them?
A. I got them in Kansas City.
Q. You got those at Kansas City? A. Yes, sir.
Q. You remember that circumstance, do you?
803 A. Yes, sir.
Q. Do you remember when you got them?
A. No, sir.
Q. Do you remember from whom you got them?
A. I think I do.
Q. From whom did you get that suit of clothes?
A. I think it was Hammerslaw.
Q. From Hammerslaw? A. I think so.
Q. That suit was a large plaid suit, was it? I mean a suit with large plaids in it? A. Yes, sir.
Q. Hammerslaw was a clothier in Kansas City, Kansas?
A. Yes, sir.
Q. Kansas City, Missouri, rather; that is correct, is it not?
A. That is right.
Q. Did you receive any letters from Mr. Hillmon while he was gone? A. I don't think I did.
Q. No recollection of receiving any? A. No.
Q. Haven't any letters now, that he wrote?
A. Don't think I have one aywhere.
Q. Now, when did you start for Medicine Lodge?
A. About the last of March, I guess.
Q. Haven't you any means of fixing the date?
A. No, sir; not at hand.
Q. Fix it as definitely as you can when you left Lawrence for Medicine Lodge?
A. Them dates I can't testify to, it is out of my memory.
Q. You know about— A. I don't know, sir.
Q. You know about when it was, don't you?
A. Probably the last of March.
Q. You think you left about the last of March?
A. Yes, sir.
Q. You and Alva Baldwin started together, did you?
A. Yes, sir.
Q. You came in from the farm to go, did you?
A. Yes, sir; I think so; I guess I came in from the farm not to go maybe; I don't remember about that.
Q. You don't remember how you happened to be in town, do you, on that occasion?
A. No, I don't remember much about it, that part of it, how I got there, I don't remember what cause I was there.
804 Q. Where did Alva Baldwin live then?
A. Alva lived in Kanwaka township.

Q. For a number of years? A. Yes, sir.
Q. How long had he lived in Kanwaka?
A. From boyhood.
Q. Kanwaka township is in Douglas county?
A. Yes, sir.
Q. About how far from the city of Lawrence?
A. About five miles.
Q. About five miles west of the city of Lawrence, is it not?
A. Yes.
Q. You say he had lived there from boyhood?
A. Yes, sir.
Q. How old a man was Alva?
A. About 22 years old probably.
Q. How did you happen to meet him in Lawrence, do you know? A. I don't know, sir.
Q. Don't know anything in regard to that; you simply—
A. I don't know that I met him there.
Q. Did you formerly live in that township? A. Yes, sir.
Q. How long did you live there?
A. Oh, probably a year.
Q. That was before you moved to Leavenworth county?
A. That was before I was married.
Q. I ask you if it was before you moved to Leavenworth county? A. Oh, yes.
Q. It was before you moved to Leavenworth county?
A. Yes, sir.
Q. Did Alva Baldwin ever visit you at your home?
A. Yes, sir.
Q. Frequently?
A. Well, once or twice a year, probably.
Q. He used to visit you once or twice a year and stay some time when he came over there?
A. Sometimes he would stay a day or two.
Q. Stay a day or two there? Do you know whether he was over there in 1878-9 or not? A. I don't remember.
Q. You don't remember in regard to that? Do you remember whether he was over there in 1871 or '72 or not?
A. No, I have no recollection of it now just at the time.
Q. You could not tell what particular time he was over there but he was over there frequently, wasn't he, and you visited backwards and forwards like any other two brothers, didn't you? A. Yes, sir.
805 Q. There wasn't a year passed but what he was over there two or three times, was there?
A. Oh, yes, I don't know about that.
Q. How is that?
A. I don't know about that; he would come there every year or two.

Q. He would come every year or two?
A. Maybe two or three times a year; I don't remember it now.
Q. How did you go from Lawrence to Medicine Lodge?
A. Went to Hutchinson on the train.
Q. And then took a private conveyance from there over?
A. Took the mail line.
Q. You went from Hutchinson to Medicine Lodge by stage; is that a fact?
A. Mail line; buckboard, I guess it was; I don't remember now.
Q. You don't remember whether it was stage or buckboard? A. I knew they had some mail.
Q. You know you didn't go by rail, don't you, from Hutchinson? A. Yes.
Q. There was no railroad into Medicine Lodge at that time, was there? A. No railroad there at that time.
Q. How many days do you think you were on the road from Lawrence to Medicine Lodge?
A. I don't remember how long we was going to Medicine Lodge.
Q. It would be one day, or part of a day to go to Hutchinson, and then a day and a half or such a matter to go from Hutchinson to Medicine Lodge by stage, or two days at the outside; do you remember in regard to that?
A. It took us two days coming back.
Q. I asked you about going down there?
A. I don't remember, sir.
Q. Don't remember how long you were going down. Do you remember when you got there, what time in the month?
A. No, sir.
Q. Do you remember the day of the week? A. No, sir.
Q. Don't remember anything about that? A. No, sir.
Q. Do you remember of seeing when you got there, John H. Brown? A. Yes, sir.
Q. Do you remember where you saw him first?
A. No, I can't tell you that, but I think he was at
806 the hotel.
Q. Do you know about what time in the day that you got into Medicine Lodge, you and Alva Baldwin?
A. I don't remember, I think it was night.
Q. You remember of seeing John H. Brown that night?
A. I don't remember sir.
Q. Do you remember anything in regard to that? How long had you been in Medicine Lodge before Colonel Walker and these parties whom you have mentioned arrived from Lawrence?

A. I don't remember that, probably a day or day and a half somewhere.

Q. You think a day or a day and a half?

A. I would think so, yes.

Q. Probably two days. Would you draw the line at a day and a half?

A. I wouldn't draw any line at all, because I don't remember just about it.

Q. Couldn't say, then?

A. I think it was about a day, maybe a day and a half.

Q. A day and a half; that will be as denifitely as you can fix the time? A. Yes, sir.

Q. During that time you had made arrangements, had you not, to fence the grave? A. Yes, sir.

Q. And when they arrived there on the ground you had part of the material at the cemetery for the purpose of fencing the grave, did you not? A. I think so.

Q. Some lumber and some posts and some barbed wire; do you remember in regard to that, Mr. Baldwin?

A. We had lumber and posts; I don't think there was any wire.

Q. You don't think there was; there was lumber and posts then and you had them out there for the purpose of fencing the grave? A. Yes.

Q. Do you remember when that had been taken out there, that is, how long after your arrival had you caused this material to be taken out there?

A. I can't say as to that, but I think it was the next morning.

Q. The next morning after your arrival—you ar-
807 rived at night, and the next morning you made arrangements to fence the grave, didn't you?

A. I think that was it.

Q. Then the next morning or the second or third morning, Colonel Walker and his party arrived on the scene, did they not; that would [—] about the order in which they came, sir?

A. They came the next day or the next day after that; I don't remember now which that was, but I think it was the next day probably.

Q. They came there: There was Colonel Walker, Major Wiseman, and Mr. Tillinghast?

A. I think that was the party.

Q. Those were all; then there was from Lawrence, yourself, and your brother Alva? A. Yes, sir.

Q. And this man Brown also? A. Yes, sir.

Q. And then I understand you to say that on the same day that these parties arrived in Medicine Lodge, the body was disinterred?

A. Yes, I think it was the same day; they might have come there at night; I don't remember now what time they came in.

Q. It was either the same day or the next day? That is correct, is it not?

A. That is about as near as I can remember it.

Q. On the day they arrived there or the next day after their arrival, this body was taken up? A. Yes, sir.

Q. That was the first time it was taken up there?

A. Yes, sir.

Q. It was, of course, enclosed in a coffin? A. Yes, sir.

Q. And a box, an ordinary box around the coffin?

A. I don't remember about that; I think so.

Q. You think there was a box also, don't you? That is the body was enclosed in a coffin and the coffin enclosed in a box? That is a fact, is it not?

A. I think so; I don't remember about these things; it is a long time ago.

Q. I know, but I want to get at the best of your recollection in regard to it; you have stated now that you remember being there, yourself and these parties from Lawrence, yourself, your brother and what other parties were

808 present, now, when the body was taken up?

A. Brother Alva was there and myself and the negro that went out.

Q. A colored man; who else?

A. I don't remember, the party that came from Lawrence, I think they was all there, and Alva and I was there, and probably two men with the wagon that went down to take out the lumber to fence the grave.

Q. Do you remember their names? A. No, sir.

Q. Now, you stated all you remember being there, especially the parties from Lawrence, yourself, and Alva and the colored man and two men who were there with the team?

A. I think there was a physician along.

Q. You think there was a physician there also, do you?

A. Yes, sir.

Q. You say you think there was a physician there, do you?

A. Yes.

Q. After the body was taken up, the coffin, of course, was opened, and you saw there, did you not, upon that body, the clothes which you had exchanged the coat and vest?

A. Yes, sir.

Q. Did you not? A. Yes, sir.

Q. And then you say that the sleeve was opened; is that a fact? A. Yes, sir.

Q. Did you examine the arm? A. Not particular.

Q. Did you notice who did examine the arm?

A. I don't remember, I think it was the doctor opened the sleeve; it might have been Walker but I don't remember as to that.

Q. Now, standing immediately around this coffin when the sleeve was opened, there was Colonl Walker, Major Wiseman, Mr. Tillinghast, Alva Baldwin and yourself, and the physician, was there; were not they the parties who were nearest to the coffin at the time the sleeve was opened?

A. I think so, and the parties that was opening the grave; I don't know where they was; I presume they was just as near as the rest.

Q. Who was standing nearest to the head of the coffin, nearest to the body at that time?

A. Colonel Walker; Colonel Walker and I stood close together.

809 Q. Did you stand next to Colonel Walker or on the opposite side of the Colonel?

A. I stood next to him if I remember right; is the memory I have of it now.

Q. You remember now that you stood next to Colonel Walker on that occasion? A. Yes, sir.

Q. Is it not a fact now that Major Wiseman stood next to him, and you stood on the opposite side? A. I don't think so.

Q. You are quite positive that that is not correct?

A. Yes, sir.

Q. You say that after the body was thus opened, I mean the sleeve, that you looked at it and these various parties that were there looked at it, did they? A. Yes, sir.

Q. And then the body was put back in the coffin and the coffin closed and taken where?

A. To Medicine Lodge. I don't think the body was ever taken out of the coffin.

Q. Well, the coffin was closed then, was it not?

A. Yes, sir.

Q. And the box closed, the box in which the coffin was put, was nailed up, was it not, or screwed up?

A. I don't remember that there was any box around it now, but the coffin was closed up.

Q. Then you say it was taken to Medicine Lodge?

A. Yes, sir.

Q. How far distant was Medicine Lodge from the cemetery or is the cemetery from the city?

A .Mile and a half maybe or two miles; I don't remember the distance, but it was not a very great distance.

Q. Do you remember what time in the day?

A. That was in the forenoon, I think.

Q. Do you know where the body was kept that night?

A. I think it was taken to the hotel, but I don't know; I can't testify to that now just where it was; but it was, I think kept in the hotel.

Q. It was kept there at Medicine Lodge that night, you think? A. Yes.

Q. You think they didn't start with the body that afternoon. For the purpose of refreshing your memory, was not this examination made in the forenoon, and after dinner didn't you have it and other effects packed, and didn't the body start for Hutchinson? A. No, sir, I don't think we did.

810 Q. Well, then, when did it start out?

A. The next morning, to the best of my recollection about it.

Q. It started the next morning?

A. That is what I think now; that is my best recollection about it.

Q. The coffin and remains were put into this spring wagon, were they not? A. Yes, sir.

Q. And John H. Brown and who else went with the wagon? A. Alva Baldwin.

Q. Alva Baldwin and John H. Brown traveled with the wagon which contained these remains? A. Yes, sir.

Q. In regard to the luggage or baggage and the effects which you found there and put up; do you remember what they consisted of?

A. No, sir, I don't think I had anything to do with them; I don't remember now.

Q. Didn't you see the luggage or the effects of Mr. Hillmon put into that wagon?

A. I don't remember it now, I don't think I did.

Q. I want to ask you particularly in regard to a pair of shoes; do you remember those shoes being put into the wagon?

A. No, sir.

Q. If I understand you correctly, you are not able to state any of Mr. Hillmon's effects which were found there and which were put into the wagon; not able to mention any of them?

A. No, sir.

Q. You were present, weren't you, Mr. Baldwin, when they were put in?

A. I don't remember about them now, at this time.

Q. You don't remember in regard to that? A. No, sir.

Q. Do you remember anything in regard to John Brown's luggage or baggage, what he had?

A. I don't remember anything about the baggage.

Q. You don't remember anything about the baggage of either Hillmon or Brown, do you?

A. No, I presume they were put in the wagon, but I don't remember about it.

Q. You don't know anything about the luggage of either?
A. No, sir, it was fifteen years ago.
Q. With whom did you ride back to Lawrence; I mean to Hutchinson.
A. I think I went on the mail if I remember right.
811 Q. The other parties went back with their private conveyances, did they? I mean Colonel Walker, and Mr. Tillinghast; they went back the same way they came down, did they not? A. I think so.
Q. You got into Hutchinson, did you not, before any of the other parties?
A. I don't remember about that who got in first.
Q. Didn't the mail make better time, so you arrived at Hutchinson before either Brown got there with the remains, or the other parties with their private conveyance?
A. I don't remember about that; we stayed on the road over night; I can remember that part of it.
Q. Don't remember which of the party got into Hutchinson first? A. No.
Q. Now, do you remember in regard to the luggage or baggage when you got to Hutchinson?
A. I don't remember anything about it.
Q. Don't remember anything about any baggage or luggage either at Hutchinson or at Medicine Lodge? A. No, sir.
Q. I will ask you now if you don't remember of discussing, asking, when a conversation was had, discussing the loss of a certain portion of the baggage or luggage that was put in there at Medicine Lodge, if, at Hutchinson, you did not ask about some of it having been lost?
A. No, sir, not that I have any recollection of now.
Q. You have no recollection either in regard to a trunk or satchel being put into the wagon at Medicine Lodge, or arriving at Hutchinson?
A. No, sir, I don't remember anything about it.
Q. Then, at Hutchinson, of course, the remains were taken and shipped to Lawrence? A. Yes, sir.
Q. Did you assist in taking the remains from the wagon and putting them on board the cars at Hutchinson; did you assist in that matter? A. I think not.
Q. Don't think you did? A. No.
Q. Do you remember being around the wagon there at Hutchinson in which the remains were brought there?
A. I think the remains went right to the depot and [—] put in the baggage room and shipped the next train.
812 Q. You think they were put in the baggage room and shipped the next train, but I asked you if you were about the wagon?

A. Don't know where I was. I was around there somewhere.

Q. What I was getting at is whether you assisted in taking e remains from the wagon?

A. I don't remember about that.

Q. All you know is that they were put on the train and at they arrived at Lawrence? A. Yes, sir.

Q. You went down there on the same train that the remains did? A. Yes.

Q. And all these other parties whom you have mentioned?

A. I think they were all on the train; I don't remember out that but I think Mr. Walker and Mr. Wiseman both.

Q. How did you ascertain or first learn that these remains re at Medicine Lodge? I don't ask you to state what was d. But I want to know how you first learned that they re down there?

A. I don't remember how I first got the word; don't remember now.

Q. I want to ask you in that connection if you did not receive a letter from John H. Brown at Tonganoxie in reference this matter? A. I don't think I did.

Q. Well, can you say whether you did or not?

A. I would say I did not.

Q. You are positive in regard to that?

A. No, I ain't. I couldn't be positive fifteen years back out such things.

Q. Didn't you testify on the second trial of this case that received a letter from John H. Brown in regard to that tter?

A. I don't know, sir, I can't tell; I am testifying to just at I remember.

Q. You may read my question and see if you cannot answer it more definitely. I will ask you if you didn't testify the second trial of this case that you rectived a letter from n H. Brown at Tonganoxie, in regard to it?

A. I don't think I did, sir.

Q. Is that as strong as you can say?

A. That is as strong as I can say it.

Q. How far is Tonganoxie from your farm?

A. Four miles.

Q. Tonganoxie at that time was your postoffice address was it not? A. Yes, sir.

Q. Are you able to state any more definitely now how long it was from the time you heard of these remains being at Medicine Lodge before you and Alva started to down there? A. I think we started the next day.

Q. That would be your recollection? A. Yes, sir.

Q. Now, I understand you to say that you do not remember w you got that information?

A. Got what information?

Q. That the remains were at Medicine Lodge?

A. I don't remember how I got that now; I presume from Mrs. Hillmon, I think she got the news first, I think.

Q. You think that is the way you got it?

A. That is the way I probably got it.

Q. Then you were in town that day, were you?

A. I don't remember that where I just was when I got the news.

Q. You don't remember where you got the information?

A. No, sir.

Q. Now, you think you got the information from Mrs. Hillmon? A. I think so.

Q. And the next day you started? A. Yes, sir.

Q. I will ask you to state if it is not a fact that before you started on that trip for the remains of John W. Hillmon, if you hadn't made arrangements with Mrs. Hillmon to borrow $10,000 of money from her? A. No, sir.

Q. Hadn't made any such arrangements? A. No, sir.

Q. I will ask you to state if it is not a fact that immediately after your return from Medicine Lodge, you did not arrange to borrow $10,000 of money from her? A. No, sir.

Q. You remember that distinctly? A. Yes, sir.

Q. We were speaking of Alva Baldwin; where does he reside now? A. Delaware county, Ohio.

Q. How long has he lived there, do you know?

A. About ten years.

Q. About ten years? A. I would think.

Q. Do you know how long he continued to live in Douglas county, Kansas after March, 1879; lived there several years did he not, after that?

814 A. He lived there a year or two, I think.

Q. Lived there a year or two after that and then removed to Delaware county, Ohio, where he now lives?

A. Yes, sir.

Q. Now, I want to inquire of you a little more fully in regard to your trip to Parkville to see Mr. John H. Brown. I will ask you if you didn't go to Parkville, Missouri, along in May or June, 1879, for the purpose of getting Mr. John H. Brown to make a proof of death in this case?

A. I don't remember what month it was, but I went there to get him to sign some papers.

Q. You went over there to get him to sign some papers?

A. Yes, sir.

Q. Those papers were a proof of death in this case, were they not? A. I think that was it.

Q. On that occasion do you remember of meeting one Mr. Buchan? A. Yes, I saw him.

Q. You saw him there; that was the occasion?
A. Yes, sir.
Q. Well, now, are you able, after having your memory refreshed in that way, to state when after that it was that John Brown was at your place?
A. John Brown was at my place in the fall, maybe September.
Q. September, 1879; you remember that circumstance now, do you? A. Yes, I have got that through my head.
Q. About what time in September, 1879, would you say that John H. Brown was at your house?
A. What time in September?
Q. Yes.
A. I don't know that it was in September, but it was in the fall.
Q. In the fall of 1879?
A. Yes, I think it was September, it was in the fall of the year anyhow.
Q. Were you at home at the time that John Brown came there, John H. Brown came there in the fall of 1879?
A. I think I was.
Q. Do you remember of going to Lawrence the same day?
A. No.
Q. Don't remember of going to Lawrence the same day that John H. Brown came to your house?
A. No, I don't remember the same day or when it was.
815 Q. In September, 1879, of whom did your family consist? Mrs. Baldwin, yourself—
A. Mrs. Baldwin, three boys and my daughter.
Q. Three boys: Will you give the age and names, now, of the three boys, commencing with the oldest? A. May—
Q. The boys I am speaking of.
A. James, Fred and Lee.
Q. How old was the oldest boy in 1879?
A. He was about 14 I guess.
Q. About fourteen years old? A. Yes, sir.
Q. At that time, did you have any help there, a girl or a hired man working for you? A. I presume so.
Q. Will you state the name of either the girl or the hired man or both, who was working for you in September, 1879.
A. I don't know who we had then.
Q. Well, refresh, your memory about it and see if you can't remember the name of your hired man?
A. Can't remember, sir.
Q. Can you remember the name of any girl you had working for you at that time? A. No, I don't remember about it.
Q. Don't remember; do you remember now whether in September, 1879, the Lawrence bridge was down and there was a ferry running there?

A. I know the Lawrence bridge was down somewhere about that time.

Q. I am speaking now of September, 1879; whether there is a bridge across the river at Lawrence? A. I guess so.

Q. You know there was, don't you, Mr. Baldwin?

A. Yes, sir.

Q. You know it was down and they used the ferry?

A. Yes, sir.

Q. The question I am asking you is whether or not the ferry was in operation at that time, September, 1879?

A. I think it was.

Q. That would be your recollection now, would it, Mr. Baldwin, the ferry was in operation then? A. Yes, I think so.

Q. Now, that your memory has been refreshed, can you give the name of your neighbor out there who had lost a leg, the one-legged neighbor? A. I can't get onto him yet.

Q. You can't? A. No, sir.

Q. Can't remember any such man, eh? A. No.

816 Q. You lived out there for a good many years?

A. Yes sir.

Q. When did you leave Leavenworth county?

A. I left there in the fall of 1879.

Q. In the fall of 1879?

A. Or 1880, I don't remember now; 1879, I guess.

Q. And from Leavenworth county where did you remove to?

A. I didn't remove; I just moved my business to Trinidad, Colorado.

Q. You went then into business at Trinidad, Colorado, some time in the fall of 1879, did you? A. Yes sir.

Q. You remained in Trinidad about how long?

A. About six weeks in business; I was there about three months.

Q. And then from there where did you remove to?

A. I came back home.

Q. Well, did you afterwards go somewhere else?

A. After that time I went somewhere else.

Q. Where did you go?

A. I went into the Panhandle of Texas.

Q. You went into the Panhandle of Texas? A. Yes sir.

Q. How long were you there?

A. I was there, probably gone about six weeks.

Q. Then where did you go? A. I went to Las Vegas.

Q. Did you go into business there? A. I did not.

Q. How long did you remain there?

A. I stayed there about two days probably.

Q. Then from there where?

A. Came back to Leavenworth county.

Q. Then where? A. Then back to Las Vegas.

Q. Then where?
A. Then back home probably; I don't know where I did go.
Q. When did you remove to Socorro, New Mexico?
A. I moved there with my family; I went to Socorro county and went into business in August.
Q. Went into business in Socorro?
A. In August, about 1881, I guess it was.
Q. About 1881 you went into business at Socorro?
A. Yes sir.
Q. I will ask you if you didn't go into business before that in Socorro, and if your family did not remove to Socorro until 1881? A. That might be.
Q. You went into business in Socorro in 1880, did you not, and your family removed to Socorro in 1881?
A. I guess that is getting near it now.
Q. That is getting near enough.
A. I guess you are nearer right than I am probably.
Q. How long did you remain in Socorro?
A. About four years.
Q. Lived in Socorro about four years? A. Yes sir.
Q. Then you moved where?
A. Moved to the Datil ranch.
Q. Where is the Datil ranch with reference to Socorro; whereabouts is it? A. West of Socorro, 75 or 80 miles.
Q. West of Socorro 75 or 80 miles? A. Yes sir.
Q. What is your postoffice address? A. Datil.
Q. Postoffice there now? A. Yes sir.
Q. How far is Datil from Magdalena City?
A. 40 miles.
Q. That was your former postoffice was it? A. Yes sir.
Q. Now, you have got a postoffice at the ranch?
A. Yes sir.
Q. At the time you went to Parkville to get this proof of death, you didn't get it did you? A. I think I did.
Q. You think you got it, you think it was sworn to there, do you?
A. I don't think it was sworn to in Parkville; I don't remember where it was.
Q. You understand the question, if at the time you went to Parkville for the purpose of getting the proof of death from John H. Brown, you did get it? A. Yes sir.
Q. Then, why did you bring John Brown to Kansas City with you afterwards?
A. I don't know but what he made that at Kansas City, I don't remember.
Q. You don't remember whether it was made in Parkville or Kansas City?

818 A. I don't remember where that was made, sir.

Q. I will ask you if it is not a fact that you didn't get it on the first trip, and that you had to make a second trip down there for that purpose before you got it, just to refresh your mind in regard to that, Mr. Baldwin?

A. No, sir, I don't think; I think I got it.

Q. You think you got it; you think you brought him to Kansas City to get it, don't you?

A. I don't remember. Don't remember where that was taken now.

Q. Did you get more than one proof from him?

A. No, I don't think so.

Q. I will ask you if the first time or second time that you went after this proof of death, that Buchan was not present?

A. Where; what do you mean?

Q. The second time that you went after the proof of death; the first time, if Brown did not decline to make it, and you went back home, and if you did not go down there a second time when Mr. Buchan was not there, and got it, the proof of death?

A. I don't think Brown ever declined to give it.

Q. You say you did go twice, or only once; which is it, now? A. I don't think I went but once.

Q. That is your recollection?

A. Yes, on that business.

Q. Well, did you go down there to see Brown for any other purpose? A. No sir.

Q. Did you ever go down there except on that occasion?

A. I don't think I did.

Q. Do you say you never visited Brown while he was in Missouri but once? A. I ain't positive about that.

Q. You are not quite positive in regard to that? A. No.

Q. Is it not a fact now, Mr. Baldwin, that you was down there in Missouri and saw Mr. Brown three times between the time you saw him at Lawrence at the coroner's inquest, and the time that he was at your house in September, 1879; if you were not down there three times?

A. No sir, that ain't a fact.

819 Q. How many times do you say you went down there?

A. I was there once, it might have been twice.

Q. Do you know—if you went there twice, what did you go there the second time for, Mr. Baldwin?

A. I don't know that I was there twice.

Q. But assuming that you did go there twice, concerning which you are not positive, what would you say you went there the second time for?

A. I never went for any purpose, I don't think, only to get

them papers, his affidavits; that was all ever I had any business with him.

Q. I understood you got those in Kansas City?

A. I don't know about that; I ain't said that; don't understand me that way, if you please.

Q. All right, you say you don't know whether you got them at Parkville, or at Kansas City; am I correct about that?

A. No, I ain't sure about that.

Q. Where do you say now, those proofs were made?

A. I can't say; I don't remember about that.

Q. You don't remember? A. No.

Q. You are still living in Socorro, New Mexico; I mean at the Datil ranch near Socorro, New Mexico.

[—]. Yes sir, I don't live there very much.

Q. You say you don't live there very much?

A. No, not very much.

And in answer to redirect interrogatories propounded to him by Mr. Riggs, counsel for the plaintiff, the witness testified as follows, to wit:

Q. What did you mean by saying you don't live there very much?

A. Why, I am away from home most of the time.

Q. Your residence is there, and your family is there?

A. Yes sir.

Q. It is your postoffice address? A. Yes sir.

Q. Where is your business now? A. Lamar, Colorado.

Q. Mr. Baldwin, at whose instance or at whose request did you make this trip to Missouri to see John Brown to get these affidavits, proofs of death? A. Mr. Riggs.

820 Q. At my request? A. Yes, sir.

Q. Who prepared the affidavits that you took over, if you know?

Objection as immaterial. Overruled; defendants except.

A. Mr. Wheat.

Q. Who placed them in your hands before you started over there? A. Mr. Wheat?

Witness excused.

It is admitted by parties that Exhibit No. 19 referred to by the witness was also introduced in evidence at this trial.

821 Alva Baldwin, a witness produced by the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by C. P. Hutchings, Esq., Counsel for the plaintiff, testified as follows, to wit:

Q. State to the jury your name and place of residence?

A. Alva S. Baldwin, Delaware, Ohio.
Q. How long have you resided in Delaware, Ohio?
A. About 18 years.
Q. Where did you reside before you went to Delaware, Ohio? A. In Douglas County, Kansas.
Q. When did you first go to Douglas County?
A. In 1859.
Q. You settled there in 1859; what year did you leave there? A. In November, 1881.
Q. Have you resided in Delaware, Ohio, ever since 1881?
A. Yes, sir.
Q. What business do you follow?
A. I am keeping a boarding house.
Q. Did you know John W. Hillmon? A. Yes, sir.
Q. When did you know him and where?
A. In the latter part of 1878.
Q. What was the extent of your acquaintance with him, how often did you see him?
A. Why, I can't say just how often I met him.
Q. Do you know the plaintiff, Mrs. Smith? A. I do.
Q. Do you know what her maiden name was? A. Quinn.
Q. What was her first name? A. Sally E. Quinn.
Q. Is she a relative of yours? A. She is.
Q. Where did you see Hillmon?
A. Why, I met him there in Lawrence several times, and at Judson's where they lived.
Q. Were you acquainted with the Judsons who lived there?
A. I was.
Q. About how tall a man was John W. Hillmon?
A. Nearly six feet.
Q. Describe his general appearance, that is, the color of his hair and his eyes, as you remember?
A. Dark brown hair and brown eyes.
Q. Did you ever notice whether Hillmon had any defective teeth? [Q.] I never did.
822 Q. Did you shake hands with Hillmon?
A. Probably.
Q. Did you ever notice any scar on his hand? A. No, sir.
Q. Did you ever notice that he had any crooked little finger? A. No, sir.
Q. I will get you to state whether, if John W. Hillmon had had absent teeth, had a bad scar on his hand and a crooked finger, your opportunities of observation were such as you would have been likely to notice it?

The defendants object to the question as incompetent, irrelevant and immaterial. The Court overruled the objection to which ruling of the Court the defendants at the time duly excepted.

A. I would, sir.
Q. Where were you living in the spring of 1879?
A. Spring of 1879, Douglas County.
Q. Do you remember in the spring of 1879 of hearing that Hillmon had been killed at Medicine Lodge? A. Yes, sir.
Q. Before going further, I will exhibit to you a picture which has been introduced in evidence here at as No. 10 at this trial and get you to state whose picture it is, if you know?
A. That is John W. Hillmon.
Q. From whom did you hear that Hillmon, John W. Hillmon had been killed at Medicine Lodge?
A. Arthur Judson first told me.
Q. Now, you have referred to the Judsons where Mrs. Hillmon boarded. What relation did Arthur Judson bear to that family? A. He is a young man that lived there, Mrs. Judson's son.
Q. You know Levi Baldwin? A. I do.
Q. What relation is he to you? A. He is my brother.
Q. Now, after you heard that Hillmon had been killed at Medicine Lodge, you may state what you did, if anything in reference to going down there to Medicine Lodge?
A. I went to Medicine Lodge.
Q. By whose request?
823 A. By request of Mrs. Hillmon.
Q. How did you go, by what road?
A. We went by the Santa Fe to Hutchinson, Kansas, and from there to Medicine Lodge by stage.
Q. Do you remember, can you give the date that you went there and arrived at Medicine Lodge? A. No, I cannot.
Q. What was your purpose in going to Medicine Lodge?
A. To bring back the body of Hillmon—

The defendants object to the question and answer as incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the defendants at the time duly excepted and still except.

Q. Answer the question?
A. To take the body of Hillmon back to Lawrence.
Q. Who requested you to do that, if any one?
A. Mrs. Hillmon.
Q. Now, I would like to have you state to the jury what you did, if anything about preparing to bring that body back.
A. We made inquiries at Hutchinson, Kansas, how we should proceed.
Q. Whom did you go to? A. Undertaker there.

The defendants object to the question and answer as incompetent, irrelevant and immaterial. The Court overruled

the objection to which ruling of the Court the defendants then and there duly excepted.

A. And he told us that we would have to get a metallic coffin, that after a person had been dead that long it would be almost impossible to ship them, either to get a metallic coffin or a box lined with zinc.

Q. Well, what effort did you make, if any; what did you do about getting a metallic coffin or a zinc-lined box?

A. After we got to Medicine Lodge, we couldn't find anything of the kind there.

Q. Did you make inquiries? A. We did.

Q. Well, then, what did you do or determine to do?

A. We determined to fence the grave in and leave the body there.

Q. For how long? A. Until the following winter.

824 Q. What prepartions of that nature did you make; state what you did?

A. There was some lumber and posts bought and taken to the grave yard.

Q. Did you know John H. Brown? A. I did not.

Q. When did you meet John H. Brown at Medicine Lodge?

A. The following morning after we got there was the first that I remember of meeting him.

Q. Well, now, you can go on and state in your own way what you did, whether you went out to the grave, and if so, what took place there, what was done?

A. We went there and took this lumber out the next day or the same day that we got there, and we done nothing in regard to fencing up that day only to take the material there, and the next day we met some parties there from Lawrence.

Q. What parties from Lawrence did you meet there the next day?

A. Colonel Walker, Major Wiseman and another gentleman; I have forgotten his name.

Q. Tillinghast, was that the name?

A. I believe that was the name.

Q. What was done then, if anything?

A. The grave was opened then and the body was looked at.

Q. Well, what was done when the body was taken up; who was there; who was present?

A. Colonel Walker, Major Wiseman, Mr. Tillinghast, Levi Baldwin, there was a colored man there, and a physician, Brown and myself.

Q. I wish you would go on and state just what occurred there as you remember it?

A. After the lid was removed from the coffin Major Wiseman said, that it was not Hillmon. Levi Baldwin stated that

it was, and Mr. Wiseman made a remark that Hillmon had false teeth, the physician pried the teeth with a knife; then the sleeve was cut open of the coat, and the scab was shown on the arm.

Q. Now, did you see the body that was exposed there when the coffin was taken up, the man in the coffin? A. I did.

Q. Who was it? A. John Hillmon.

825 Q. Now, what was done after that with the body?

A. The body was taken to Medicine Lodge.

Q. When was it taken to Medicine Lodge?

A. That afternoon and was kept there that night and the next day started for Lawrence.

Q. How was it taken from Medicine Lodge?

A. It was taken in a wagon to Hutchinson, Kansas.

Q. Who drove the wagon? A. John Brown.

Q. How did you return? A. I went with the wagon.

Q. Did you go all the way from Medicine Lodge to Hutchinson with the body? A. Yes, sir.

Q. What was done with the body when it reached Hutchinson. A. It was taken to the depot and shipped to Lawrence.

Q. Do you remember how long it took to make the trip from Medicine Lodge to Hutchinson?

A. It took nearly two days.

And in answer to Cross-Interrogatories propounded to him by Mr. Barker, counsel for the defendants, the witness testified as follows, to wit:

Q. Mr. Baldwin, I understand you to say that you now live in Delaware, Ohio? A. Yes, sir.

Q. How long have you lived there?

A. I lived in Delaware county eighteen years.

Q. What business do you say you are engaged in?

A. Boarding house now.

Q. Keeping a boarding house in Delaware, Delaware county, Ohio? A. Yes, sir.

Q. How [lany] years have you been living there?

A. Nearly eighteen years.

Q. Do you remember just when you went there?

A. The middle or latter part of November in 1881.

Q. Middle or last of November, 1881? A. Yes, sir.

826 Q. Did you go direct from Douglas county to Delaware, Ohio? A. Yes, sir.

Q. How long were you in making the trip?

A. From Lawrence?

Q. From Lawrence to Delaware, Ohio?

A. Why, I think two days and a night.

Q. There was one or two days elapsed between your leaving Douglas county, Kansas, and arriving in Ohio? A. Yes, sir.

Q. Now, when did you leave Delaware, Ohio, to come out here? A. Last Tuesday at 12 o'clock.
Q. When did you arrive here?
A. Wednesday evening at half past seven.
Q. What day of the month would that be on?
A. That would be on the 18th, I believe.
Q. The 18th of the month you arrived here? A. Yes, sir.
Q. Where have you been stopping since you came, what hotel? A. At Mrs. Duke's boarding house.
Q. Does Mrs. Hillmon board there? A. No, sir.
Q. Whereabouts is this boarding house?
A. On Shawnee street.
Q. Did you come out here for the purpose of testifying?
A. Yes, sir.
Q. You have been in court nearly every day?
A. Several times, yes.
Q. You heard the deposition of your brother Levi Baldwin read this morning? A. Yes, sir.
Q. You knew, it seems, that when this coffin was opened down there that there was a controversy in regard to whose body that was, didn't you? A. At that time, yes, sir.
Q. That was in 1879? A. 1879.
Q. What relation did you say you were to the plaintiff?
A. Cousin, second cousin.
Q. You are a second cousin to the plaintiff? A. Yes, sir.
Q. You knew that a controversy had arisen then?
A. Yes, sir.
Q. This is the first time you have ever testified in this case, is it not? A. Yes, sir.
827 Q. Did you testify before the coroner's jury?
A. No, sir.
Q. That is the first time you have ever testified?
A. Yes, sir.
Q. Then from the first of April, 1879, until you left the December following—in 1881, where were you living, whereabouts with reference to the city of Lawrence?
A. About five miles west of Lawrence.
Q. In Kanwaka township? A. Yes, sir.
Q. You lived there for nearly two [yeats] after this inquest was held, did you not? A. Yes, sir.
Q. You may state where Mrs. Hillmon was living during that time, if you know? A. No, I could not, all the time.
Q. Do you know where generally she was living?
A. In Lawrence.
Q. She was living in the city of Lawrence? A. Yes, sir.
Q. I will ask you, now, from April, 1879, to December, 1881, whether or not Mrs. Hillmon frequently visited your house?
A. No, sir, not frequently.

Q. Well, she visited at your house, did she not?
A. Sometimes.
Q. Speak a little louder, please. A. Yes, sir.
Q. She visited there during that time? A. Yes, sir.
Q. Quite a good many times?
A. I couldn't say how many times.
Q. Well, about how many times; wasn't she out there on an average once a week? A. Oh, no.
Q. Not as often as that? A. No, sir.
Q. But she visited there frequently, did she not?
A. Maybe once or twice during the year or two.
Q. Now, Lawrence was your postoffice address?
A. Yes, sir.
Q. You visited Lawrence frequently, did you not?
A. Yes, sir.
Q. Almost weekly? A. Yes, sir.
Q. Sometimes oftener that? A. Yes, sir.
Q. And during that time you saw Mrs. Hillmon frequently, did you not? A. Undoubtedly.
Q. I say it is a fact, is it not? A. Yes, sir.
Q. Did you have a farm in Douglas county? A. Yes, sir.
Q. Did you sell the farm? A. I did.
828 Q. To whom did you sell the farm?
A. To my brother Lafayette.
Q. How long after you sold the farm before you left the county? A. I did not catch the question.
Q. How long after you sold the farm before you left the county? A. I left the county before I sold the farm.
Q. You left the county before you sold the farm?
A. Yes, sir.
Q. So that the date of the deed would not furnish a basis of the time you left? A. No, sir.
Q. How long was it after you sold the farm before you left there?
A. I left there in November, 1881; I don't just remember what year I sold the farm in.
Q. Have you been back since that time until you came here this last time? A. Yes, sir.
Q. How many times have you been back from Ohio to Kansas since you left in 1881? A. Twice.
Q. What years were you back in?
A. I was back in 1882, in February.
Q. In February, 1882, you was in what place, city of Lawrence? A. At Lawrence, or at my brother's.
Q. Your brother's? A. Yes.
Q. Levi Baldwin wasn't living here then? A. No, sir.
Q. You don't mean your brother Levi? A. No.
Q. You mean your brother Lafayette? A. Yes, sir.

Q. Where was he living; on the old farm? A. Yes, sir.
Q. About five or six miles from Lawrence? A. Yes, sir.
Q. That would be one time when you returned from Dela-county of Kansas; that was the first visit back, was it?
A. Yes, sir.
Q. When did you make your next visit?
A. I can't remember what year that was.
Q. State it as definitely as you can how long it was after that. A. No, sir, I can't.
Q. You can't state? A. No, sir.
829 Q. About how many years ago, was it?
A. I could not state the time.
Q. Have you corresponded with your brother Lafayette?
A. Yes sir.
Q. With Mrs. Hillmon? A. No sir.
Q. With her attorneys? A. No, sir.
Q. Didn't keep up any correspondence with them?
A. No sir, I did not.
Q. But you did keep up a correspondence with your brother Lafayette? A. Yes, sir.
Q. It was generally known where you were going, was it not? A. Oh, yes.
Q. By your neighbors? A. Yes sir.
Q. There was nothing concealed about your going?
A. Nothing whatever.
Q. It was generally understood you were going back to Ohio? A. Yes.
Q. Among your neighbors and friends? A. Yes, sir.
Q. On each occasion that you returned here, did you see Mrs. Hillmon? A. I think not; I don't remember.
Q. Don't you remember of seeing her in 1882 when you returned? A. No sir, I don't.
Q. Do you know where she was living?
A. No, sir, I could not say.
Q. You were here to visit your friends and relatives?
A. No, I was here on business.
Q. You came back on business and not on a visit?
A. Yes sir.
Q. You did, it seems, visit your relatives?
A. I visited my brother, yes, at his place.
Q. You did not visit her? A. I think not.
Q. Do you know whether you did or not?
A. I should say not.
Q. When you were back after that, did you see her?
A. I don't remember of seeing her.
Q. Do you say whether you did or not see her?
A. No, I don't remember.
Q. You mean to say simply in regard to the second visit that you don't remember whether you saw her or not?

A. Yes sir.

Q. Now, in regard to your acquaintance with John Hillmon; when and where did you become acquainted with n?

A. It was in the winter of 1878 as near as I can remember.

Q. You are clear, now, in regard to the time?

A. Yes sir.

Q. About what time in the winter of 1878?

A. I think along in November or December.

Q. Along in November or December, 1878, you became acainted with John W. Hillmon?

A. My first remembrance.

Q. Whereabouts did you become acquainted with him?

A. Met him in Lawrence.

Q. Where was the first place you saw John W. Hillmon was Lawrence? A. As I remember.

Q. In the winter of 1878? A. Yes sir.

Q. Where did you see him? A. Seen him at his house.

Q. At his house: Do you mean at his house at Mrs. Jud-'s house? A. Yes, at Mrs. Judson's.

Q. Was that before or after he was married?

A. That was after he was married.

Q. You did not make the acquaintance of John W. Hillmon il after he was married? A. Not as I remember.

Q. I am right about that, am I? A. Yes sir.

Q. You made his acquaintance at Mrs. Judson's? A. Yes.

Q. How many times did you see him at Mrs. Judson's?

A. Oh, I could not state.

Q. What would be your best judgment?

A. I could not state.

Q. You knew when he went away?

A. About when he went away.

Q. You were not present when he went away? A. No sir.

Q. Just for the purpose of fixing the date: Were you pres- at their marriage? A. No sir.

Q. You were not there on that occasion? A. No sir.

Q. You were not present, I mean in the city of Lawrence when these parties, Brown and Hillmon started for Medicine Lodge or wherever they went—Wichita?

A. Not to my remembrance.

Q. You have no recollection in regard to that?

A. No, sir.

Q. Do you remember the fact that they went away?

A. Yes, sir.

Q. Have you any means of fixing the date when you first rd that they went away or learned that Hillmon and wn had gone away to Wichita or some other place?

A. No sir.

Q. After they went away on that occasion, that is, after going to Wichita, did you ever see Hillmon after that at Lawrence?

A. I think about a month before the accident occurred.

Q. You think about a month before the accident occurred you saw Hillmon at Lawrence? A. Yes sir.

Q. Where did you see him on that occasion?

A. I think I met him on the street.

Q. You met him on the street casually in the city of Lawrence? A. Yes, sir.

Q. Did you have any conversation with him there then?

A. I don't remember as to that.

Q. Who was with him? A. I could not say.

Q. Would you say there was anybody with him? A. No.

Q. Just met him on the street, did you? A. Yes, sir.

Q. Can you swear you ever shook hands with him in your life? A. Undoubtedly.

Q. That was because you were in the habit of shaking hands, that is the only reason on earth? A. Yes.

Q. On account of your habit of shaking hands?

A. Yes sir.

Q. You think you shook hands with him? A. Yes sir.

Q. Of course, you made no examination of his hands?

A. No sir.

Q. In regard to his teeth, I understood you to say you never examined them? And never noticed his teeth?

A. Not in particular, I never examined them closely.

Q. Now, have you stated the extent of your acquaintance with him as well as you are able to? A. Yes, sir.

832 Q. Now, you have stated that you heard through Mr. Judson, I believe, that he had been killed?

A. Yes sir.

Q. You heard that in Lawrence? A. Yes, sir.

Q. Who was with you when you heard that matter discussed or talked about?

A. Mr. Judson was the only one I remember of.

Q. When was that?

A. I can't just exactly remember when that was.

Q. How long was it before you started?

A. It was the day before.

Q. It was the day before you started? A. Yes sir.

Q. Did you go out home after you learned that fact, or got that information? A. Yes sir.

Q. Was Levi Baldwin with you when you received that information? A. No, sir.

Q. How did it happen that you met Levi Baldwin: When did you meet him after that, the first time?

A. Why, the next day I think it was.

Q. Where did you meet him?

A. There at Lawrence on the street.
Q. You met him on the street in Lawrence? A. Yes sir.
Q. Where did you go when you met Levi?
A. I think we went to Mrs. Hillmon's.
Q. You went over to Mrs. Hillmon's did you? A. Yes sir.
Q. She was then living at Judson's of course? A. Yes sir.
Q. Can you tell now what month that was in?
A. That was in the latter part of March, 1879.
Q. And then you started did you for Medicine Lodge?
A. Yes sir.
Q. You and Levi Baldwin? A. Yes sir.
Q. You have stated that you went by rail as far as Hutchson? A. Yes, sir.
Q. Have you any means of fixing the date at which you rived at Hutchinson?
A. No, only the same day; it was in the evening.
Q. You have spoken about having a talk with some parties Hutchinson; you had lived in and around Lawrence for how many years?
3 A. Nearly twenty years.
Q. You had been living in and around Lawrence r nearly twenty years? A. Yes, sir.
Q. You were well acquainted with the business men of awrence, were you not? A. Yes, sir.
Q. The principal undertakers there were Bailey & Smith, ere they not?

The plaintiff objects to the question as not proper cross-xamination. The Court overruled the objection, to which ction and ruling of the Court the plaintiff at the time duly xcepted.

A. Yes, sir.
Q. There were other undertakers in Lawrence, were there ot? A. Yes, but I have forgotten their names.
Q. There were other undertakers there? A. Yes, sir.
Q. You had been spoken to to go down to Medicine Lodge efore you and Levi started? A. Yes, sir.
Q. Did you talk with either Bailey [&] Smith about bringng the body back? A. No, sir.
Q. Did you talk with any other undertaker in the city f Lawrence about bringing the body back? A. No, sir:
Q. But you waited until you got to Hutchinson, did you?
A. Yes, sir.
Q. How far is it from Lawrence to Hutchinson?
A. I don't remember exactly.
Q. State your best recollection of the distance?
A. Probably two or three hundred miles.
Q. You got out there and then you say you had a conversation with an undertaker? A. Yes, sir.

Q. Do you remember the name of the undertaker?
A. No, sir; I do not.
Q. Can't state his name? A. No, sir.
Q. Can you state where his place of business was?
A. No, sir; I cannot.
Q. How large a place was Hutchinson in 1879?
A. Oh, I don't know.
834 Q. It was a little bit of a town, was it not?
A. I don't remember the size of it.
Q. Do you remember where the man's place of business was? A. No, I could not state.
Q. You don't remember his name? A. No, sir.
Q. Do you remember what kind of a man he was, appearing man? A. No, sir.
Q. Can you describe the man? A. I could not.
Q. Neither the man nor the place nor the name? A. No.
Q. Did you make inquiry of more than one undertaker?
A. Only one.
Q. Was there an undertaker there then? A. Surely.
Q. Then you went from there to Medicine Lodge, you and Levi Baldwin? A. Yes, sir.
Q. You went by stage or some public conveyance?
A. Yes, sir.
Q. You didn't have any private conveyance? A. No, sir.
Q. Do you remember when you got down there?
A. It was about two o'clock in the morning; we drove from Hutchinson right through, that is, stopped only to change horses.
Q. You left Hutchinson at what time?
A. It was in the morning about six o'clock.
Q. Left Hutchinson in the morning about six o'clock, and arrived at Medicine Lodge at two o'clock the next morning?
A. Yes, we drove in the night.
Q. I will ask you to state—you met this man Brown down there, did you? A. Yes, sir.
Q. When did you meet him? Did you meet him that morning that you got in there? A. In the morning, yes.
Q. Was he stopping at the same hotel at which you and Mr. Baldwin stopped,—your brother? A. I could not say.
Q. Do you remember when and where you first saw Brown? A. No, I don't.
Q. Have no recollection in regard to that? A. No.
835 Q. But you remember seeing him the next day?
A. Yes, sir.
Q. The next day you went out to the cemetery, did you?
A. Yes, sir.
Q. And during that same day you made arrangements to fence the lot there, did you? A. Yes, sir.

Q. You had posts and boards and wire taken out there?
A. No wire, to my remembrance.
Q. Just boards and posts? A. Yes, sir.
Q. What time the next day did you do these things?
A. I think that was in the afternoon if I remember right.
Q. In the afternoon of the first day after you arrived?
A. Yes, sir.
Q. Some of the people there at Medicine Lodge at that time: Do you remember whether this colored man Mr. Gilmore was there at that time or not?
A. I could not say as to that; there was a colored man there the next day, I remember.
Q. Then, when did Colonel Walker, Mr. Wiseman and Tillinghast arrive there?
A. I can't just state when they got there.
Q. State as definitely as you can how long it was after you arrived there before Colonel Walker, and this party came from Lawrence? A. It was sometime the day after.
Q. You were well acquainted with Colonel Walker, were you not? A. Yes, sir.
Q. You had known him ever since you had lived in Douglas county, had you not? A. Yes, sir.
Q. For over 20 or [20] years you had known Colonel Walker? A. Yes, sir.
Q. You knew him when he was sheriff? A. Yes, sir.
Q. And marshal—

The plaintiff objects to the question as not proper cross-examination. The Court sustained the objection, to which ruling the defendants at the time duly excepted.

Q. Did you hear a conversation between Levi Baldwin and Colonel Walker before you went out to the grave?
A. I don't remember.
836 Q. How did it happen that you went out to this grave together, I mean you and Levi Baldwin, Colonel Walker and the party from Lawrence?
A. I did not say we went together.
Q. I beg your pardon; I understood you did. Well, you were out there at the same time, were you not? A. Yes, sir.
Q. Just tell how it happened; you need not state the conversation but how it happened that you met there?
A. Why, we went out to open the grave.
Q. You went out to open the grave? A. Yes, sir.
Q. That was after you had made arrangements to fence it?
A. Yes, sir, the next day.
Q. The next day you went out to open the grave?
A. Yes, sir.
Q. Did these parties whom I have mentioned go out with you? A. Not in the same conveyance.

Q. But at the same time?
A. They went out at the same time, yes.
Q. And met you there? A. Yes, sir.
Q. And the grave was opened?
A. The grave was opened.
Q. Do you remember how the various parties were standing around that coffin when it was taken out of the grave and opened? A. No, I could not state.
Q. Can you state who was standing at the head of the coffin? A. No.
Q. Do you remember where Levi Baldwin was standing?
A. No, I could not state exactly.
Q. Can you tell where you were standing?
A. I was standing near the foot of the coffin.
Q. I will ask you if you were not standing near the head with Colonel Walker, Major Wiseman, Mr. Tillinghast and Levi Baldwin? A. I could not state.
Q. You don't remember the order in which they stood?
A. No, sir.
Q. You have stated that the coffin was opened; was there a cloth over the face? A. I think not.
Q. Do you remember in regard to that?
A. I would not state positively, but I think not.
837 Q. You think there was no cloth over the face?
A. No, sir.
Q. When the coffin was opened, you say that somebody, you say that Major Wiseman— A. Yes, sir.
Q. As soon as Major Wiseman saw it, he said, That is not Hillmon? A. Yes, sir, very soon afterwards.
Q. Very soon afterwards he said, That is not Hillmon?
A. Yes, sir.
Q. You say that Levi Baldwin said it was Hillmon?
A. Yes, sir.
Q. Then, what was the next thing that was said?
A. I think they asked me the question what I said.
Q. Well? A. I said I was satisfied it was John Hillmon.
Q. You said that, did you? A. Yes, sir.
Q. You are positive in regard to that?
A. I am positive.
Q. Do you recollect anything else that was said there?
A. In regard to the teeth.
Q. What was that?
A. Mr. Wiseman said that Hillmon had false teeth.
Q. Yes; what was done then?
A. The doctor pried the teeth with the point of a knife.
Q. Then what was the next thing done?
A. The sleeve was ripped open.
Q. The sleeve was ripped open, was it? A. Yes, sir.

Q. And he had on a coat? A. Yes, sir.
Q. Do you remember the coat, the kind of coat he had on?
A. If I remember rightly, it was a large plaid coat.
Q. That is, a coat with large plaids? A. Yes, sir.
Q. And the sleeve was cut there, was it? A. It was.
Q. And the arm examined? A. Yes, sir.
Q. Well, then what was done?
A. Then soon after that the coffin was closed again.
Q. The coffin was closed and taken from there to where?
A. Placed in the wagon and taken to Medicine Lodge.
Q. Taken from there to Medicine Lodge? A. Yes, sir.
Q. Now, about what time in the day was it that it was taken from there to Medicine Lodge?
838 A. That was in the afternoon.
Q. Have you stated all the persons you can remember of being there at the time the coffin was opened, that is, Wiseman, Walker, Tillinghast, yourself, Levi Baldwin, the doctor and who else? A. A colored man.
Q. A colored man? A. And John Brown.
Q. Where was John Brown at that time? I mean at the time the coffin was being opened? A. I could not say.
Q. You could not state where he was? A. No, sir.
Q. Then you state that body was taken back to Medicine Lodge? A. Yes, sir.
Q. The coffin closed and taken back there, and then the next day you and John Brown started for Hutchinson with this body, did you? A. Yes, sir.
Q. How did you carry the body; how was it taken?
A. It was placed in the wagon.
Q. Do you know what wagon that was?
A. The wagon that Hillmon and Brown were using.
Q. The wagon that Hillmon and Brown were using; that included the team, did it? A. Yes, the team.
Q. What were they? A. They were a pair of ponies.
Q. And an old spring wagon? A. Yes, sir.
Q. And the ponies were in a very bad condition, looking condition?
A. Why, if I remember rightly, a pretty fair span of western ponies.
Q. Now, besides the coffin containing the remains, what else was put in there?
A. The luggage, but I don't remember as to that.
Q. What do you mean by luggage, a trunk?
A. I don't remember.
Q. What it consisted of? A. No, sir.
Q. Was there a trunk in the wagon?
A. I don't remember as to that.
Q. Was there a valise in the wagon?

A. I could not state.

Q. Was there a pair of shoes put in that wagon?

A. I have no remembrance of them.

839 Q. Were any effects whatever that you know of John W. Hillmon's put in that wagon and carried along at the same time the remains were?

A. I don't remember, but they undoubtedly were.

Q. I know, but have you any recollection on that subject?

A. No.

Q. You can't tell, then, whether they were or were not?

A. No, sir.

Q. All you can testify as being in the wagon was the coffin and its contents? A. Yes, sir.

Q. Now, you and John started from there at what time?

A. In the morning.

Q. In the morning; can you tell now what day of the month it was and of what year?

A. No, I could not tell the day of the month; it was in 1879.

Q. It was in 1879, but you are not able to tell the day of the month? A. No, sir.

Q. You drove from there to Hutchinson, did you?

A. We drove from there to Kingman and stayed all night at Kingman.

Q. Do you recollect whether there was any baggage or effects whatever of John W. Hillmon in the wagon at Kingman? A. No, sir, I don't remember as to that.

Q. Can you state as to whether there was a trunk?

A. No, sir.

Q. Have no recollection in regard to that? A. No, sir.

Q. How long had you been making the trip from Medicine Lodge to Kingman? A. One day.

Q. What time did you arrive at Kingman?

A. In the evening.

Q. Do you remember where you stayed that night, with whom? A. I stayed at the hotel there.

Q. Do you remember the name of the hotel? A. No, I don't

Q. Then you started out the next morning, did you?

A. Yes, sir.

Q. And you drove to Hutchinson?

A. To Hutchinson, yes, sir.

Q. Was there anybody else with you on that trip except Mr. Brown?

A. Mr. Brown and myself, so far as I remember.

Q. What time did you get into Hutchinson?

A. In the afternoon or evening.

840 Q. In the evening of the second day? A. Yes, sir.

Q. Who arrived in Hutchinson first, you or your brother Levi? A. I couldn't state as to that; I don't know.

Q. Did you find Levi and these other people there waiting for the remains? A. I could not state.
Q. Don't recollect in regard to that?
A. I do not know that.
Q. The remains, of course, were taken on board the cars and shipped to Lawrence? A. Yes, sir.
Q. You were not an invalid then, were you? A. No, sir.
Q. Did you assist in taking these remains from the wagon to the car? A. Yes, sir.
Q. Transferring them? A. Yes, sir.
Q. You helped do that? A. Yes, sir.
Q. Now, can you testify to seeing any effects of John W. Hillmon there on that occasion?
A. No, I don't remember at all.
Q. Now, what time did the train leave Hutchinson on which these remains were conveyed to Lawrence?
A. I could not state that exactly. It was in the evening.
Q. Was it on the same evening?
A. It was the evening train, if I remember rightly.
Q. You and John Brown did not take the train?
A. I did not take the train; I would not say as to John Brown.
Q. Do you know whether John Brown did or not?
A. I could not say.
Q. Where did you stay—at Hutchinson, that night?
A. Yes, sir.
Q. Did Brown stay with you? A. No, sir.
Q. Did you leave the team there? A. At Hutchinson?
Q. Yes? A. Yes.
Q. You left the team at Hutchinson, did you?
A. Yes, sir.
Q. What did you do with that team and wagon after you had brought them over there?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and not proper cross-examination.

841 The Court overruled the objection, to which ruling the plaintiff at the time duly excepted.

A. That team and wagon were sold the next day.
Q. Where?
A. At public auction, at Hutchinson, Kansas.
Q. By whom?
A. I had it done; an auctioneer sold them.
Q. You had an auctioneer sell the whole outfit the next day? A. The next day.
Q. Was Brown there at the time they were sold?
A. No, sir.
Q. He had come on to Lawrence? A. I suppose so.

Q. Then, what did you do after you had sold the team and that outfit; what did you do then?

A. I went to Lawrence.

Q. When did you arrive in Lawrence?

A. The next day or the day after; I am not positive which.

Q. Then you got in there, is it not a fact, just one day later than your brother did? A. Yes, one day later.

Q. Just one day later than your brother you got into Lawrence? A. Yes, sir.

Q. You simply stayed back to sell the team?

A. Yes, sir.

Q. At the time you arrived there was there an inquest being held? A. I believe so.

Q. There was an inquest being held over this body?

A. I believe so.

Q. The same body? A. Yes, sir.

Q. Of course, you knew before that that there was a controversy in regard to the identity of that body? A. Yes, sir.

Q. I understood you to say that you did not testify on that occasion? A. I did not.

Q. Were you there at the inquest? A. No, sir.

Q. Didn't go near the inquest? A. No, sir.

Q. You were living then about six miles from Lawrence?

A. Five miles.

Q. Is it not a fact that you were in town every day during the time that inquest was going on? A. No, sir.

842 Q. You went out home when?

A. The same evening I got home.

Q. You went out home the same evening you got home. When did you come back again?

A. I don't remember as to that.

Q. Did you come back again until after the inquest was over? A. I could not state as to that.

Q. You have no recollection in regard to that?

A. No, sir.

Q. There was considerable excitement there in regard to the matter was there not?

The plaintiff objects to the question as incompetent, irrelevant and immaterial, calling for the conclusion of the witness upon a matter of no possible importance. The Court sustained the objection to which action and ruling of the Court the defendants at the time duly excepted.

By Mr. Isham: May I state the ground upon which I consider this evidence relevant. This witness has said that he was at the grave at Medicine Lodge; that he saw the corpse and recognized it as as that of John W. Hillmon; he returns to Lawrence where there is an inquest in progress. The evidence

has already shown that Levi Baldwin was asking people to go and identify the body, but this witness was not asked to go and did not go. We think that a very relevant circumstance bearing upon the question of identity. The implication is that witness if he had gone, would have testified it was Hillmon, and the fact that he was not invited, and did not go, is evidence that the body was not that of Hillmon.

By the Court: Whatever may be said on behalf of the plaintiff in reference to this question from the defendant's standpoint, all that could possibly be gained by this question, or questions of like character would be to reflect upon the witness who is now testifying. It is clearly not cross examination of this witness.

To which ruling of the Court the defendants at the time duly excepted.

Q. I believe I asked you when, after the inquest,
843 were you in Lawrence again?

A. I think it was the next day.

Q. You have no means of fixing the date any more definitely? A. I don't believe I understand your question.

Q. I said, when after the inquest, were you in Lawrence?

A. I have no recollection at all.

Q. You were in Lawrence nearly every day?

A. Not every day, Oh, no.

Q. But frequently? A. Yes, sir.

Q. You had been down to Medicine Lodge and back?

A. Yes, sir.

Q. Who paid the expenses of that trip?

A. I paid my own expenses.

Q. Do you know who paid Mr. Levi Baldwin's?

A. No, sir, I could not state.

Q. How much did this team bring? This outfit?

The plaintiff objects to the question as not cross-examination and immaterial.

By the Court: What is the purpose of that, Mr. Barker?

By Br. Barker: I think it would throw some light upon this question to show with what kind of an outfit a man able to carry $25,000 of life insurance was traveling around the country.

The Court overruled the objection, to which action and ruling of the Court the defendants at the time duly excepted.

A. I don't remember.

Q. Can you approximate it? A. No, sir.

Q. Can't even tell now how much it sold for? A. No, sir.

Q. This picture, marked, I believe by this Court, Exhibit
10. When did you first see that picture?

A. This is the first time I have seen it so far as I know.
Q. This is the first time you have seen that picture?
A. Yes, so far as I know.
Q. To-day? A. So far as I know.
Q. Has the picture or one like it been shown to you by either the plaintiff or her attorneys since you have been here?
A. Yes, sir.
Q. You have seen either this or one just like it?
A. Yes, sir.
844 Q. Seen it several times, have you not, since you have been here? A. Yes, sir.
Q. It has been shown to you by either the plaintiff or her attorneys? A. Yes, sir.
Q. You stated that that was a picture of John W. Hillmon?
A. Yes.
Q. To make this matter clear: You never saw it, you say, until you saw it here, I mean, here in Leavenworth since you came here this last time?
A. I don't know as I have seen the same picture; I have seen pictures like it.
Q. Before you came here?
A. Before I came here to Leavenworth?
Q. Where did you see it? A. I don't remember exactly.
Q. You don't know where you saw it? A. No, sir.
Q. Now, look at this picture—I can't tell what exhibit it is—look at that picture. You have seen that picture or one like it before? A. Yes, sir.
Q. Of whom is that a picture? A. John W. Hillmon.
Q. That is a picture of John W. Hillmon also, is it?
A. Yes, sir.
Q. You say that these two pictures are pictures of the same individual? A. Yes, sir.
Q. Have you had any pictures sent to you? A. No, sir.
Q. The small picture which I show you is Exhibit 14 of this Court. Did you see those remains there at Lawrence while they were at Bailey & Smith's? A. No, sir.
Q. You did not go down there at all?
A. I did not see them.
Q. Were you present when the remains were buried; that is, did you go out to the cemetery? A. No, sir.
Q. Do you know of your own knowledge when the remains were buried? A. No, sir, I do not.
Q. You know nothing in regard to that? A. No, sir.
Q. Do you know anything about there being any funeral there at Lawrence over these remains? A. No, sir.
Q. You never heard of any, did you?
A. I don't remember anything of it.
845 Q. At Lawrence: I say, you never heard?
A. No sir.

Q. Now, I want to call your attention again to what took place down there at the cemetery when these people were standing around there; I will ask you to state, sir, if there wasn't a cloth on the face, and when that cloth was removed, and you saw the features, you didn't say, "Hell, that isn't Hillmon?" A. I never said so.

Q. I will ask you to state if you didn't make a remark to that effect? A. I never did.

Q. Did you say so in that occasion in substance, I mean on the occasion at Medicine Lodge when the coffin was opened and the face of the corpse exposed there, if you did not exclaim that that was not Hillmon? A. I never said so.

Q. You are positive in regard to that?

A. I am positive in regard to that.

Q. Now, I will ask you to state if at the time of the coroner's inquest was being held in Lawrence, you did not state to parties there on Henry street—I will give you the name of the party presently—that these could not be the remains of John W. Hillmon because there was too much discrepancy in the height; if you did not state that in substance?

The defendants object to the question because the time, place and person are not definitely given.

The court sustained the objection to which action and ruling of the court the defendants at the time duly excepted and still except.

A. Are you acquainted with one Mr. C. E. Emery?

A. I am acquainted with an Emery that used to live near us, but I have forgotten his initials.

Q. You are acquainted with an Emery who lived near you in Kanwaka township? A. Yes sir.

Q. I will ask you if you did not state to this Mr. Emery at or near Henry street in the city of Lawrence, at or about the time that the inquest was being held that those could not be the remains of Hillmon because there was too much
846 discrepancy in the height; that those remains which were at Bailey & Smith's could not be the remains of Hillmon because there was too much discrepancy in height?

A. I never said so.

Q. I will ask you if you didn't state that in substance?

A. I did not.

Q. I will ask you if you didn't state to Mr. Emery on that occasion. You know whom I am referring to now?

A. Yes sir.

Q. That you could not account for the discrepancy in height between the remains there and John W. Hillmon. I am asking about Henry street, at or about the time the inquest was being held, and Mr. Emery. I will ask you to state

if on the same occasion, you did not tell him, in substance, that those remains could not be the remains of John W Hillmon on account of the teeth, there being so much difference in teeth? A. No sir, I never said any such thing.

Q. Didn't you state to him that in substance?

A. I did not.

Q. Did you not state to him on that occasion, that is, at the time the inquest was being held, on Henry street in the city of Lawrence, that you could not account for the difference between the teeth of the remains lying down there and those of John W. Hillmon?

A. I never made any such statement.

Q. You know this man Emery?

A. If it is that one, I know him, yes.

Q. I will ask you that question in a little different shape. Referring, now, to the same time and place, and the same man, I will ask you if Mr. Emery did not ask you how you accounted for the difference between the height of the remains down there and John W. Hillmon, and if you did not state to him in substance that you could not account for the difference?

A. No sir.

Q. I will ask you to state if on that occasion Mr. Emery didn't ask you how you accounted for the difference between the teeth of the remains down there and the teeth of John W. Hillmon, and you did not state to him that you could not account for the difference?

847 A. Never such a conversation.

Q. I will ask you if he did not ask you how you accounted for the difference between the appearance of the hair of the remains at Bailey & Smith's and the hair of John W. Hillmon, and if you did not tell him that you could not account for the difference? A. No sir.

Q. You had no conversation in regard to that matter?

A. No conversation with him at all.

Q. With him at that time? (No answer.)

Q. Referring now to the grave at Medicine Lodge, you have already spoken about the coffin being opened, and the remarks that were made by Mr. Wiseman and Levi Baldwin. Now, I will ask you how long, after the coffin had been opened and the face exposed, before anything was said to you or you said anything in regard to it?

A. It was not long; I don't remember exactly.

Q. Well, about how long?

A. It had only been a few moments.

Q. Well, I understood you to state on your direct examination that they asked you what you said about it?

A. Yes sir.

Q. They asked for your opinion, did they not?

A. Yes sir.
Q. Who asked for your opinion there?
A. Colonel Walker.
Q. How long was that after the coffin had been opened?
A. Only a short time; I couldn't state exactly.
Q. Five, ten or fifteen minutes? A. Probably.
Q. There had been considerable discussion going on around
ere before they asked your opinion? A. Yes sir.
Q. You did not express any opinion you say, in regard to
until you were asked? A. No sir.
Q. After you were asked your opinion by Colonel Walker
u said you were satisfied that was Hillmon? I understood
u to say that? A. Yes sir.
Q. Now, have you not talked with various parties in regard to the identity of those remains?

s Counsel for plaintiff objects to the question unless the time, place and party, are named.

By Mr. Barker: I just ask the general question.
By the Court: I suppose it is preliminary.

A. Yes sir.
Q. You have talked with parties there at Delaware, have
ou not? A. Not as I remember of.
Q. You have talked with parties at Delaware from Kan-
s in regard to it?
A. Not as I remember of at Delaware.
Q. Do you remember a man by the name of Spangler talk-
g with you in regard to it?
A. I don't know his name; there was a man came there to
hio six or seven years ago.
Q. You don't remember his name?
A. No, I don't remember his name.
Q. I did not understand you to say where he came to?
A. He came to Ohio.
Q. To Delaware? A. Yes sir.
Q. Where did you see him?
A. At Center Village, Ohio.
Q. How far is that from Delaware?
A. About twenty miles.
Q. What were you doing there?
A. I was living there at that time.
Q. You were living at Center Village? A. Yes sir.
Q. What business were you engaged in there?
A. I was clerk in the postoffice and store.
Q. Have any of the attorneys in this case for the plain-
iff visited you? A. No sir.
Q. Has Mrs. Hillmon been down there?
A. Not to my knowledge.

Q. You have not seen her down there? A. No sir.

Q. Now, I will ask you if you did not state to Mr. Spangler that you could not say whether those were the remains of John W. Hillmon or not? A. Never stated so.

Q. I will ask you at the time Mr. Spangler saw you at this place in Ohio, five or six years ago—you had a talk with him in regard to this case? A. Very little.

849 Q. I will ask you if you did not on that occasion state to him that you could not say that those were or were not the remains of John W. Hillmon but you thought they were? A. No, sir, I did not state it that way.

Q. You remember the circumstance, do you?

A. Yes, sir, I do.

Q. And the conversation? A. Yes, sir.

Q. I desire to ask you this question: Did Levi Baldwin ask you to go down to Bailey & Smith's to look at the remains there while they were lying three?

A. Not to my remembrance.

Q. You have no recollection in regard to that? A. No, sir.

Q. Referring now to Hutchinson: What train did you leave Lawrence on for Hutchinson at the time you and Mr. Levi Baldwin started for Medicine Lodge?

A. If I remember rightly it was in the afternoon, I could not state just the hour or just the time.

Q. What time did you get into Hutchinson?

A. Along in the evening after night fall.

Q. What time in the evening?

A. I could not remember that exactly.

Q. You think you took the afternoon train from Lawrence to Hutchinson and got in there in the evening?

A. Yes, sir.

Q. Now, what time in the morning did you start on your trip from Hutchinson?

A. It was very early in the morning; probably six o'clock.

Q. Very early in the morning, at six o'clock, you had started on your trip? A. Yes, sir.

Q. Then, you say between the time you got in there at night and six o'clock the next morning, you had consulted with this undertaker whose name and residence you cannot give? A. Yes, sir.

Q. At whose request was the body brought back?

A. At the request of Mrs. Hillmon.

Q. Now, I mean after it was buried there and taken up, didn't Colonel Walker insist on the body being brought back?

A. No, I don't think—

Q. He was there that day? A. We decided after finding—

Q. No, I ask you who spoke about bringing it back;

850 I asked you who at the grave first spoke about bringing the body back.

A. I had a conversation with Levi there.
Q. Well, was it in the presence of these other parties?
A. While we were talking in regard to it Colonel Walker came up and asked us what we intended to do with the body?
Q. Well, go on and state.
A. We told him we intended to take it to Lawrence.
Q. Who was present when that conversation was had?
A. Levi Baldwin and Colonel Walker.
Q. Anybody else? A. Not to my remembrance now.
Q. Now, I understand you that at Hutchinson you were informed by an undertaker that the body could not be removed?
A. Yes, sir.
Q. Then you went down there and made arrangements to fence the grave, had the material on the ground to fence it, and that you then concluded to bring the body back, did you?
A. After it was removed from the grave and we found the condition it was in.
Q. After it was removed from the grave and you found what condition it was in you concluded to bring the body back, and you did bring it back? A. Yes, sir, brought it back.
Q. How many days were you gone upon that trip; that is, how many days was it from the time you left Lawrence until you got back there. A. Why, five or six days.
Q. I understood you to say that you never observed any scar upon Mr. Hillmon's hand? A. No, sir.
Q. And never discovered any peculiarity in regard to his teeth? A. No, sir.
Q. And in regard to his hair, you describe that as—how did you describe his hair? A. Dark brown in color.

And in answer to redirect interrogatories propounded to him by Mr. Hutchings, counsel for the plaintiff, the witness testified as follows, to wit:

851 Q. You have been asked about some party by the name of Spangler visiting you in Ohio some six or seven years ago. Do you see him here in the court house?
A. No, I do not recognize him.
Q. I will get you to state whether at that time he told you that represented the insurance companies?
A. No, sir, he did not.
Q. What did he say?
A. He said he came there in regard to a case where Green was plaintiff against the Lawrence Strawboard Company. I told him I knew nothing about any case of that kind.
Q. Go on and state the conversation that you had with him.
A. And he wanted my affidavit. We went to a notary public by the name of L. B. Hanover and there he asked me some questions in regard to the Hillmon case.

Q. What did you tell him as to whether that was Hillmon?
A. He asked me if I recognized him as John W. Hillmon, and I told him I did; he asked me if I did not state in the presence of Colonel Walker, Major Wiseman and some others that that was not Hillmon. I said that I never had said so or in their presence or anybody else's.

Q. Now, then, you may state whether that was written down before a notary public and signed by you for this man Spangler? A. Yes, sir, it was written down and signed.

By Mr. Hutchings: Will you please produce that paper?

By Mr. Barker: Never saw such a paper or heard of it before.

Q. How many times or upon how many other occasions did the insurance companies send a man there to you?

The defendants object to the question because it assumes, without proof, that the insurance companies sent men to him, and not re-examination. The Court sustained the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

By Mr. Barker: I asked you before if you had ever testified in this case, and you said you never had testified before?

A. Yes, sir.

852 Q. I meant to include in that whether or not the plaintiff had ever taken your deposition?

A. The plaintiff?

Q. Yes? A. No, sir.

Q. Your deposition has never been taken in this case, has it? A. No, sir.

By Mr. Hutchings:

Q. Defendant never took your deposition, either?

A. Only that one time.

Q. When Mr. Spangler came there?

A. Whatever his name was; I don't know his name.

By Mr. Green: We adopt that cross-examination for the Connecticut Mutual Life Insurance Company.

By Mr. Barker: You have never been called as a witness in this case before in any stage of it? A. No, sir.

Witness excused.

853 Mrs. Sallie E. Smith, the plaintiff, called in her own behalf, in answer to direct interrogatories propounded to her by Mr. Hutchings, Counsel for the plaintiff, testified as follows, to wit:

Q. What is your name? A. Sallie E. Smith.

Q. What was your maiden name? A. Sallie E. Quinn.

Q. Where were you born? A. Near Columbus, Ohio.

Q. What was your father's name? A. John Quinn.
Q. When did you come to Kansas?
A. In 1872, the fall of 1872.
Q. How old were you at that time?
A. I was 14 years old; a little past 14.
Q. What was your father's business?
A. He was a farmer.
Q. Is he living? A. No, sir.
Q. When did he die? A. He died I think—
Q. Before or after you came to Kansas?
A. Before we came to Kansas.
Q. Of whom did your family consist when you came to Kansas?
A. My mother, my grandmother, and my brothers and sisters.
Q. How old were your brothers and sisters?
A. I cannot tell the ages.
Q. Well, comparatively, were they older than you or younger?
A. Yes, sir, there was seven of us, and there was three younger than me.
Q. After you came to Kansas, where did you live?
A. We came to our uncle's west of Lawrence, five miles west, I. C. Baldwin's.
Q. Was he either of these Baldwins we have mentioned?
A. He was the father of the one just on the witness stand.
Q. How long did you live there?
A. I think we remained there six weeks.
Q. Where did you live then?
A. Mother bought a farm over near Levi Baldwin's, and I remained with Levi Baldwin; mother rented a house on the adjoining farm to the one she bought; she couldn't
854 get possession until March, and she remained with the rest of the family in that house until the first of March, and then we all moved home on the farm.
Q. Now, then, when you got settled on that farm, who was in the family?
A. There was mother and my brothers and sisters, except one sister.
Q. What year was that?
A. That would be in the spring of 1873.
Q. How long did you continue to live there?
A. We lived there until, I think it was 1876; we rented the farm and moved to Lawrence.
Q. Of whom did your family consist then?
A. My mother, two sister and myself.
Q. Where had your brothers gone?

A. They were at home, my two [two] brothers, my sisters and myself were at home.

Q. These brothers, were they older or younger than you?

A. Younger.

Q. They were children? A. Yes, sir.

Q. Then your father was dead, you had no older brothers and lived with your widowed mother? A. Yes, sir.

Q. When did you first become acquainted with Hillmon?

A. About the holidays of 1872, or just after, I think it was after the holdays. I think it would be in 1873 just after the holidays.

Q. Where were you living at that time?

A. I was at Baldwin's living at Mr. Baldwin's.

Q. Now, I will get you to state to the jury the extent of your acquaintance and your relations with Mr. Hillmon: When were you engaged to marry him?

A. About a year from that time; I think he came back from the west; then he went away again, and then he came—

By Mr. Barker: The question was, when were you engaged?

By Mr. Hutchings: You say that you first became acquainted with him in 1873? A. Yes sir.

Q. Where was he living at that time?

A. He was living somewhere in the west; he was just back on a visit.

855 Q. He was engaged somewhere in the west in some kind of business?

A. I think it was stock; I don't know; I think he brought some stock in from the west.

Q. Well, how long did you see him at that time on the occasion of your first acquaintance?

A. Just a short time; he was backwards and forwards there every two or three weeks; he would come and perhaps stay over night, or perhaps stay a day or something like that.

Q. When were you engaged to be married to him?

A. I think it was the following year—Well, along perhaps in the following May. We were not really engaged; Mamma said I was too young. I hadn't left school. It was not really an engagement.

By Mr. Barker: What her mother said is not competent. Stricken out.

Q. About what year was it that Mr. Hillmon spoke to you about marriage?

A. It was in my fifteenth year, at least.

By Mr. Hutchings: We would like to show the extent of her acquaintance with him.

By Mr. Barker: I think it is incompetent.

By the Cort: Wherein do you claim it is incompetent.

By Mr. Barker: It calls for a conversation between parties to an independent contract that has nothing to do with this case.

By the Court: You may ask her when she became engaged.

Q. State?

A. I can't; I know at that time I was in my 15th year.

Q. Now, after that, where was Mr. Hillmon?

A. Somewheres in the west; he went west.

Q. About what year was that?

A. About 1873, I think.

Q. How long did he remain in the west at that time?

A. I don't think—He remained until in 1876.

Q. During that time you may state if you were in correspondence with him? A. I was.

Q. When did he return? A. In 1876.

Q. Where were you living then?

A. We were living at Lawrence, Kansas.

856 Q. Did you see him then? A. Yes sir.

Q. How long did he remain there at that time?

A. He remained several months.

Q. You may state how frequently you saw him?

A. He was buying stock over Missouri and Kansas, and when he would come into town he would generally come and see us at our house.

Q. Well, after that, state where did he go?

A. He went west again.

Q. How long was he gone west on that occasion?

A. I think he came back the following winter.

Q. Of what year? A. 1877.

Q. He came back in the winter of 1877?

A. The winter of 1877, I think the last of January or first of February.

Q. How long did he remain there at that time?

A. Not more than two or three weeks.

Q. Had you been in correspondence with him in the meantime? A. Yes sir.

Q. How often did you see him during that period of three weeks or thereabouts?

A. I saw him, Oh, I saw him quite a number of times; he came and went; he went down to St. Louis, he told me, and then to Kansas City, a number of different places and then he came back.

Q. Well, where did he go after that time?

A. He went back in the west.

Q. How long was he gone then?

A. He came back the next August or September.

Q. August or September 1878? A. 1878, yes sir.

Q. In the meantime, had you been in correspondence with

him? A. Yes, sir, all the time.

Q. Now, when were you married?

A. Married the 3d of October, 1878.

Q. Now, I want you to describe to the jury the appearance of Mr. Hillmon as to his height, his general appearance, the color of his hair and his eyes, what kind of teeth he had, and so forth?

857 A. He measured five feet eleven and one-half inches in his shoes, he was a dark complexioned man, he had brown eyes, and dark brown wavy hair and I think would weigh about 160 pounds. I have seen him weighed.

Q. Now, I will get you to state to the jury whether he had any defective teeth? A. He did not.

Q. What kind of teeth did he have; describe them to the jury? A. Just good, even, white teeth.

Q. You spoke about his being five feet, eleven and a half inches in height. You may state to the jury how you know that? A. I saw him measured.

Q. When was that?

A. Sometime after we were married; I don't remember just how long.

Q. Where did it take place; who was present?

A. In our room at Mrs. Judson's. Mr. Arthur Judson, my cousin May and myself were there.

Q. How did he wear his beard, if he wore a beard?

A. Sometimes he wore just a mustache and sometimes he wore just chin whiskers and a mustache.

Q. Now, why don't you speak louder, Mrs. Smith?

A. I speak as loud as I can; I have throat trouble.

Q. Where were you living at the time of your marriage to Mr. Hillmon? A. At Mrs. Judson's on Henry Street.

Q. In what place? A. Lawrence, Kansas.

Q. You say that was in what month?

A. October 1878, October 3d.

Q. Now, after your marriage, where did you live with your husband?

A. We boarded a short time. Then we went to housekeeping.

Q. How long were you housekeeping, up to what date, to what time? A. I can't remember.

Q. Did Mr. Hillmon after your marriage go away and if so, when?

[Q.] Yes, sir he went south on the 18th of November, or December 18th; December.

Q. 18th of December of what year? A. 1878.

858 Q. You say Mr. Hillmon went south on the 18th of December, 1878? A. Yes, sir.

Q. Do you know whereabouts south he went?

A. I received a letter from him from Wichita, Kansas.

Q. Well, did you receive other letters from him?
A. Yes, sir.
Q. From what places? A. From different places.
Q. What other places?
A. From Hutchinson, from Harper, Kingman, Medicine Lodge and I presume Sun City.
Q. Now when did you next see him after the 18th of December, when, as you say, he went south?
A. He came back somewheres along about the 25th of January, I think.
Q. Of what year? A. Same year, 1879.
Q. The same year or the next year? He went away, you say, in December, 1878? A. Yes, sir.
Q. And you saw him again on the 25th of January, 1879?
A. Yes, he was not home the holidays.
Q. I am speaking about the year; you say he went away in December, 1878? A. Yes, sir, he did.
Q. It was the following January?
A. It was the following January yes.
Q. How long did he remain at home when he returned on the 25th of January, 1879?
A. I think he returned on the last of the month, perhaps the 27th. I won't say positively but he didn't remain very long.
Q. Where did he go then? A. Back to Wichita.
Q. Did you receive letters from him? A. Yes, sir.
Q. From what places? From any other places except Wichita?
A. Yes, sir; I received letters from him from some of these places I have just spoken of, Wichita and Hutchinson, and perhaps Kinsley.
Q. Well, where did you see him next?
A. He came back to Lawrence in—
Q. When was it he came back on that occasion?
A. Saint Valentine's Day, the 14th of February.
859 Q. How long did he remain at Lawrence then when he came on St. Valentine's Day; how long did he remain in Lawrence?
A. I think he returned about the 27th day of February.
Q. That is, went away again? A. Went away, yes, sir.
Q. Where did he go? A. Went back to Wichita.
Q. Did you get letters from him at Wichita? A. Yes, sir.
Q. Do you remember the date of the last letter you received from him?
A. I don't remember the last letter I received from him; Medicine Lodge or Harper.
Q. Well, from Wichita; the last letter that you received from Wichita? A. The fourth day of March.

Q. Where is that letter?

A. I think the attorneys had it but they returned it to me, they claimed, and I think it was burned up with other letters.

Q. Now, you may state how it came to be burned up.

A. I had my trunks at my mother's and the house burned on Saint Patrick's Day, 1884, I believe. It was of 1894.

Q. 1894? A. Yes, sir.

Q. Do you remember the substance of that letter?

A. Well, I could not—It was a short letter—I couldn't—

Q. Do you remember the substance of that letter?

A. I think so, yes, sir.

Q. Well, you may state it.

The defendants object to the question as incompetent, irrelevant and immaterial, because the letter was a communication between husband and wife.

By Mr. Hutchings: I suppose the objection is based upon the statute. We expect this testimony will show that the letter was a direction from the husband to the wife appointing her as agent, directing her to do certain things, and established an agency.

By the Court: If you expect to show that, you may do so.

To which action and ruling of the Court, the defendants at the time duly excepted.

860 By Mr. Hutchings: State the contents of the letter, the substance of it.

A. I could not state just word for word; there was certain things that I remember distinctly, that he told me to go to Selig and tell him if the policy that he had in his hands or if he had not received it for me to take the money back as he would be home in a short time and was going to drop that policy anyhow and I could get the money on it.

Q. Who was Selig? A. He was an insurance agent.

By Mr. Barker: We desire to have the answer of the witness stricken out as incompetent, irrelevant and immaterial, because, having made a contract in that way, they could not rescind it.

By Mr. Hutchings: This testimony is upon the good faith of Hillmon in taking out so much insurance.

By Mr. Barker: He could not make testimony for himself in that way more than in any other.

By the Court: Suppose the defendant company desired to cancel the policy and surrender the premium, and Hillmon refused to take it and there was no authority in the policy permitting it, could not the companies introduce evidence of that fact as bearing upon Hillmon's good faith? Most

certainly they could. Now, suppose on the other hand, that Hillmon had attempted to secure a cancellation of the policy and receive his money back; would it not be competent for that to be shown as bearing upon Hillmon's good faith. Now, what Hillmon could do, or attempt to do, he could authorize somebody else to do. If it was competent for Hillmon to show what he himself attempted to do, it is competent for Hillmon to show that he directed somebody else to attempt it. As his agent in that respect, his wife differs from no one else. The objection is overruled.

To which action and ruling of the Court the defendants and each of them, at the time duly excepted and still excepts.

By Mr. Barker: How does that apply to the Mutual Life?

I object on behalf of each company but particularly on
861 behalf of the Mutual Life.

By the Court: The answers allege that there was a plan to secure policies in three companies, and the answers set out the names of the companies and the amounts of insurance obtained in each company. Now, anything that attacks the integrity of that defense is competent evidence, whether it relates to one policy in one company, or all the policies in all the companies. It bears upon the good faith of this transaction.

To which action and ruling of the Court the defendants and each of them at the time duly excepted.

Q. Now, after you received that letter on the 4th day of March, dated the 4th day of March, at Wichita, from your husband, John W. Hillmon, you may state what you did, if anything, in relation to the directions that he gave you?

A. Sometime afterwards I received a letter or postal card from Selig asking me to come to his office, that he had received the policy, Mr. Hillmon's policy; I went to the post-office; his office was just on the opposite side of the street. I went to his office and he told me that he had received the policy. I told him I didn't want the policy as I had just received a letter a short time before from Mr. Hillmon, and he told me that I could go and get the money and have the policy cancelled as he was going to drop it any way and he thought it was not worth continuing it and I should take the money back.

The defendants move to strike out the answer of the witness for reasons last above fully stated. The Court overruled the motion to which action and ruling of the Court the defendants and each of them at the time duly excepted.

Q. What did Mr. Selig say when you told him that you wanted to get back the premium and surrender the policy?

A. Mr. Selig said the money had been paid, and he could not return it to me; it had been sent on to the home office and he had received the policy and I would have to take the policy, and I told him I didn't want the policy, Mr.
862 Hillmon was going to drop it on his return anyway; and he said I had better continue, he said, because he was down in a wild country and I didn't know what might happen before he would get back.

Q. Who was it that said that? A. Mr. Selig.

Q. Mr. Selig was the insurance agent?

A. He was, yes, sir.

Q. Now, did he give you the policy?

A. Yes, sir, he gave it to me.

Q. You may state whether this Exhibit No. 3 is the policy that Mr. Selig gave you at that time?

The defendants move to strike out the last answer of the witness for the reason that it is not proper proof of agency.

By the Court: That may be stricken out, wherein she states he was agent of the company. She may state what connection he had with the transaction, so far as she knows.

To which action and ruling of the Court the defendants and each of them duly excepted.

A. This is the one I received from Mr. Selig on that day, on the 15th.

Q. You may state whether it was the same Selig who gave you this policy you have sued on here? A. He is the same.

Q. I will ask you to state whether he gave you a receipt for $60.70?

A. A. L. Selig told me it had been paid and the receipt was in the policy, and I found it some time afterwards.

Q. When he gave you the policy the receipt was in it?

A. Yes, sir, I found it afterwards; he told me it was in there; he told me it had been paid for.

By the Court: The jury can infer from what he did in reference to this transaction whether he was agent or not. It might not be competent for this lady to say he was an agent where the agency is in dispute.

Q. Now, can you fix the date that it was that you went to Selig's office and he gave you this policy and receipt?

A. Yes, it was the 15th day of March.

863 Q. Now, then I will get you to state to the jury when it was that you heard of the death of your husband?

A. The 24th day of March.

Q. How did you hear it?

A. Mrs. Judson told me; I was at my mother and had just gotten in town and Mrs. Judson came out and told me, told

Mr. Baldwin and then told me; she took me in the house and told me.

Q. Now, I want you to state when Mr. Hillmon went away the last time, after his return, as you say on Saint Valentine's day, what, if anything, you know about his having been vaccinated?

A. Yes, sir, he was vaccinated on his last trip home.

Q. After you heard of the death of your husband, what, if anything did you do in relation to it?

A. My two cousins came in and I asked them if they would go down and bring him home.

Q. What two cousins do you refer to?

A. Levi Baldwin and Alva Baldwin; at first Levi thought—

Q. I expect they will object to your saying what he said; you may state whether they went; whether your cousins went?

A. Yes, sir.

Q. What instructions did you give them when they went; for what purpose did you send them to Medicine Lodge?

The defendants object to the question as incompetent, irrelevant and immaterial. The court overruled the objection, to which action and ruling of the court the defendants and each of them at the time duly excepted.

A. To bring my husband home.

By the Court: The witness may answer as to the purpose in sending her cousins to Medicine Lodge.

To which ruling of the court, the defendants separately at the time duly excepted.

A. I sent them down to bring my husband home.

Q. Now, in addition to Mr. Selig, do you know G. W. E. Griffith? A. Yes, sir.

864 Q. Do you know Mr. Tillinghast?

A. Yes, sir, I have met him twice I believe.

Q. You may state whether, after the death of your husband, you saw those gentlemen, and if so, where?

A. I saw them at Mrs. Judson's, I think, it was the next day, the next day, the next afternoon after my cousins had gone south; they came to our house.

Q. Who came? A. Mr. Selig and Mr. Tillinghast.

Q. What time of day did they come there? A. I can't tell.

Q. Do you know what their business was; what business they followed?

A. Only what they told me; they represented the New York Life—

By Mr. Barker: To what they said as to their business, we object as incompetent, irrelevant and immaterial.

By Mr. Hutchings: I think it was stated in the opening statement that these gentlemen were agents of these companies.

By the Court: I do not think that would be a proper reason for permitting incompetent testimony from this witness. You cannot prove agency by the declarations of the parties made to the witness.

Q. When did Mr. Griffith come there?
A. He came after Mr. Selig and Mr. Tillinghast came.
Q. Now, I would like to have you state what conversation, if any, you had at that time with Tillinghast and Selig in relation to the death of your husband?

Mr. Green: We object to the question as calling for incompetent, irrelevant and immaterial evidence. There will be no attempt to show that these men had any authority from the companies; and especially will it not be attempted to be shown that Tillinghast had any shadow of authority from any of the companies whose cases are now on trial.

By Mr. Wheat: We claim that at this stage of the case, a conspiracy was organized by the insurance companies, their agents and representatives to throw doubt upon the identity of this body and to destroy as much as they could the evidence of identity, and that they worked continuously at it from that time until they procured whatever they got from John
865 H. Brown. We claim that on the 25th day of March, they went there and tried to persuade the plaintiff not to see her husband. We expect to prove that Mr. Griffith invited this lady to call at his office that day, or as soon as she could, and that he would make out her application, asking her to bring her papers, etc., along. She went there and they began to talk to her and made it clear to her that they wanted to make out her application for the payment of the money upon the policies.

The court sustained the objection, to which action and ruling of the court the plaintiff at the time duly excepted.

Q. You may state whether you received a letter from either of these persons, and if so, when?
A. I received a letter from Mr. Griffith.
Q. I will get you to examine this paper here, to be marked "Exhibit 21," and state whether that is the letter you received from Mr. Griffith?
A. Yes, this is the one I received from Mr. Griffith.
Q. When did you receive that letter?

A. On the second of April, in the evening.
Q. After receiving that letter, you may state what, if anything, you did?
A. I received the letter from the postoffice, and I went on my way home I stopped at his office.
Q. At the office of whom? A. Of Griffith.
Q. Whom did you see at that office at that time?
A. Mr. Griffith and Mr. Selig.
Q. Mr. Selig, the same person who delivered you the policy for the Connecticut Mutual? A. Yes, sir, the same one.
Q. State what took place; state what was said and done there at Griffith's office at the time you met Griffith and Selig there in response to this letter?

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: That is substantially the question that was ruled out. The objection will be sustained.

866 To which ruling of the Court, the plaintiff at the time duly excepted.

By Mr. Hutchings: We now offer the letter in evidence. (Exhibit 21.)

The defendants object to the admission of said letter in evidence as incompetent, irrelevant and immaterial. The Court sustained the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

Q. In order to save the point, I will repeat the question since the letter has been offered and ruled out.
You may state what was done at that time, if anything, at the office of Griffith, when you went there in response to this letter marked Exhibit 21.

The defendants make the same objection as before.

By the Court: In view of the statement of counsel for plaintiff as to the purpose of this evidence, the objection will be sustained.
To which ruling of the Court the plaintiff at the time duly excepted.

Q. You may state whether you were at the office of Mr. Griffith at any other time, after the death of your husband, except this time that you have mentioned?
A. I think not, sir.
Q. Did you meet Selig and Griffith at any other place except at the office of Griffith at the time you have mentioned?
A. Never together.

Q. Whatever was done or whatever was said at any time when Selig, Griffith and yourself were together, was on that occasion? A. Yes, sir.

Q. Now, after your husband return to Wichita in February, did you see him again alive? A. No, sir.

Q. Did you receive any other notice than the communication from Mrs. Judson of the fact that your husband was dead?

A. There was letters but they had been sent to the country; they took the wrong road and they brought them in in the afternoon; there was letters from the county attor-
867 ney and letters from the minister—

By Mr. Barker: I object; I do not object to the fact that she had notice, but I don't think it competent to go into details.

Q. Do you know where those are now? A. No, sir.

Q. Were they burned up at the time you spoke of at the time the other papers were burned?

A. Yes, sir, there was more than two letters; there was one from the county attorney, and Mr. Paddock—

Q. The coroner?

A. The coroner; and a minister and one from Mr. Brown.

Q. How long was it that you received those after Mrs. Judson had told you?

A. Her son had gone to the country for me and he took another road; we missed him on the road; I came in on another road, and he brought the mail in in the evening; so I received those letters the same time; I don't know as I ever read them; I don't remember; I didn't read them; I looked them over but not read them then; I did not.

Q. These have been produced here at previous trials and introduced in evidence up to the time they were burned up; all these papers? A. Yes, sir, they have.

Q. You may state where you next saw the body of your husband?

A. At Bailey & Smith's at Lawrence, Kansas.

Q. Who were Bailey & Smith?

A. They were undertakers.

Q. When did you lean the body was to brought to Lawrence; or that it was being brought back?

A. On the second day of April in the evening, Mr. Smith, the undertaker, brought me a telegram.

Q. Who was the telegram from?

A. From my cousin, Levi Baldwin.

Q. Who was the telegram to?

A. I think it was Mr. Smith, and he requested him to bring it to me.

The defendants object to the contents of the telegram as incompetent.

Q. What was done with the telegram?

By the Court: What was that question?

A. In the telegram, Mr. Baldwin requested him to bring the telegram to me.

868 By Mr. Hutchings:

Q. Mr. Baldwin sent the message to Mr. Smith, and requested Mr. Smith to communicate it to her, she says.

By the Court: After you heard of your husband's death?

By Mr. Hutchings: About bringing the body back.

By the Court: Counsel for the defendants object to her stating the contents of the telegram. That objection ought to be sustained.

Q. What was done with this telegram?

A. I gave it back to him and told him to take it to Mr. Selig and give it to him, or show it to him, rather.

Q. The Mr. Selig that you before mentioned? A. Yes, sir.

Q. Have you ever seen it since? A. No, sir.

Q. When was it that telegram was brought there?

A. The evening before my husband was brought back in the morning.

Q. Now, you may state what, if anything, after that telegram was brought there, you did in relation to preparing to receive the body?

A. I asked Mr. Judson if he would go down to the depot and have them bring the body to the house, and he went down there the next morning to meet the seven o'clock train.

Q. Did they bring the body to the house?

A. They did not.

Q. You may state what, if any authority or permission you ever gave to take the body and deliver it to Bailey & Smith?

A. I never gave any.

By Mr. Barker: I think that is a conclusion to be determined from the facts and circumstances in the case, and move to strike out the question and answer for that reason.

By the Court: I do not think it necessarily involves a matter of law.

To which ruling of the Court, the defendants severally at the time duly excepted.

A. I never gave any one permission to take it anywheres but to bring it home to the house.

Q. When did you first learn that the body had been
869 taken to Bailey & Smith's undertaking establishment?

A. Mr. Judson came back and told me they would not let him have it; that they had taken it to Bailey & Smith's.

The defendants move to strike out what Mr. Judson said.

By the Court: It may be stricken out.

Q. The question is when did you first learn that the body had been taken to Bailey & Smith's undertaking establishment? A. Mr. Judson came back and told me.

Q. When he came back? A. Yes, sir.

Q. When did he come back?

A. He came back along about, he went down to meet the seven o'clock train, and perhaps an hour; I don't know the exact time, but a little while.

Q. You may state what you did when you learned that the body was at Bailey & Smith's?

A. Mr. Judson came up with a carriage and horses, and along I think about nine or ten o'clock we went down there; he got horses and a carriage and took mama, Mrs. Judson and myself down to the undertaker's.

Q. Did you see the body?

A. No, sir, we did not.

Q. What took place?

A. Mr. Smith came out and we were getting out of the buggy, and he said that we couldn't go into the room, it was not in a fit condition for us to see. That was about ten o'clock I should think. I ain't positive; it seemed a long time.

Q. You may state to the jury what, if any permission you gave to any person to cut this body into pieces, or to perform a post mortem examination upon it?

A. I gave no one any such permission.

Q. State what knowledge, if any, you had, prior to the taking of that body to Bailey & Smith's, or prior to the time that they dissected it, that it was to be done?

A. I did not know anything about it.

Q. You may state whether any one asked your permission or consulted you in relation to it? A. They did not.

Q. Well, did you finally see the body at the undertaker's?

A. I did.

870 Q. Whose body was that?

A. It was the body of my husband.

Q. The body of your husband?

A. The body of my husband, John W. Hillmon.

Q. You may state what the condition of the body was at the time they permitted you to look at it, that is, so far as you could see?

A. Is was back in a back room across the alley from the furniture house; it was in a box; the cover was off, and he was lying there.

Q. What was the condition of the hair?

A. It was all ruffled all over his head, all ruffled up, mussed up; I took my fingers and smoothed his hair down and parted it as best as I could; then I sat down for a few minutes.

Q. Now, after that, you may state to the jury whether any person requested you to go to some place where they were pretending to have an inquest over the body?

A. Yes, sir, Sheriff Clarke, H. S. Clarke, came up to the house afterwards, and after we got back home, and asked me to go down to the courthouse and bring all the letters and photographs that I had of Mr. Hillmon. He asked me if I understood his request, and I told him yes; he said, "Well, then, come down at two o'clock," I believe.

Q. Did you go down there? A. Yes, sir, I went down.

Q. Did you take any letters down there?

A. Yes, sir, letters and photographs.

Q. What else did you take there?

A. Some letters that had been brought home to me.

Q. From whom? A. From Mr. Hillmon and a diary.

Q. By whom were those letters written?

A. Those letters I took down were letters I had written to my husband.

Q. Where to?

A. There was one at Harper, Wichita and Medicine Lodge.

Q. Do you know what became of those letters?

A. I received them all back but one.

Q. Where are the letters now? A. They are burned up.

Q. Did you produce the same letters at some of the early trials of the case? A. I think so.

871 Q. What letter was there that you had written to your husband at Medicine Lodge?

A. I think it was the last letter that I wrote to him at Medicine Lodge.

Q. Do you know about the time that you wrote that?

A. No, I don't. But he received it just before he died because Mr. Brown told me he had received a letter—

The defendants object to the answer and move to strike it out as incompetent, irrelevant and immaterial. The Court sustained the objection and motion to which action and ruling of the Court the plaintiff at the time duly excepted.

Q. How did the letter come back into your possession?

A. I think that Mr. Brown brought it to me; they brought all these things back to me, a tin type of myself; and the coroner, Mr. Paddock wrote and asked me if he could keep

that one picture of myself and I gave it to him and he just kept it.

The defendants move to strike out the last part of the answer of the witness.

By Mr. Hutchings: It may be stricken out.

Q. I did not ask you that. When did you get these papers, these letters, that you had written to your husband were they returned to you? A. I was saying that Paddock—

Q. Were they sent back to you in a letter from the coroner, or did Mr. Baldwin bring them, or how did you get them, or don't you remember?

A. I don't remember but I know I received them back.

Q. Did you take any pictures there? A. Yes, sir.

Q. What pictures did you take there?

A. I took two tin types and a photograph.

Q. Now, you may examine this picture which has been introduced in evidence as Exhibit 14, and state if that is one of the pictures that you took there?

A. I don't know whether this is but it was one just like this.

Q It was that or a copy of it?

A. It was this or taken at the same time; I don't know.

872 Q. Now examine this tin type which will be marked Exhibit No. 22, and state whether that is one of the pictures that you took there?

A. I think so; that is one; I am very positive of that.

Q. Did you take any other picture there; if you did, describe it.

A. I took another tin type of Mr. Hillmon and Mr. Brown standing together side by side.

Q. Did you deliver those pictures to the coroner; exhibit them?

A. Either to him or Mr. Green, I gave them to one or the other; they both had them in their hands while I was there.

Q. Now, that tin type of Mr. Hillmon and Mr. Brown, you say they were standing side by side? A. Yes, sir.

Q. I will get you to state whether that standing picture of your husband was a good picture?

A. Yes, sir, it was a good picture.

Q. Of whom? A. Of my husband.

Q. You may state when the standing picture, that is the picture with Brown and Hillmon standing was taken?

A. Sometime before they went away.

Q. Was it the last picture he ever had taken?

A. I think it was, yes, sir.

Q. You may state whether it was the best picture you had of Mr. Hillmon? A. Yes, sir, I considered it the best.

The defendants object to the testimony because it is incompetent to compare pictures in that way.

A. At that time I considered it the best picture.
Q. By the word best, I mean the most faithful, or best likeness, the one that represented him the most correctly?

The defendants object to the question as leading, and as calling for incompetent, irrelevant and immaterial evidence.
By the Court: The first objection is sustained; the latter one overruled.
To which action of the Court in overruling the objection, the defendants and each of them at the time excepted.

873 Q. You may state then to the jury what kind of a picture that was of Mr. Hillmon.

By the Court: That is to say, the objection to the question preceding the last one is sustained; the objection to the last one is overruled.

Q. You say it was the last picture he had taken before he was killed? A. Yes, sir.
Q. Do you remember in the picture, which of the two standing persons was the tallest? A. Yes, sir.
[—] Which? A. My husband was the tallest.

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: You mean which was shown to be the taller by the photograph?

By Mr. Hutchings: Yes, sir.

By Mr. Isham: In the first place, this is entirely secondary evidence; in the next place, it ought to be shown in what relation the parties were standing to the camera. If one of them is thrown into perspective, there will be a false appearance as to their relative heights.

By the Court: The objection for the present will be sustained. To which and ruling of the Court [the Court] the plaintiff at the time duly excepted and still excepts.

Q. Are you acquainted with John H. Brown? A. Yes, sir.
Q. Was one of these figures in the picture John H. Brown?
A. Yes.
Q. Was it a good picture of him?
A. It was a good picture.
Q. Now, how did those figures that appeared upon this picture, how did they stand; what was their position?
A. Side by side.
Q. Was it a front view or a side view?

A. It was a front view.

Q. Now, you may state which of the two persons was the tallest as shown by the picture.

The defendants object to the question for the reason
874 that the integrity of the picture has not been shown. Before a picture is admissible, it must be shown that it is a correct representation of the object, and that it has not been tampered with or changed in any way.

Q. By the Court: When was this picture taken, Madam, if you know?

A. It was taken some little time before Mr. Hillmon and Mr. Brown went away.

Q. About how long?

A. Well, just a few weeks I should judge.

By Mr. Hutchings: Allow me to make a suggestion as to the purpose for which we offer this proof. We do not offer it for the purpose of showing that Hillmon was taller than Brown; that was not in my mind when I asked the question. Dr. Patterson testifies that there was exhibited to him by Dr. Morris, a tintype containing two persons, one of whom appeared by the picture to be taller than the other, and that the taller of the two persons he recognized as the one he had been working over two or three days in taking this cast. Now, we have brought this witness upon the stand, in the first place to show that she was requested to bring the pictures she had, and that she took this picture, among others, and delivered it to the coroner, and that the person appearing upon
875 the picture to be the taller of the two was—

By the Court: Not for the purpose of showing that Hillmon was the taller of the two?

By Mr. Hutchings: Certainly not, but for the purpose of making it certain to the jury that the picture which was put into the hands of the coroner was the picture which Dr. Patterson saw, and that it was the taller of the two that was her husband as it appeared upon the picture.

By the Court: With that statement of the purpose of this question that is, that it is for the purpose of identifying the picture concerning which Dr. Patterson testified, the objection will be overruled, and I will say to the jury that they should not consider the answer given by the witness as showing the height of John W. Hillmon or the relative heights of John W. Hillmon and John H. Brown shown by that picture, but simply to connect one of the figures in the photograph, which has been lost, with the figure concerning which Dr. Patterson testified.

To which action and ruling of the court, the defendants and each of them then and there duly excepted.

Q. Now, with reference to this tintype with the two figures, you may state what you did with it when you took it there to the coroner?

A. I gave it to the coroner or to the county attorney; I don't know which; they were both sitting there together.

Q. Did you leave it with them when you went away?

A. Yes sir.

Q. You may state whether you know of any other picture, had any other picture with two figures on it?

A. No sir, the only one.

Q. I believe you already stated that one of these pictures was a picture of your husband, and the other of John H. Brown? A. Yes sir.

Q. Now, do you know what has become of that picture with the two figures on it?

A. I don't know where it is now.

Q. You may state—

A. I left it either with the coroner or the county attorney. Then I went to the coroner and asked him for it, and
876 he gave me the other pictures and letters, but he said that Mr. Green had it.

The defendants object to the witness stating what the coroner said.

By the Plaintiff's Counsel: We think it competent to show what effort was made to produce the original.

A. I went to the coroner's office—

By the Court: Hardly what Dr. Morris said.

Q. Well, you say you asked him for the picture?

A. Yes sir.

Q. And he gave you the other pictures? A. Yes sir.

Q. But didn't give you this one? A. No sir.

Q. Did you make any other efforts?

A. I went to the coroner and asked him for the picture; we did not see him then but I went some little time afterwards and asked him for them, and he said the county attorney had them—

What the coroner said was stricken out.

Q. You inquired of the coroner to whom you had delivered them? A. Yes sir.

Q. And he said he didn't have it?

Objected to as leading and not answered.

Q. You may state whether Mr. Green and the coroner were there at that time? A. Yes sir, both together.

Q. Now, you may state what other efforts you made, if any, to get that picture back?

A. When Dr. Morris told me that he didn't have the picture, he would get it for me, that the county attorney had them.

By the Court: You are insisting on telling what Dr. Morris told you.

A. I do not ask you what Dr. Morris said; I ask you whether, after you went and inquired of Dr. Morris, and he did not give you the picture, if you made any other efforts to get it; if you inquired of anybody else? A. Yes sir.

Q. Of whom? A. Of Mr. Green, the county attorney.

Q. Did he give to you?

877 A. No, he said he didn't—

Q. Did you ever get it back, or have you seen it since? A. No sir.

Q. Now, while we are on this subject, speaking about the height of your husband and John Brown, you may state what their relative heights were, which was the taller of the two?

The defendants object to the question as incompetent, irrelevant and immaterial and because it is not shown that the witness has any knowledge on the subject.

The Court overruled the objection, to which action and ruling of the court the defendants and each of them at the time duly excepted.

A. Yes, sir, Mr. Hillmon was the tallest.

Q. You may state to the jury whether you have seen them together?

A. Yes sir, I have seen them walking together and standing together.

Q. Have you seen them standing side by side as they were in the picture? A. Yes sir.

Q. You may state to the jury when you have seen them standing side by side in the manner described, which appeared to be the taller; which was the taller of the two?

A. Mr. Hillmon was the tallest, perhaps two inches.

Q. Now, do you know Mr. Borgolthaus? A. Yes sir.

Q. I will get you to state whether Mr. Borgolthaus appeared there at the coroner's inquest as your attorney; whether you gave him any such authority? A. I did not.

Q. You may state what, if any relations, you had had with Mr. Borgolthaus before that inquest or up to that time that the inquest concluded?

A. Mr. Selig told us that we would have to get some one, or get a letter of introduction—

The defendants object to the answer of the witness as hearsay.

By Mr. Hutchings: We will show that Mr. Selig sent Mrs. Hillmon to Borgolthaus to prepare some papers to get the body back, and that that was the sole relation she had with Mr. Borgolthaus.

Thereupon, the Court overruled the objection, to
878 which action and ruling of the court the defendants and of them at the time duly excepted.

A. Yes sir.
Q. Go on and state now?
A. Mr. Selig said we would have to have some form in order to get the body of my husband; so he suggested going to Mr. Borgolthaus to write out the form, so Mr. Borgolthaus came up to the house and said Mr. Selig sent him.
Q. Came to your house?
A. Yes, sir, Mr. Selig had sent him.
Q. What did he do?
A. He wrote—prepared a form and I signed it and gave it to my cousins and they took it with them.
Q. What was the form about; what was it for?
Q. So they could get the body of my husband and bring it back.
Q. Now, then, you may state whether up to the time of the conclusion of this inquest, you had employed Mr. Borgolthaus or authorized him to do anything else for you?
A. I did not.
Q. Going back to the subject of the pictures. You were shown yesterday a picture which has been introduced in evidence as exhibit No. 10. It is this picture. I will get you to state whether you took that to the coroner's inquest?
A. No, sir.
Q. Why didn't you?
A. I didn't have it; it was over at Mr. Baldwin's.
Q. You may state whether it was your picture at that time? A. No, sir, it was Mr. Baldwin's.
Q. And you hadn't it in your possession? A. I had not.
Q. Well, after this body had been at Bailey & Smith's, you may state what was done with it; after they had done what they pleased with it, what was done with the body?
A. They sent word to us and we took him out to the cemetery and buried him.
Q. You may state who it was that delivered the body to you then? A. Bailey & Smith took it to the cemetery.
Q. Did you pay the expense of burying it? A. Yes, sir.
Q. Procure a grave for it A. Yes, sir.

879 Q. Now, you may state what knowledge, if any, you had, of their going there afterwards to the grave where you had buried your husband, and taking up the body?

A. I didn't have any knowledge of it until afterwards.

Q. Were you consulted at all? A. No, sir.

Q. The grave was broken open and the body taken up without any consultation or knowledge upon your part?

A. Yes, sir.

Q. Now, you have been present during the examination of John H. Brown.

A. I heard John H. Brown's deposition here, most of the time.

Q. Did you hear read here a paper purporting to be written by Mr. Brown directed to you which commences, "Where is John" or something to that effect; did you hear that paper read? A. Yes, sir.

Q. This paper which has been introduced in evidence here as an exhibit to John Brown's deposition, marked B, Henry McGrew, Notary Public. In order that the jury may understand, I will read: "Mrs. Hillmon. I would like to know where Johnnie is, how that business is, and what I shall do, if anything. Let me know through my father.

JOHN H. BROWN."

I will get you to examine that paper and state to the jury whether that was ever delivered to you?

A. No, sir, I never received the letter.

Q. Did Mr. Buchan ever give you that letter?

A. No, sir, he did not.

Q. When did you first hear that John H. Brown had ever written any such a letter as that? A. On a trial of this case.

Q. Now, after the body had been delivered to you for burial, you may state if you know what was done with the personal effects, for instance, the trunk of your husband?

A. I never received the trunk.

Q. Did you apply for it? A. Yes, sir.

Q. To whom? A. To Mr. Green.

Q. When was that?

A. Just a short time after my husband died.

880 Q. Do you know W. J. Buchan? A. Yes, sir.

Q. You may state to the jury when you first became acquainted with him.

A. In the spring of 1879, along in the latter part of May or the first of June.

Q. How did you form his acquaintance; under what circumstances?

A. Old Mr. Brown, John Brown's father, asked me to go to see Mr. Buchan—

Q. You may state at whose request you went to Buchan's office? A. Old Mr. Brown's.

Q. When you there, you may state what occurred, if anything? A. He introduced me to Mr. Buchan.

Q. Who introduced you?

A. Mr. Brown. Brown said that he had employed him as his attorney to take care of his son.

Q. Buchan was present at that time? A. Yes, sir.

Q. What further was said in that conversation, if anything, by Mr. Buchan or Mr. Brown in the presence of you and Buchan?

A. I didn't understand what care that his son needed. I told Mr. Brown that I didn't understand what care that his son needed; the old gentleman said that there was a warrant out, or something out for him, and that he had Buchan to look after him, and had employed him as his attorney to take care of him.

Q. Well, what further, if anything, was said?

A. I don't remember so very much more.

Q. Where did you go after that interview; where did you go? A. I went back to Lawrence.

Q. You were living at Lawrence at that time?

A. Yes, sir.

Q. When did you next see Buchan or hear from him?

A. Some time in the summer of 1879; some time later; I think perhaps in August.

Q. Well, how did you—

Q. Did you ask when I heard from him or saw him?

Q. Yes. Either saw him or heard from him?

A. I heard from him; I received a letter from him asking me to come down to Wyandotte to see him regarding
881 this case.

Q. I exhibit to you a paper here which will be marked Exhibit 23, at this trial, and get you to state whether that is the letter you received from Mr. Buchan referred to in your preceding answer.

A. Yes, sir, that is the one I received from him.

Counsel for the plaintiff reads said letter in evidence. It is in words and figures as follows, to wit:

"W. J. Buchan,
Attorney at Law.

Wyandotte, Kansas, August 25, 1879.

Mrs. S. E. Hillmon,
Lawrence, Kansas.

Madam: I have just seen Brown and have something important to communicate to you. Please come down on first train.

Respectfully,
W. J. BUCHAN."

Q. Now, you may state whether upon, or after the receipt of that letter you went to see Mr. Buchan as he requested?

A. No, sir.

Q. Well, when did you see Mr. Buchan, then?

A. Some little time afterwards, I think the same year, September.

Q. Where did you see him? A. At my house.

Q. At your house, where? A. At Mrs. Judson's.

Q. He came there, did he? A. Yes, sir.

Q. What conversation did you have with him on that occasion?

A. He said he came up to see me about this case. I told him I didn't know, I couldn't tell him much about it, but he could go and see my attorneys and they could tell him more about it, and he only stayed, he stayed just a short time, and then he went away. He asked me if I would see him at Mr. Borgolthaus' office and I told him I would and I went down at two o'clock and met him there.

Q. Did you tell him at that time who your attorneys were?

A. Yes.

Q. Well, did you meet him at Borgolthaus' office according to your appointment? A. I did.

882 Q. What conversation took place there, if any?

A. I think he came in there just after I was there, after I had gotten there; he didn't say very much; he might have spoken about the case but he stayed there only a very short time, and said it was train time and he must be going, and he went away.

Q. Now, then, you said you are acquainted with Brown. I will get you to state to the jury when next after this meeting at Borgolthaus's office did you see John H. Brown, if at all?

A. I saw him in September at my cousin's, Levi Baldwin's.

Q. Where did Levi Baldwin live at that time?

A. He lived about nine or ten miles from Lawrence.

Q. Were you at your cousin's? A. Yes, sir.

Q. What time did John Brown come there?

A. He was there when I got there.

Q. When you got there? A. Yes, sir; when I got there.

Q. Did you have a conversation with him? A. Yes, sir.

Q. You may state that conversation?

A. The substance of it as near as I can remember, I can't tell just the words, or just how it first came up. I went into the room where he was in the sitting room and spoke to him, and he told me that he had come to see me about this case, and I asked him in what way, and he said that he wanted, that Mr. Buchan had sent him there to see me, and for me to meet him at some place, and that he would explain why he

wanted to see me. I asked him if he couldn't explain and he said no, he couldn t explain. I don't remember now much what else was said that evening; that was in the evening when I got there.

Q. Did he stay there all night? A. Yes, sir.

Q. Did you see him in the morning? A. I did.

Q. Did you have a conversation with him in the morning?

A. Yes, sir.

Q. State as near as you can remember the substance of that conversation?

A. I can't now state just the words more than that the next morning I asked him, wanted him to explain himself, what he meant by the conversation we had the night
884 before, and he said he couldn't explain it, but if I would go to see Mr. Buchan he could explain it all to me; and I insisted on knowing something more about it. Then he finally said that he had made a contrary statement from the one he had made at Lawrence and at Medicine Lodge. I asked him what kind of a statement he had made and he said that he had made a statement, and that in the statement he had said that was not the body of my husband, but was a body that my husband had killed, and if I would go to see Mr. Buchan he would explain it all to me and also show me this statement that he had made; and then he didn't stay any after that; he said—that was about the last thing he said. He asked me if I would meet Mr. Buchan at any place; I told him that I could go to Lawrence; that my attorneys were there, and he said no, he didn't want me to meet him anywhere where my attorneys were but he wanted me to meet him at Wyandotte; I told him, no, I wouldn't go to Wyandotte, and he said, well, then, any place so I didn't go to Lawrence, and then I agreed to meet him at Leavenworth.

Q. What time did you appoint to meet him at Leavenworth?

A. That was on Saturday morning and I came to Leavenworth on Monday morning.

Q. Was there an appointment for Monday morning?

A. Yes, sir; I told him I would go to Leavenworth Monday morning.

Q. Did you go to Leavenworth to meet this appointment you had made? A. Yes, sir.

Q. I want you to state what occurred when you first got to Leavenworth; how did you go to Leavenworth?

A. On the train.

Q. Well, when you got to the station in Leavenworth?

A. Mr. Buchan met me at the depot.

Q. Anybody with him? A. I think not; he was alone.

Q. Well, when you met Mr. Buchan at the station, what was said, if anything; what occurred?

A. I don't remember more than he said, he asked me to go to the Planters Hotel, that Mr. Brown would be there.

Q. Did you go?

884 A. We went up to the Planters House together.

Q. Did you go?

A. Yes, sir; we went to the Planters House together.

Q. When you got there, did you meet anybody?

A. Mr. Brown came in a short time afterwards; I don't remember just how long.

Q. Now, after you got to the Planters Hotel I want you to state to the jury as fully as you can remember, the conversation that you had with Mr. Buchan?

A. I can't just remember the words.

Q. I am not asking for the words, but for the substance of what occurred there as you can best remember it?

A. I asked him what he wanted to see me for, and he asked me if Brown hadn't explained to me, and I told him no, that he hadn't explained; and then he said that Brown had made a contrary statement to the one he had made at Lawrence and at Medicine Lodge, and that he never could be a witness of mine, and that he wanted to get me to give up these policies.

Q. What did you say?

A. I told him I would not give up the policies; that I knew that was my husband that I should not give up those policies.

Q. What was said further?

A. He said, that may all be, he said, but that Brown had made a contrary statement, and that if I insisted on ever bringing suit on those policies, he would put Mr. Brown on the stand, and he would testify—that he had already made a statement that that was not the body of my husband in the statement and that he had sworn to it, and he would be obliged to stand by it and I asked him how he could make such a statement. He said he had [he had] to do it in order to protect himself because a warrant was out for him, that he had, in order to save himself, he would have to make this statement.

Q. Was Brown present at that conversation?

A. Yes, sir; he was.

Q. What did Mr. Brown say, if anything?

A. He just sat there and hung his head down.

885 Q. Did he say anything at any time during the conversation?

A. No, sir; I asked him how he dared to make such a statement and he said he had made it and he would be obliged to stick to it in order to save himself.

Q. Well, now, go on and state.

A. I don't remember much more then, but later in the day there was more conversation.

Q. Now, before we come to the conversation later in the day, I would like to have you state to the jury what the condition of your health was at that time?

Q. I had, I suppose it was called malarial fever; I was suffering with it; I don't think it was a chill; it was a kind of a low fever that I was troubled with.

Q. I will get you to state whether any of your attorneys were present, or whether you had any relative or anybody to advise with? A. No, sir; I did not.

Q. Well, after the first conversation that you testified to, what did you do?

A. I can't tell just when this conversation came in, but that was what they said before dinner.

Q. Did you go to dinner? A. No, sir, I did not.

Q. You may state the facts to the jury as to your condition at that time, whether you ate any dinner?

A. I did not have any dinner; I had a headache and fever; they went out to dinner and I lay down on a couch; they went out to dinner, and Mr. Buchan brought me a cup of tea and I believe a cracker; I drank the tea and then laid down and I think I took a nap; I think I went to sleep. They were gone some little time and then they came back.

Q. Now, then, would like to have you state to the jury, as well as you can remember, what conversation was had and what took place after dinner?

A. I think it was just about the same conversation that we had before dinner more than I think it was fuller; he went on to state that these companies had a warrant out for Brown, that Brown was frightened at that, and he being his
886 attorney that he had to take care of him and that I must surrender these policies as the companies never intended to pay me, and that Brown being my main witness that I never could prove that he was my husband, so I might just as well give up the policies.

Q. Now, did you know at that time that Mr. Brown was the only person present when your husband was killed?

A. Yes, sir.

Q. Did you believe at that time the statements of Mr. Buchan that by reason of Mr. Brown having made this statement, that you could never prove your case? A. I did.

Q. Go on and state what was further said?

A. He said that the companies had millions where I didn't have cents, and that I never could recover; that Brown was my main witness, and that he would go on the stand and testify that that was not the body of my husband but was the body of another man and that I never could recover on these

policies, and I might just as well give them up, besides it would always be a shadow over me; no matter where I might be that the shadow would follow me, and if I would give up the policies there would be nothing more said about it; as I never received the money it wouldn't do me any hurt, but if I continued it would only bring a shadow over me, and Brown would be prosecuted and perhaps put in the penitentiary, but the shadow would never be removed.

Q. How old were you at that time?

A. In my 21st year.

Q. You had lived most of your life on a farm?

A. Yes, sir.

Q. What did you do finally?

A. Towards evening he wanted me to sign some papers; he took some papers out of his pocket and put them on a little stand there, and wanted me to sign them. I told him I couldn't sign them. He said, yes, I must sign them, and at last I did sign them.

Q. Now, during this conversation, you may state, if you remember whether anything was said as to who it was claimed this body was that had been killed? As to what his name was? A. I think they said something about Nichols,—

Q. Frank Nichols? A. Frank Nichols, yes, sir.

887 Q. You may state if you remember whether it was claimed for some time that the man that was killed was Frank Nichols?

The defendants object to the question as incompetent, irrelevant and immaterial.

By Mr. Hutchings: We want to show that for a long time it was claimed it was Frank Nichols, until they found him alive, and then they claimed it was Joe Burgess until they found him alive.

By the Court: You ask, not whether the insurance companies claimed but whether it was claimed generally that the body was that of Nichols, and that that claim was urged upon her at that Buchan meeting. In that respect, it would be pertinent.

To which ruling of the Court, the defendants and each of them at the time duly excepted.

Q. You may state, if you remember, who it was generally claimed was the person that had been killed at Medicine Lodge?

The defendants object to the question as incompetent, irrelevant and immaterial.

A. Frank Nichols.

By the Court: She may answer if it is proposed to connect that claim with any argument used by Buchan at the meeting at which she signed the paper for the surrender of the policies.

To which action and ruling of the Court, the defendants and each of them at the time duly excepted.

Q. Now, you may state, whether in this conversation, Mr. Buchan stated who it was that it was claimed had been killed at Medicine Lodge instead of your husband?

A. He said in this statement that Brown had made, he said it was Frank Nichols.

Q. Well, now, as you say, you finally signed some papers there? A. Yes, sir.

Q. I will get you to examine these papers which have been introduced in evidence here as Exhibits 16, 17 and 19 at this trial. Look them over and see whether those are the papers which you signed there at the Planters Hotel, in Leav-
888 enworth at the time you have stated at the request of Mr. Buchan?

A. I never saw the contents of these papers, but that is my signature and it is on the same date that I was at Leavenworth, September 15th; I never read the contents of the papers; I don't know what the contents were; I can't say, but that is my signature and I signed it on September 15th; that was the day that I was in Leavenworth.

Q. You say then that you signed the papers, or that is your signature? A. That is my signature.

Q. They are dated the 15th of September?

A. Yes, sir, the day I was in Leavenworth.

Q. You did sign papers there that day? A. I did.

The papers in question are the two releases heretofore read in evidence, and the order on Mr. Wheat for the delivery of the policies. Counsel again reads them in evidence.

All these papers are already in evidence in the testimony of J. W. Green and are therefore not again copied.

889 Q. You may state whether you received at the time mentioned in these alleged releases, the one dollar mentioned? A. I did not receive anything.

Q. Did you receive anything whatever for executing these releases? A. I did not.

Q. Was there anything promised you for executing them?

A. No, sir.

Q. Did you receive any consideration of any kind whatever for making the releases? A. I did not.

Q. Did you receive any consideration, anything of value, or any promise of anything, for executing the order upon Mr. Wheat and your attorneys for the policies? A. I did not.

By Mr. Barker: I desire to object to the form of the question. I have no objection to his asking her to state fully what she received.

By the Court: It is leading, yes.

Q. Now, after you had signed these papers, I will get you to state what was done; what you did, and what Mr. Buchan did, if anything.

A. He asked me to go to Mr. Wheat's office and I went with him.

Q. What took place at Mr. Wheat's office?

A. We went up to his office, and I asked him for the policies; he asked me what I meant, what I wanted them for, and I told him I couldn't explain, I just wanted the policies, and he walked into the back room, as I supposed to get the policies, and came back, and he says, "I can't let you have them; this looks to me like a fraud, and I can't let you have these policies." I says, "I want them." He says, "Well, I believe we have got a lien on these for about ten thousand dollars," so then he turned and went out, and Buchan said to me, "Why didn't you insist on getting those policies?" and I said I couldn't insist on it and then we went back to the hotel.

Q. Now, up to this time, you may state whether or not you had consulted with your attorneys or any friend or had anybody to advise you in relation to your actions

A. No, sir, Mr. Wheat was my attorney but Mr. Buchan stayed right with me all the time and I went away with
890 him.

Q. You didn't get the policies?

A. I didn't get the policies.

Q. Where did you go after calling at Wheat's office?

A. We went back to the hotel.

Q. I want you to state what conversation you had then, that is, after you returned to the hotel with Buchan?

A. It was growing a little late and I said I would go home now. He said, No, the train had gone. I says, I will go to Mother's; but I was going back to Lawrence and he said the same train that ran to Lawrence was the same train that I would have to go back to my cousin's and back to my mother's. He says, You can't go back to Lawrence. I says I will go back to Mother's. Then he said No your train is gone. I didn't know whether there was any more trains going out. He said to go to Wyandotte with him. I told him, No, I wanted to go back to Lawrence. He said I could not go back to Lawrence, but if I would go to Wyandotte he would give me this Brown statement; if I would go to Wyandotte that evening with him, the next morning that he would give me the statement of Brown, this contrary statement that he had made.

Q. Well? A. I went with him to Wyandotte.
Q. When you got to Wyandotte; where did he take you?
A. To the Garno House in Wyandotte.
Q. That was a hotel there then? A. Yes sir.
Q. Who paid your expenses there at the hotel?
A. I don't know.
Q. How long did you stay at the Garno House?
A. I think two days and then I went to his house; he had company—
Q. Wait a moment? You stayed there two days?
A. Yes sir.
Q. Well, the next morning, what was the condition of your health then? A. I was still sick.
Q. You may state whether you saw Mr. Buchan the next day?
A. I went to his office the next morning about nine o'clock, I think.
Q. His office was there?
A. In Wyandotte; I don't know what street.
891 Q. His law office? A. Law office, yes, sir.
Q. Whom did you meet there if anybody?
A. John H. Brown and Mr. Buchan.
Q. I want you to tell the jury what took place on that occasion?
A. I asked him for the statement and he handed it to me and I read a small portion of it.
Q. What took place then?
A. Then I turned around and asked him how he dared to make such a statement; he said he had made it and would stick to it.
Q. What was done then; was there another paper shown you on that occasion?
A. Yes, I wanted to keep this paper because he had promised to give it to me if I would come to Wyandotte, but he took it from me and said he couldn't do it, he wouldn't dare to let me have it in my possession.
Q. Who said that?
A. Buchan; he said he wouldn't dare to leave it in my possession; he had promised it to Brown and he was going to give it to him; he turned and gave the paper to Brown and Brown tore it—
Q. What did Brown do with it?
A. He tore it up; I don't know whether he put it in the stove or Buchan put it in the stove but one of them put it in the stove.
Q. What time in the year was this? A. In September.
Q. Now, you may state whether there was any fire in the stove?
A. I don't think there was; no, it was warm.

Q. Was there any other paper shown you there at that time? A. Yes sir.
Q. Who was that signed by? A. H. B. Munn.
Q. Who gave you that paper?
A. Mr. Buchan; he read it to me and then handed it to me.
Q. What did you do? A. I handed it back to him.
Q. What did you say?
A. I said I didn't want that paper; I had no use for it.

892 The defendants object to the conversation in regard to this paper as incomptent, irrelevant and immaterial.

The Court overruled the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

Q. I believe you said that he handed this paper to you and that you handed it back to him and said you did not want it? A. Yes sir.
Q. You may look at that paper and see if that is the paper he had and handed to you on that occasion?
A. Yes, sir, this is the paper.
Q. This is marked at this trial Exhibit No. 15.

By Mr. Hutchings: I would like to read this paper.

The defendants, and each of them, object to the reading of the paper because the same is incompetent, irrelevant and immaterial, and for the further reason that it could not possibly have operated to induce the plaintiff to give the releases, because it is not claimed that she knew of the existence of the paper until the occasion in Mr. Buchan's office after the releases had been signed.

By the Court: While it may be true that it did not operate to induce the plaintiff to sign the releases, yet, on the other hand, it is an illustration of the purposes and motives of Buchan.

To which action and ruling of the Court the defendants and each of them at the time duly excepted.

Mr. Hutchings reads said paper to the jury.

(Said paper is already set forth fully in this bill of exceptions and is not, therefore, again copied herein.)

Q. Now you may go on and state after this interview at Buchan's office where you went to?
A. I went back to the hotel and stayed there, I think, two days at the hotel, and then he took me to his home.
Q. Who took you to his home? A. Mr. Buchan.
Q. This same W. J. Buchan? A. Yes, sir, the same one.
Q. How did you come to go to his home?

A. Well, he said I couldn't go back to Lawrence, and I couldn't go back to my people, and I didn't have any other place to go.

Q. Well how long did you stay there at his house?

A. I don't remember; until I got to feeling better.

893 Q. Well, about how long did you stay there?

A. A week or two; I can't give the exact time.

Q. After you had stayed at his house for a week or two, where did you go then? A. I went to Ottawa, Kansas.

Q. How did you come to go to Ottawa, Kansas?

A. I had a sister living in Ottawa, and I went to her house.

Q. How long did you stay there?

A. I don't know just how long.

Q. Well, approximately?

A. I couldn't say; not but a short time.

Q. Well, while you were there, did you hear anything further from Mr. Buchan?

A. Yes, he wrote me to come back to Wyandotte.

Q. Where is that letter? A. I don't know.

Q. Was it destroyed with the other letters you spoke of?

A. I think so; I haven't got it at least.

Q. You may state now, whether after receiving this letter from Buchan, you did go back to Kansas City?

A. Yes, sir, I went to Wyandotte.

Q. How long did you remain there on that occasion?

A. Several weeks.

Q. Several weeks where? A. At his house.

Q. By his house, what do you mean; his residence?

A. Yes, sir; his home, where his family lived.

Q. He was a married man?

A. Yes, had a wife and two children.

Q. You may state whether before that time you were acquainted with Buchan or his family or any of them?

A. I was not acquainted with his family until I went there; I was acquainted with him early in the Spring.

Q. You may state whether you had ever been on social terms with him or his family, had ever visited there?

A. No, I never had; never heard of him until old Mr. Brown told me of him.

Q. After you had stayed there three or four weeks, you may state where you then went?

A. I went to my aunt's in Trenton, Missouri.

Q. Why did you go there? A. When I did go?

894 Q. Why?

A. Because he said I mustn't go back to Lawrence and I didn't want to stay there; he said, he asked me if I had any relatives. I told him I hadn't any relatives only those living around Lawrence, except those in Ohio, except one aunt, I had one aunt in Trenton, Missouri. He said I had best go

there. He asked me if I wouldn't like to go to Colorado; he said I must, I would have to go somewheres. I told him, yes, I would go to Colorado. He said he would get me a pass but in the meantime he couldn't get it, and I should go to my aunt's in Missouri until he procured the pass for me.

Q. I wish you would state as fully as you can remember, what Buchan said to you about going back to your mother and family?

A. He said I could not go back to them, mustn't tell them anything I had done, must never tell anybody, any living soul what I had done, nor, he says, since I knew what Brown had done I must never tell it to any one.

Q. How long did you stay with your aunt in Trenton?

A. About the holidays.

Q. Did you finally get the pass from Buchan?

A. Yes sir. But in the meantime I had gone back to my mother's and he sent me the pass; it was sent to mother's and mamma asked me what I—

By the Court: You need not tell any conversation with your mother.

Q. Did you use the pass? A. I did not.

Q. You may state whether in the meantime you had, or whether upon that pass coming there, you went to your attorneys? A. Not until after I received the pass.

Q. Then you may state whether your mother advised you after you received the pass as to what course you should pursue?

The defendants object to the question as incompetent, irrelevant and immaterial.

By Mr. Hutchings: I am not asking what she advised, but whether she did go to her attorneys.

A. Yes sir, she did.

895 The Court overruled the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

Q. What did you do after your mother advised you?

A. I went back to Lawrence and went and saw my attorneys and explained to them what I had done.

The defendants object to any statement of what she said to her attorneys as incompetent, irrelevant and immaterial. (... ruling.)

Q. You consulted with your attorneys? A. Yes sir.

Q. You may state whether you communicated to them what you had done? A. Yes sir.

By Mr. Hutchings: Don't answer until they have an opportunity to object.

The defendants object to the question and answer as incompetent, irrelevant and immaterial. The Court sustained the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

On motion of defendants, the answer is stricken out.

Q. Now, I will get you to state what you know, if anything, about [hour] husband, Mr. Hillmon, wearing a ring?
A. Yes, sir, he had worn a ring of mine up until the last time he was at home, and then he left it with me.
Q. What kind of a ring was it?
A. It was a memory ring.
Q. Describe it to the jury as to whether it was a band ring? A. Yes sir, it was a band ring; a flat ring.
Q. How long had your husband worn that ring?
A. I don't know; I think he wore it before we were married or just afterwards; he wore it for some time; it was large for my finger and he wore it.
Q. When did he cease wearing it?
A. On his last trip home; he said it made his finger cold and he gave it to me.
Q. That was in February? A. Yes sir.
Q. Saint Valentine's Day? A. Yes sir.
896 Q. What finger did he wear it on?
A. On his little finger on the left hand.
Q. You may state whether on each trial of this case up to the last trial, the next to the last trial, up to and including the trial in 1895, you have produced this ring in court?
A. Yes sir at each trial.
Q. You may state whether it is lost, or if you know where it is? A. I don't know where it is now; I saw it last—
Q. Where did you last see it?
A. At the next to the last trial of this case at Topeka; then the attorneys for the defense had it—
Q. Never mind about that. You may state whether it was lost at that trial? A. Yes sir.
Q. And you have not seen it since? A. No sir.

And in answer to cross-interrogatories propounded to [him] by Geo. J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Mrs. Smith, will you please state to the jury when and where you were born? A. Near Columbus, Ohio.
Q. When? A. 1858.
Q. What month and day of the month?
A. It was the 10th of December.
Q. 1878? A. Yes sir.

Q. I understood you to say that you came to Kansas in 1872?

A. I did on a former trial, but I afterwards,—

Q. I am speaking now of this trial, Mrs. Smith.

A. No, 1873.

Q. I am speaking of this trial; did you come to Kansas in 1872? A 1873.

Q. You come to Kansas in 1873?

A. Yes sir, I think it was; yes, I thought it was 1872 or 1873, but I think that it was 1873; I know on the former trials I thought it was 1872.

897 Q. I am only asking you about this trial. Well, when did you come to Kansas, then?

A. I think it was 1873.

Q. In 1873? A. I think so.

Q. When you first came to Kansas, you went to live over by Alva Baldwin's in Kanwaka Township, Douglas county?

A. No sir.

Q. Where did you go?

A. We came directly from the depot at Lawrence to Uncle. I. C. Baldwin's west of Lawrence, and we stayed there six weeks.

Q. That was near Alva Baldwin?

A. It was right at his home.

Q. You lived there at Alva Baldwin's for six weeks?

A. Yes, we visited there, I think, about six weeks, and then my mother bought a farm in Leavenworth county.

Q. And you then moved to Leavenworth county?

A. Yes, sir.

Q. North of Levi Baldwin's? A. Yes, sir.

Q. In Leavenworth county, Kansas? A. Yes, sir.

Q. Levi Baldwin and Alva Baldwin were relatives of yours? A. Second cousins.

Q. How long did you continue to live in Leavenworth county near Levi Baldwin's?

A. Mother bought the farm there in 1873 and in 1884, I think, she sold, and moved away.

Q. Did you live there from 1873 to 1884?

A. Yes, sir, that was my home until I was married.

Q. That was your home until you were married?

A. Yes, sir.

Q. How far did you live from Levi Baldwin's when you lived in Leavenworth county?

A. About two and a half or three miles.

Q. And there you continued to make your home until 1884?

A. We rented the farm and moved to Lawrence I think three—two years before I was married.

Q. Were you at Levi Baldwin's, live there, a portion of the time?

A. Yes, sir, before we got possession of our own house I lived at Levi Baldwin's.

Q. How long did you live with him then?

A. We got possession of our house the first of
898 March, that is the rule, the first of March, from just about Christmas until the first of March, I remained at Baldwin's.

Q. After that were you at Baldwin's?

A. Oh, frequently, yes, sir, I never lived there but I was there frequently.

Q. Did you stay at Mr. Baldwin's considerable of the time after that before you moved to Lawrence?

A. I used to go there and stay two or three days at [at] a time, visited back and forth; a short distance.

Q. You continued to do that until you moved to Lawrence, did you? A. Yes, sir.

Q. Alva Baldwin, at the time you lived in Lawrence, still continued to live in Kanwaka township, in Douglas County?

A. Yes, sir.

Q. I understood you became acquainted with Mr. Hillmon at Levi Baldwin's? A. Yes, sir.

Q. When was that? A. Along about the holidays.

Q. Of what year? A. 1873.

Q. About the holidays of 1873?

A. Just after the holidays.

Q. Just after the holidays in 1873 you became acquainted with John W. Hillmon? A. Yes, sir.

Q. Where were you at that time; at Levi's? A. Yes, sir.

Q. And he was there? A. Yes, sir, he came there.

Q. Had he been absent and come there on a visit?

A. That is the first I saw him; they told me he had been absent.

Q. And came there? A. Yes, sir.

Q. How long did he remain there at that time?

A. I don't know when he came and went.

Q. I say about how long did he remain there at that time?

A. Perhaps a day or two; then he went away, and then he came back; he was there—

Q. Well, off and on, how long was he [there] there?

A. Several months.

Q. Did he then go away? A. Yes, sir.

899 Q. I understood you to say on your direct examination that you became engaged to him; when was that?

A. Just before he went west; in less than a year.

Q. In less than a year after you met him, you became engaged to him? A. Yes, sir.

Q. Now, from the time that he came to Levi Baldwin's, and you first met him, until you became engaged to him, had he been away? A. No, sir.

Q. He had lived in that neighborhood?

A. He was here very long at a time, perhaps a month or two, on his visit, before going west to remain.

Q. Repeat that answer.

A. I say, on his last visit in before going west I was engaged to him.

Q. And then he went away, did he? A. Yes, sir.

Q. How long was he gone on that occasion?

A. I think he returned in 1876.

Q. Yes, I know, but I say, how long was he gone, six months, a year, or two years?

A. From the spring of 1873 or 1874 until 1876.

Q. From the spring of 1873 or 1874 until the spring of 1876?

A. Yes, sir.

Q. You did not see him during that interval?

A. No, sir.

Q. I understood you to say on your direct examination that you corresponded with him? A. Yes, sir.

Q. Will you state to what place you addressed letters to him during that time?

A. A number of places in Colorado.

Q. Well, will you mention one of the places in Colorado.

A. Well, there was Golden City was one, and there was a number of places, mining towns.

Q. I know, but any other place?

A. I can't now recollect any other place.

Q. Do you remember of addressing any letters to him in Texas? A. No, not on that trip, no, sir.

Q. Not on that trip? A. No, sir.

900 Q. The only place that you remember addressing letters to him during that time was at Golden City, Colorado?

A. That was one time but there was a number of other places, but I cannot now recollect them.

Q. You cannot now recollect the places? A. No, sir.

Q. Then he returned again, did he? A. Yes, sir.

Q. Have you any means of fixing definitely the time when he did return on this occasion?

A. I think about two years before we were married.

Q. Where were you living at that time?

A. Lawrence, Kansas.

Q. Whereabouts; in North Lawrence or South Lawrence?

A. South Lawrence, on Mississippi street.

Q. How long did he remain there on that occasion at that time? A. Several months.

Q. He remained there several months and then went away did he? A. Yes, sir.

Q. Can you tell the jury when he went away; what year?

A. I think it was in June of the same year that he came in; he came in in the early spring, and went away perhaps the first of June.

Q. Came in the early spring and went away again in June?

A. Yes, early, perhaps February.

Q. How long was he gone?

A. He came back the next winter.

Q. In 1877? A. February, 1877.

Q. I understood you to say that you corresponded with him while he was gone on that occasion? A. Yes, sir.

Q. To what places did you address your letters during that time? A. Somewhere in Texas, Fort Worth.

Q. At Fort Worth, Texas?

A. Yes, sir, and a number of other places; I can't now remember. I know, but, of course, I can't remember.

Q. You can't remember any other place except Fort Worth, Texas?

A. Yes, there was other places, but I remember Fort Worth.

Q. Do you remember any other place?

901 A. I just now cannot.

Q. Now, will you state definitely when he returned from this trip in 1877? A. In January or February.

Q. Did he go away again? A. Yes, sir.

Q. When did he leave the last time—Before you were married I am speaking of?

A. He did not remain but a week or two.

Q When he returned in 1877? A. Yes, sir.

Q. Then he went away again, you say? A. Yes, sir.

Q. Will you state as definitely as you can what year he went away in? A. 1877, I think.

Q. What time in the year?

A. I think it was in February.

Q. When did he return from that trip?

A. In August or September.

Q. Of what year? A. Of 1878.

Q. Now, during that time did you write to him?

A. Yes, sir.

Q. To what places did you address your letters at this time?

A. He was in New Mexico.

Q. I am not asking you where he was; will you kindly tell the jury where you addressed letters to him?

A. No, that is not impressed on my mind; I can't tell.

Q. You can't tell where you wrote any letter to him during that time, if you can, please state.

A. Somewhere in New Mexico; he was in New Mexico.
Q. I didn't ask you where he was Mrs. Smith; I ask if you can tell the jury where you addressed letters to him during that time?
A. He was in New Mexico and Texas, but just where, I can't tell, just the places.
Q. Can't tell where you addressed them?
A. Fort Worth was one place. In fact, I think that is where all his mail was sent after he came in on his last trip.
Q. I will ask you again when your husband returned from the west in 1878?
A. You mean before we were married? Some time in August or September.
Q. 1878? A. Yes, sir.
Q. Now, when did your mother remove from the neighborhood of Levi Baldwin's to Lawrence?
902 A. I think it was in 1876 she rented the farm and moved to Lawrence.
Q. Whereabouts did you first live in the city of Lawrence?
A. On Mississippi street.
Q. Did you ever live in North Lawrence?
A. Yes, sir, one winter.
Q. What winter at that?
A. I don't know whether went over there before Christmas—
Q. I am asking what winter it was?
A. I think it was in 1877, yes, 1877.
Q. The winter of 1877 you lived in North Lawrence?
A. Yes, sir.
Q. Did you live there all winter? A. Yes, sir.
Q. Was that before or after you moved on to Mississippi street? A. That was after.
Q. You lived on Mississippi street in the city of Lawrence, and then removed to North Lawrence, did you? A. Yes, sir.
Q. What were you doing in Lawrence in 1876, do you remember? A. I was living with mother.
Q. Your mother lived on Mississippi street in 1876?
A. Yes, she kept house.
Q. What were you doing? A. Well, I sewed some.
Q. Took in sewing? A. Yes, I sewed some.
Q. Did you work for various parties?
A. Not various parties.
Q. You worked for some parties? A. Yes, sewed some.
Q. Do you remember of working for William T. Faxon?
A. Yes, sir. Several weeks I was with them.
Q. That was in that year? A. That would be in 1878?
Q. In 1878, you worked for William T. Faxon?
A. Yes, sir.

Q. In 1876 and 1877, you were taking in sewing?
A. Not all the time; I was at home at mother's and sewed some.
Q. Were you working for any one, working in a restaurant?
A. My brother kept a restaurant sometime in the summer or fall of 1877 and I waited on the tables sometimes.
Q. You worked in there for a while, did you?
903 A. Yes, sir, he didn't keep the restaurant but a short time.
Q. You worked at the Lawrence House?
A. No, sir, I never did.
Q. Did you work at the Marshall Hotel? A. No, sir.
Q. Work at any hotel there?
A. I was at the Central Hotel, I think only one day or two days.
Q. You worked at the Central Hotel but a short time?
A. Waited on the table I think one or two days.
Q. Besides working for Mrs. Faxon and in the hotel and restaurant at what other places did you work, if you remember? A. I don't remember.
Q. You don't remember the other places?
A. I didn't work any other places.
Q. You have stated that you were acquainted with John H. Brown? A. Yes, sir.
Q. When and where did you become acquainted with John H. Brown?
A. Mr. Hillmon introduced him to me in 1876.
Q. Where did you become acquainted with him?
A. At mamma's.
Q. At your house in North Lawrence?
A. On Mississippi street.
Q. Came there with Mr. Hillmon, did he?
A. Yes, sir.
Q. In 1876? A. Yes, sir.
Q. What time in 1876? A. In the spring.
Q. That is the first time you saw John H. Brown, at your mother's house on Mississippi street in the spring of 1876?
A. Yes, sir.
Q. When did you next see him?
A. I don't think I saw him again until 1878.
Q. Then you didn't see him from the spring of 1876 until sometime in 1878? A. No, sir, I think not.
Q. You did not see him again from the time you saw him in 1876 until after you were married, did you?
A. Yes, I saw him before me were married.

Q. I beg your pardon, but you did not understand. I say you did not see him from the time you saw him in the spring of 1876 until after you were married in 1878, did you?

904 A. Yes, I did.

Q. Well, when and where did you see him?

A. At my house.

Q. You saw him at your house? A. Yes, sir.

Q. Do you know whether or not he was at your house between 1876 and 1878?

A. I don't know that he was there but the one time; when he first came back from the west he came up with Mr. Hillmon.

Q. That was in 1878? A. Yes, sir.

Q. Before you were married? A. Yes, sir.

Q. Then you did not see him from 1876 until some time in August or September, 1878, at the time your husband returned from the west; that would be correct, wouldn't it?

A. Correct.

Q. You say at that time he came to the house where you were with Mr. Hillmon?

A. Yes, sir, he came there, yes, sir.

Q. You were living at Mrs. Judson's were you not?

A. No.

Q. Where were you living when Mr. Hillmon returned in 1878 and Mr. Brown came over there with him?

A. I think it was at my sister's over at North Lawrence. The only time I saw him after seeing him in 1876, I next saw him at my sister's in North Lawrence in 1878, when he came back from the west.

Q. How long did he remain there?

A. I think he just made a call and I don't think I saw him any more until after we were married.

Q. So that you had really only seen Mr. Brown twice be- you were married, once in 1876, and once in 1878 over at your sister's? A. I won't say positively.

Q. That would be your best recollection?

A. I don't know how that is; I remember seeing him, though, those two times, at the time I was introduced to him, and then he came on the last trip home before we were married; he came to my sister's with Mr. Hillmon.

Q. When did you commence boarding at Mrs. Judson's?

A. After we closed up the house—

Q. I don't care to go into those details; if you can fix the date it was, do so.

905 A. I can't tell; we went to the country, sometime, I think about the first of September, and I went over to Mrs. Judson's and remained there until we were married.

Q. You went to Mrs. Judson's, then, you think, in September, 1878; would that be correct? A. I think so, yes sir.

Q. And you continued to live there until you were married, at all events? A. Yes sir.

Q. You were married, I think, you said, on the third day of October, 1878? A. Yes sir.

Q. Was Mr. John H. Brown at your wedding?

A. No sir.

Q. He was not present? A. No, sir.

Q. Had you seen him then prior to the time you saw him at your sister's up to that time? A. I think not.

Q. Then, after you were married, when did you first see John H. Brown?

A. I think he came to the house; he took dinner with us; that is perhaps the day before they went away.

Q. The day before he and your husband went away, John H. Brown you think came to the house and took dinner?

A. I think so.

Q. That was the first time you had seen him after seeing him at your sister's?

A. I think so; I don't remember.

Q. How long did he remain there then?

A. He came over with Mr. Hillmon before dinner, and I think he went away and I didn't see him any more.

Q. You didn't see anything more of him? A. No sir.

Q. You didn't see him any more until he went off with your husband did you? A. No, the next day they went away.

Q. The next day they went away? A. Yes sir.

Q. You did not see him that day?

A. The day they went away?

Q. Did you see John H. Brown the day that he and your husband went away?

A. I think he was at the house; yes, they was at the house when they went away together.

Q. Now, I call your attention a little more definite-
906 ly to your wedding; it occurred on the 3rd day of October, 1878, and Levi Baldwin was there, was he not?

A. Yes, sir, and his wife and daughter.

Q. They were present at your wedding?

A. Yes, and my mother and sister.

Q. Any other relatives or friends? The Judson family was there? A. Yes, sir, that was all, I think.

Q. Now, from the time that you moved to Lawrence up to the time of your marriage, were you ever out to Levi Baldwin's, from the time you moved to Lawrence in 1876 until the time you were married there in 1878, did you ever go out to Levi, Baldwin's place?

A. Quite often, yes sir.

Q. Now, you have stated in regard to your being married to Mr. Hillmon. When did Mr. Hillmon and Brown go away?

A. December 18.
Q. On the 18th day of December, 1878; is that correct?
A. Yes, sir.
Q. They started from your house, did they? A. Yes, sir.
Q. You mean by your house the house at Mrs. Judson's?
A. Yes, sir.
Q. At that time you and Mr. Hillmon had been keeping house there at Mrs. Judson's?
A. Part of the time, yes, sir.
Q. You boarded there a little while, did you?
A. Yes, sir, before and after.
Q. Before you were married? A. And after, yes, sir.
Q. And Mr. Hillmon boarded there a little while before he was married? A. Yes, sir.
Q. And you boarded there a little while before you were married? A. Yes, sir.
Q. And then you went to keeping house there in one room did you not, with Mr. Judson?
A. We kept house all over the house; we lived all over; yes, sir, we had one room to ourselves.
Q. You heard Mrs. Judson's testimony read in regard to that, that you kept house in one room there, and cooked on her stove for a while and then during the hot weather got a stove of your own didn't you?
A. Yes, sir, we got a little parlor cook stove but we
907 lived all over the house because we had permission—
Q. I am not asking you in regard to that. You have stated in regard to your husband going away; I will ask you when he returned the first time?
A. About the 25th of January, I think.
Q. The 25th of January, 1879, that would be right, wouldn't it? A. Yes, sir.
Q. How long did he remain home at that time?
A. I think he went away about the last of January.
Q. Of the same year, of course? A. Yes, sir.
Q. Now, during that time did you see Levi Baldwin, I mean during the time your husband was home on that occasion, did you see Levi Baldwin? A. Yes, sir.
Q. Where did you see him?
A. He came up to the house several times.
Q. Did you and your husband go out to his place during that time; did you drive out there?
A. I think we was at mother's and on the way back we stopped at Baldwin's.
Q. You and your husband paid Levi Baldwin a visit during that time?
A. Yes, I am quite sure we did, because we had to go past their house when we went to mother's.

Q. Was your mother living on the place?
A. Yes, sir.
Q. She had moved back on the farm, had she?
A. Yes, sir.
Q. When did she move back on the farm?
A. In the spring of 1878.
Q. You stated that your husband remained at home until—
A. I don't know the date of his going away; about the last of January.
Q. Have you any means of fixing it definitely when he went away on that occasion?
A. I am quite positive it was the last of January.
Q. Do you mean the last day?
A. No, not particularly. It was some[t] time near the last of January, 1879.
Q. Any one return with him on that occasion?
A. No, sir.
908 Q. Do you remember whether Levi Baldwin was in town the day he went away, or not?
A. I don't remember about that.
Q. How long was he gone on that occasion when he went away?
A. He came back on Saint Valentine's Day, the 14th of February.
Q. You think that is the very day on which he did return?
A. I know it is.
Q. You are positive in regard to the day?
A. Yes, sir.
Q. Did any one return with him on that occasion?
A. No, sir.
Q. How long did he remain there then?
A. He went away again along about the last of the month, about the 27th, of February.
Q. Have you any means of fixing definitely the date on which he went away on that occasion? A. I remember.
Q. You remember when it was? A. Yes, sir.
Q. Have you any means of fixing the date?
A. It was about the 27th or 28th.
Q. Is that a mere matter of recollection, or have you any data or memoranda or anything of the sort by which you can definitely determine the date when he went away?
A. That is about the date.
Q. Is it not a fact that he went away on the 28th day of February?
A. It may be; somewheres along the latter part.
Q. Then he was at home nearly two weeks, wasn't he, on that occasion?
A. He came home on the 14th of February, and went away the last of February.

Q. Yes; now, during that time, was Levi Baldwin in town?
A. Why, I don't know.
Q. Was he at your house? A. I don't remember.
Q. You don't remember whether during the last visit of your husband on that occasion, whether Levi Baldwin was at your house or not. A. I don't know; I don't remember.
Q. You don't remember in regard to that?
A. No, sir; we were at mother's——
Q. And you saw Levi Baldwin?
A. I don't know whether we saw him or not; we
909 were out there and we stopped just a short time at Baldwin's.
Q. You mean by we, you and your husband, Mr. Hillmon?
A. Yes, sir.
Q. You were still living at Mrs. Judson's house?
A. Yes, sir.
Q. Well, was one of Levi Baldwin's daughters living with you [with you] during this time?
A. After Mr. Hillmon went away she came and stayed with me and went to the university.
Q. Which daughter? A. His oldest daughter, May.
Q. May Baldwin? A. Yes, sir.
Q. How old a girl was she?
A. She was grown up; she was as tall as her father.
Q. I am not asking you in regard to her size, Mrs. Smith; I will ask you if you know in regard to her age?
A. She was a grown up young lady.
Q. If you know her age, or anything about it, so far as that is concerned. A. I don't know her age, but she was——
Q. I am not asking you anything about her size.
A. I don't know positively just her age.
Q. I don't want to know just her age.
Q. I don't want to know just her age, but I want to know whether she was 11 or 12 or 16 or 18 years old, whatever you say in regard to that; was she 18?
A. Nearly so. I couldn't say positively; she was grown up; she was a good deal taller and larger than I was.
Q. You don't remember whether Mr. Baldwin came in during that time or not?
A. Yes, sir; I think so; he used to come in every Friday and take us out home, and I would go over to mother's.
Q. Can you fix the date when she came?
A. After Mr. Hillmon went away she came and stayed a while.
Q. You have stated in regard to his going away that time, on that occasion, and I believe you said that was the last of February? A. Yes, sir.
Q. And I believe you said something about his leaving a ring? A. Yes, sir.

910 Q. He left a ring with you when he went away that time? A. Yes, sir.
Q. A ring, you say, he had been wearing some time?
A. Yes, sir.
Q. He left that with you?
A. He left it with me; he said it made his finger cold.
Q. He left that ring with you? A. Yes, sir.
Q. Mr. Brown did not return on that occasion?
A. No, he did not return.
Q. I understood you to say on your direct-examination that you knew that they had been at Wichita? A. Yes, sir.
Q. I understood you to say you had received letters from him at different points? A. Yes, sir.
Q. Do you remember from what points you had received letters from him during that time, that is, I mean by that time, between the first and second visits home?
A. I won't say positively, but I know I received letters from him while he was gone.
Q. I ask you from what points, if you remember?
A. From Hutchinson, I think, from Kinsley, Harper, Kingman, and I think Sun City and Medicine Lodge; I know I received them from all those points but just when I received them, I don't know, but it was on that trip.
Q. Do you know what train he took when he went away this last time? A. No.
Q. Do you know whether he went in the afternoon or evening? A. He went in the forenoon.
Q. Do you know on what road he left? A. No.
Q. Did you go to the depot with him? A. No, sir.
Q. I understand you did not see him after that alive?
A. No, sir, I never saw him alive.
Q. Then, when did you hear of his reported death?
A. The 24th day of March.
Q. You were then living at the Judson house?
A. Yes, sir.
Q. And this May Baldwin was living with you?
A. Yes, sir.
911 Q. And you said that Mrs. Judson told you in regard to that, I believe; the first information you got in regard to it was from Mrs. Judson?
A. And Mr. Baldwin brought me—
Q. I asked you—
A. And then Mrs. Judson came out to the gate and called Mr. Baldwin to her and told him something, and I saw him begin to turn pale, and I said, Is there anything the matter—
Q. Mrs. Judson was the first person that told you and that was on the 24th day of March? A. Yes, sir.
Q. Was Mr. Levi Baldwin there? A. Yes, sir.
Q. Was Alva Baldwin? A. No, sir.

Q. After that, when did you next see Alva Baldwin?
A. I think he came to our house the next or perhaps the same day.
Q. Either the next day or the same day?
A. I don't think it was the same day. No, the next day.
Q. Then it would be the 25th? A. Yes, I think so.
Q. The 25th day of March? A. Yes, sir.
Q. You say that Levi was there that same time?
A. Yes, he brought me in town.
Q. He brought you to town? A. Yes, on the 24th.
Q. From where? A. From the country.
Q. Levi Baldwin brought you from what place to what place on the 24th?
A. I came down to mother's on sabbath evening and the next morning he brought me to Lawrence.
Q. Then he had taken you out there the night before?
A. No, I won't say; I think I was out there at mother's perhaps a week; I won't say positively.
Q. You had been there for some time, then?
A. I won't say positive; I don't know how that was.
Q. And Levi Baldwin brought you in?
A. He generally brought me in.
Q. I am inquiring in regard to this particular time; he brought you in on this 24th day of March, 1879, from your Mother's? A. He didn't bring me directly from mother's.
912 Q. Where did he bring you from?
A. From his house.
Q. He brought you from his house to Lawrence on this 24th day of March, to Mrs. Judson's? A. Yes, sir.
Q. And then on the 25th day of March, you saw Alva Baldwin, did you? A. Yes, sir.
Q. And Levi? A. Yes, sir.
Q. Were they both at the house together?
A. Yes, and Lafey; all three came together; they were all three there.
Q. They were all three together?
A. I don't think they came up together; I don't know; I think that Lafey came with Alva, and I think that Levi came in the next morning; I don't know that; I don't know as to that.
Q. What I was getting at, did Levi go out home after he brought you in, and then come in the next day, and then he and Alva met at your house? A. They were both there.
Q. You think Levi Baldwin went home, and Alva came in the next day and then they were at your house?
A. Yes, sir.
Q. You say they started from your house to go down to Medicine Lodge? A. Yes, sir.

Q. Now, how long was it from the time they left your house until you saw them again?

A. I never saw them again until about the third; the morning of the third of April.

Q. The morning of the 3rd of April?

A. I didn't see Alva; I saw Levi.

Q. On the morning of the third of April you saw Levi?

A. I think so.

Q. But you did not see Alva? A. No.

Q. No, from the time you were married in 1878, up to this time, did Alva Baldwin continue to live out in Kanwaka township? A. Yes, sir.

Q. Did you see him frequently A. Oh, quite often.

913 Q. In the city of Lawrence? A. Yes, sir.

Q. And you were at his house, at his residence in Kanwaka township?

A. Yes, I think we were there; I think we were out there.

Q. You were on visiting terms, were you not at that time?

A. Yes, sir.

Q. And he was at your house frequently in Lawrence?

A. Yes, he came to our house and took dinner with us.

Q. You and Mr. Hillmon had visited at his house?

A. I won't say. We might have been there.

Q. You know that you had been out there, do you?

A. Yes, I used to often go out there.

Q. That is, from the time you were married?

A. No, I don't mean that; from the time that we came to Kansas; while we lived in Lawrence we used to go out there frequently.

Q. I was asking particularly if you went out there after you were married; if you still continued your visiting?

A. I won't say as to that; I know that they came in; Alva and his wife came in, and Uncle Andy came in to see us.

Q. I am only asking in regard to Alva now?

A. Alva and his wife came in to see us; I can't remember whether Mr. Hillmon and I went out there or not.

Q. Can't say in regard to that? A. No, sir; I can't say.

Q. After their return from Medicine Lodge, he continued to live out on the farm, didn't he; Alva Baldwin?

A. Yes, sir.

Q. He lived there for several years after that, did he not?

A. Yes, sir.

Q. Did you frequently see him during that time?

The plaintiff objects to the question as not proper cross-examination. The Court overruled the objection, to which ruling of the Court the plaintiff at the time duly excepted.

Q. Did you visit at his house? That is, between the time he returned from Medicine Lodge, until he left the county, of course? A. I can't understand that question.

914 A. Do you mean after my husband died?

Q. I mean from the time that Alva Baldwin returned from Medicine Lodge until he removed from Douglas county, whether or not you visited at his house? A. Yes sir, I did.

Q. Frequently? A. Why, quite often.

Q. Do you remember the last time?

A. He was away south a little while, and while he was gone I was out there and stayed several weeks with his mother and his wife and family.

Q. Now, will you kindly tell the court and jury when it was that you visited with his mother out there in Kanwaka township, what year it was, and what time in the year, as near as you can?

The plaintiff objected to the question as not proper cross-examination. The Court sustained the objection, to which action and ruling of the Court the defendants at the time excepted.

Q. How did you learn, if at all, that Levi Baldwin and Alva Baldwin were returning, and that they would be in Lawrence?

A. By a telegram Mr. Smith brought me; the telegram said they would—

Q. I am not asking you what they said; you learned by telegram? A. Yes sir.

Q. Do you remember when that was?

A. The evening of the second of April.

Q. Then it had been from the 24th of March until the 2nd day of April—

A. No, I hadn't heard from them from the time they went away until the evening before they came back.

Q. Was that telegram to you or to Bailey & Smith, the undertakers?

A. I understood it was in his care and he brought it to me.

Q. If you know, please state?

A. No, he brought it to me and I suppose—

Q. Do you know whether it was a telegram to you or to Bailey & Smith?

The plaintiff objects to the question as not proper cross examination. The Court overruled the objection, to which
915 ruling of the Court the plaintiff duly excepted.

A. Mr. Smith brought the telegram and stating—

Q. I do not ask what it stated; I simply want to know whether that telegram—

A. He brought it to me and I told him to take it and give it to Mr. Selig; so it must have been calculated for me or I would not have given orders to give it to Mr. Selig.

Q. I don't want argument; I simply want the fact, if you know it. If not, please say so.

By the Court: Give your best recollection.

A. I think that was it or I should never have given the orders to give it to Mr. Selig, if it had not been for me.

Q. You think the telegram was to you?

A. Well, now, it must have been, because I told him to—

Q. I am not asking you for that; you simply say you think it was to you?

A. I think it was because I told him to take it to—

Q. I am not asking you for reasons or an argument, Mrs. Smith. Now, do you know who the telegram was from?

A. Well, I think it was to me in the care of Bailey & Smith.

Q. No, I ask you if you know from whom the telegram was? A. From my cousin, Levi Baldwin.

Q. Do you know what time you received or got word in regard to that telegram?

A. Yes, sir, on the evening of the second.

Q. On the evening of the second of April, 1879?

A. Yes sir, just after I came from Mr. Griffith's office.

Q. Then, what did you do, if anything?

A. I gave it back to Mr. Smith and told him to go to Selig.

Q. I did not ask you what you said. You gave it back to Mr. Smith, did you? A. Yes sir.

Q. Now, the next morning, I understood you to say, you expected the remains?

A. Yes sir, it stated so in the telegram.

[Q.] Answer of the witness stricken out as not responsive to the question.

Q. Now, I understood you to say that the next morn-
916 ing you sent Mr. Judson down to the train?

A. Yes sir.

Q. Mr. Judson had an express wagon; ran an express wagon at that time, did he not?

A. I don't know whether at that time he had an express wagon or not.

Q. What business was Arthur Judson in?

A. He had a team but I don't know just what he was doing at that time.

Q. You don't remember in regard to that? A. No sir.

Q. But I understood you to say that you sent him with an express wagon. A. You didn't understand it all that way.

Q. You sent him down? A. He just walked down.

Q. Did any other members of the family go down?

A. No, not at that time.

Q. Then he came back and reported to you, did he?

A. Yes sir, came back and said that—

Q. I am not asking what he said; then after that, you went down town, did you?

A. He came up with a team and took Mamma, Mrs. Judson and myself down to Bailey & Smith's.

Q. What time in the day was that?

A. About ten o'clock.

Q. That would be on the third day of April, 1879, wouldn't it not? A. Yes sir.

Q. And that is the time when you say that you did not see the body? A. No, did not see it at that time.

Q. Then you returned home, did you? A. Yes sir.

Q. When did you go down again?

A. I think it was on the morning of the 4th.

Q. On the morning of the 4th?

A. I think it was; I won't say positively, but I went down and saw him; I don't know whether it was the next morning or not.

Q. Can you tell the jury about how long it was from the time you went down the first time until the second time?

A. I think it was the second morning.

Q. Now, did you notify, or cause to be notified, the relatives of Mr. Hillmon in regard to this matter?

917 The plaintiff objects to the question as not proper cross examination. The Court overruled the objection, to which ruling the plaintiff duly excepted.

A. I did not know his relatives at the time, just where they were living at that time.

Q. You knew he had sisters?

A. Yes, I knew he had sisters and brothers, but I didn't know just where they lived.

Q. You didn't know the residences of his sisters?

A. No, I did not.

Q. Well, then, of course, no notice was given to them?

A. No sir, not at that time.

Q. In regard to this matter.

Q. From the 24th of March to the 3rd of April, 1879, no notice was given because you say you did not know where they were? A. No sir.

Q. You knew they lived in Kansas?

A. I thought that—Well, I didn't know; I think I did; I knew they lived somewhere—

Q. You had been engaged to Mr. Hillmon for several years and had been married to him on the 3rd day of October, 1878, and didn't know where his sisters lived, or lived in Kansas; didn't you know he had a sister living in Valley Falls?

A. No, not at that time; I didn't receive any word from them until my husband was buried some time.

Q. Then you say you did receive word from them?

A. Yes, in answer to a letter I had written.
Q. Did you receive word from Mrs. Nichols?

The plaintiff objects to the question as incompetent, irrelevant and not proper cross examination. The Court sustained the objection to which action and ruling of the Court the defendants and each of them at the time duly excepted.

Q. Now, when you went into Bailey & Smith's to see the remains and when you did see them, whom did you say went in with you?
A. My cousin Levi Baldwin, and Arthur Judson were with me.
Q. Those are the persons who were with you at that time?
A. Yes.
918 Q. Did you see other people in there?
A. I saw Mr. Smith and there was several others I didn't know just in the room or just outside.
Q. Just in the room or just outside? A. Yes sir.
Q. People coming and going at that time, were they?
A. Yes, but not many.
Q. At that time, had you seen Levi Baldwin after his return from Medicine Lodge?
A. Yes, I think he came to the house.
Q. Had you seen Alva Baldwin? A. No, Alva was not there.
Q. When did you first see Alva after his return from Medicine Lodge?
A. Some time; several days.
Q. It was several days before you saw Alva Baldwin after his return from Medicine Lodge?
A. No, I think Alva came to the house after he first came back; I won't say positively.
Q. You can't say whether he came to the house when he first came back, or that you did not see him for several days?
A. I think he came to the house.
Q. That is what you say now?
A. Yes, I think he came to the house and then went out home. Yes, I think he did.
Q. Had you seen him more than once?
A. Now, I don't understand that.
Q. Had you seen him more than once before the coroner's inquest?
A. Oh, I didn't see him before the coroner's inquest; he wasn't here at that time.
Q. You didn't see him during the coroner's inquest, then, during the time it was being held?
A. Yes, I think he came to my house when he first came back.
Q. You only saw him once?

A. Yes sir; I saw him as soon as he came, when he first came in, but I don't remember of seeing him any more.

Q. Now you have spoken about the coroner's inquest, and about producing certain pictures. Do you know where the coroner's inquest was held?

A. At the court house.

919 Q. At the court house in the city of Lawrence?

A. Yes, sir.

Q. Now, you stated that you were requested to produce certain pictures. A. Yes, sir.

Q. I will ask you to state if that request was not made to you by Mr. H. S. Clarke of Lawrence, Kansas? A. Yes, sir.

Q. He was the first person who spoke to you about producing pictures there? A. Yes, sir.

Q. That conversation was at your house, was it not?

A. Yes, sir.

Q. I will ask you if you did not then and there deliver him the pictures, give them to him right there at your house?

A. He told me to bring them—

Q. I am not asking what he told you then; I am asking you if you did not then and there at your house give him the pictures? A. No, I did not; I took them down.

Q. You took them down; you did not give them to him, then? A. I did not, no, sir.

Q. Now, look at Exhibit 14 and state if that is one of the pictures or the picture itself, which you either gave to him or took down there?

A. I don't know whether it is the exact picture.

Q. Was it one like that?

A. Yes, sir, it was one like that, but I don't know whether that is the exact picture or not.

Q. It was either that picture or one like it?

A. It was either that one or one that was taken at the same time.

Q. Exhibit 22, did you take that picture too?

A. Yes, I took that.

Q. You didn't deliver it to Mr. Clarke? A. No, I did not.

Q. Now, I call your attention to Exhibit No. 10; did you take that picture down?

A. No, I didn't have it at that time.

Q. You did not have that in your possession? A. No, sir.

Q. You didn't know where it was?

A. Yes, I knew where it was.

Q. You knew where it was at that time? A. Yes, sir.

Q. You stated that this picture—

A. This is a good picture of him.

920 Q. Do you know whether that is an original or a copy?

A. No, that is the original picture that he sent in from the west.

Q. Did he send it to you?

A. No, he sent it to my cousin, Mr. Baldwin.

Q. How do you know that he sent it to him?

A. Because I saw the letter that he wrote; at the time that the box came it was in one of these specimen frames.

Q. He sent that in? A. Yes, sir.

Q. Do you know where the picture was taken?

A. Somewhere in Colorado; I don't just remember.

Q. Do you know anything about where the picture was taken? A. I won't say positively, because I don't know.

Q. Do you remember from what place it was sent? A. No.

Q. Is there anything on the picture which indicates where it was taken? A. No, sir.

By Mr. Barker: I wish to show it to the jury for the purpose of showing that there is nothing on it to indicate where it was taken.

Q. You knew at the time this coroner's inquest was going on that there was a controversy in regard to whose remains those were, did you not?

A. Not when he asked me to bring the pictures; he told he to bring all the pictures I had in my possession and these were the only ones I had.

Q. You didn't know at that time there was any controversy in regard to whose remains those were down there?

A. I don't think I did.

Q. You don't think you knew anything in regard to that?

A. Not at that time.

Q. You had seen and talked with both Levi and Alva Baldwin and still you didn't know anything in regard to that?

A. I don't think they said anything about it— No, I hadn't seen Alva at that time.

Q. Now, when did you bring those pictures with reference to the commencement of the inquest, was it the first day or the second day of the inquest?

A. I don't know; it might have been the fourth or fifth.

921 Q. I am not asking about dates, but so far as the time of the inquest is concerned; was it the first day or the second day of the inquest that you took the pictures down there?

A. I don't know; I was there just once, and I don't remember.

Q. When was it you went there?

A. Towards the last; I don't remember when it was.

Q. You have spoken in regard to another picture, have you not? A. Yes, sir.

Q. That, you said was a picture of Brown and your husband taken together? A. Yes, sir.

Q. Do you know when and where that picture was taken?

A. Yes, it was taken there in Lawrence.

Q. When?

A. I don't know; some time before they went away; several weeks.

Q. Several weeks before they went away? A. Yes, sir.

Q. Do you know of Mr. Brown being up there several weeks before he went away? I understood you to say you did not see him from the time you saw him when he returned with your husband in 1878 until after you were married?

A. No, I didn't say that, did I?

Q. I understood you to.

A. I had been in the city and I might have seen him.

By the Court: I desire to say this: There is a juror here whose conduct is very commendable, and whom I honor for it, has stated to me that a communication was made to him, which he interpreted as preliminary to an offer to bribe. He stated to me the language that was used to him, and it looks very much to me as it did to him, but inasmuch as there might be some mistake, I think it best not to mention the name of the party who made the communication, or the name of the juror to whom it was made; but I desire to say this, that if there is any further effort made in that direction, I will have that man's name presented to the United States grand jury for indictment.

922 Mr. Barker here offered to speak.

By the Court: It is no lawyer connected with this case; I do not mean to say that the effort came from either side of this case, and no counsel is called upon, it is not necessary in the mind of the Court for any counsel to say anything one way or the other about it. There is no reflection cast upon any one directly connected with this case, so far as I know, but I desire to say to the person that that must stop; it must proceed no further. If I can prevent it, this case will not be tried with anything of that sort in it.

The hour of 12 m. having arrived, the Court arose in recess until 2 p. m.

923 Afternon session. Parties present as before.

By Mr. Barker: If the Court please, the defendant has a motion which it would like to submit at this time, and I think it is a motion that ought not to be, perhaps, argued in the presence of the jury, and we would like to have a moment to present it to the Court.

By the Court: (to the jury) Remembering the admonition that has been given you, gentlemen, please retire to the corridor beyond hearing of what may transpire in Court.

The jury accordingly retired.

By Mr. Barker. It would seem from the remarks of the Judge just before adjournment that he believes that an attempt has been made by some one, the foundation has been laid for bribing a juror; that the Court believes that from the statements which the juror makes; has made. Now, upon that proposition, the Court has said that at this time, he would not investigate, but I submit that if anything of that sort has been done, if the Judge of this Court thinks anything has been done, that it ought to be probed to the very bottom, and done now; and we court the fullest investigation in regard to that matter. There is another matter which grows out of that, and upon that we make a motion, and that is, that the entire panel be discharged, and a new venire be issued. Taking into consideration the character of this case, the plaintiff and the defendants, the fact that the plaintiff is a woman, and the defendants corporations, and taking into consideration the talk which has been had in Court, the insinuations and remarks that have been made in regard to the millions which these companies are alleged to have, I submit that when the Court says in the presence of the jury that he believes that the foundation has been laid or that a juror has been tampered with, that the imputation would go out, the impression would go out; it would make an impression upon the jury that if anybody had done that, it was the defendants in this case, because the defendants have the money. I submit that under these circumstances, taking into consideration these facts that we ought not to be required to go on with the trial of this case before a jury where the Judge of this Court has made remarks of that kind, where the Judge of this Court believes, as your Honor evidently does, in regard to that matter. We are over here, so far as that is concerned, in Leavenworth county, where the plaintiff lives; where her counsel, two of them, live, and if we have been guilty, directly or indirectly, or remotely, of anything of the sort, we ought to be punished for it, and we court the fullest investigation in regard to that. But furthermore, we submit that the statement of the Court in regard to that matter would have a tendency and would necessarily and naturally prejudice the jury against defendants in this case, and that we could not go on now and have a fair and impartial trial before this jury, and we have submitted a motion here that on account of the statements of the Court in that respect, that the entire panel be discharged,

and that a new venire issue, and we save, in addition to that, an exception to the remarks of the Court in the presence of the jury.

By the Court: So far as any prejudice is concerned, I cannot conceive how the Court's remarks could operate to the disadvantage of the defendants any more than they would to the disadvantage to the plaintiff, for, as counsel says, on the one hand are the insurance companies, and they have the money—that is the expression used by counsel for the defendants; on the other hand, as counsel says, the plaintiff resides in this community, and two of her lawyers reside
924 in this community. When this matter was first brought to my attention, I considered the propriety of allowing it to proceed to see to what extent it would be carried, but I thought then that that was perhaps beneath the dignity of the Court; that it might, in a measure, be laying a trap for the man who possibly had an evil intent in that direction. I have no hesitancy in telling counsel the words that the juror repeated to me. They were a request on the part of the person in question to a juror to come to a certain place—that there was something in it for him. Now, what was the Court to do? As I say, I did not consider it the proper thing to allow that to proceed without calling attention to it, and yet, it bore to my mind, the unmistakable ear-marks of preliminary preparation for bribery, and I thought that the best thing to do was to call the attention of counsel, (and I do not think it made any difference whether it was in the presence of the jury or not), to what was considered by the Court as the beginning of an attempt to bribe a juror, and to warn the person, who, I may say, was then in the court room, that if there was any further attempt in that direction, I would do my utmost to have him indicted by the grand jury. I would have done that without regard to the connection or relation of that person; I do not propose, as long as I occupy this bench, to tolerate any conduct of that character. Now, suppose I had mentioned the name of the person who was guilty, or whom I thought might be guilty? It might have operated to cast a reflection upon him that he did not deserve; he might have said that although he made use of those remarks, that they had reference to something entirely disconnected from this case, notwithstanding their equivocal character. Now, because of that occurrence, am I to discharge this jury, and lose all the time, all the care, and all the energy that counsel and litigants have devoted to it up to the present time? I have stated to the jury that no lawyer connected with this case, and no party to it, was a party to that communication to the juror. Now, if there is anything further that I can say in that direction that will tend more fully to clear those who are

connected with the trial of this case, I am willing to say it if counsel will suggest it to me, because I have not the remotest idea that that attempt, if it be one, was inspired by either side to this case.

By Mr. Isham: Certainly no one can concur with the Court more heartily than we in the view that the Court has expressed, that nothing of this kind should be tolerated, or that the slightest shadow should fall over this case; nor do we, for a moment believe or think in anywise that there was the slightest purpose in the mind of the Court of doing prejudice to one party or the other by the remarks which your Honor made this morning in the presence of the jury. They do, practically, because we think the burden of this thing will fall upon the defendants, and that the matter ought not to stop here; it ought not to be postponed, as your Honor suggested, but should be explored to the very bottom at once. Your Honor is perfectly aware that from the beginning to the end, in the long history of this case, there has been a parade that is familiar to the people of Kansas from one end to the other, of the poverty and weakness of this plaintiff, and of the moneyed power—that is the phrase dwelt on here in this forum continually—of the defendants. We cannot bring a witness from a distance; we cannot take a single step that involves a little expense, but it is immediately dwelt upon and has been here to an extent before the Court to an extent that I think ought to have been stopped, and ought not to be permitted, as evidence of the money power, and of the corruption of their witnesses and all that sort of thing, with nothing on the face of the earth to found it upon except the fact that we have been able to bring witnesses from a distance, or we have been able to do this, that or the other, to
925 throw light upon the identity of this body at Lawrence.

Now, the very first thought, if anything of this kind occurs, is, Why, such a thing cannot emanate from this poor woman! Of course, it is the act of these wealthy corporations! That is the sentiment that is published and spread abroad, and that is abroad in the community, and finds its expression continually from counsel in this case, which, I think ought not to be allowed without some evidence to support it; but the imputation is at once in the mind of every juryman here, as it would be in the minds of any group of people that might be gathered on the street, to whom this thing might be presented. "Oh, these insurance companies have done that; of course, this poor woman has nothing to buy jurors with." Now, with that fact, the absolutely certain fact of the situation before us, I think that it is absolutely impossible for us now to have a fair trial before that jury, and we ask these two things: We ask, in the first place, that whatever of this

sort of thing may have occurred, may be explored now; if we are guilty, if counsel here, who are connected with this case, if anybody on our behalf has been doing anything of this kind, we want to know it. If, on the other hand, anything of the kind has been done by anybody else, it ought to be known. If anything has been done and worked about so that it should be calculated to give an impression abroad that we have been doing anything of the kind, it ought to be explored; it ought to be shown whether it is true or not; but in the present situation, we think the whole thing should be explored now, and not deferred, and we think if it is deferred —in any event, in the light of what has transpired here, that it is impossible for us to have a fair trial. I think consideration ought to be given to the fact of the very great disparity in weight and force of the slightest implication or word that emanates from the lips of the Court, as compared with anything that counsel on either side might possibly say in the case. Any word emanating from the Court that casts a shadow upon a juror would be potent beyond expression, and the Court declares emphatically that it is convinced that the preliminary step towards bribing a juror has occurred in this case. To say that it has not been done by parties, and not done by counsel, does not exonerate us.

By the Court: How would counsel interpret that language? When I said I was convinced, I perhaps should have said that the language used was very suggestive.

By Mr. Isham: I agree with the Court; I agree with the Court that the language was quite sufficient to challenge investigation, to entirely justify the action of the Court, even more action of the Court, but I think it was not necessary that the opinion should have been expressed before the jury.

By the Court: What could the Court have done in that situation?

By Mr. Isham: It was just at adjourning; the jury might have been let go and counsel been retained and this matter laid before them as we are doing now; the jury might not have been retained here; they might have been let go, and this thing could all have taken place just as this discussion is now occurring between the Court and counsel; and then, in addition to that, the Court could take any measures, more rigorous and better I think; this man, whoever he may be, should be hauled right up now. I haven't the slightest idea who he is, but he and his relations and whoever is behind him, all should be brought right up, and the matter explored to the bottom now.

By the Court: It is something aside from the case on trial that that should be done now.

926 By Mr. Isham: The impression is inevitable in the situation upon the minds of the jury that an attempt has been made that, in the ordinary course of things would naturally be attributed to defendants in the light of the continual talk of counsel for plaintiff which has gone on since this trial commenced, and which will be continued until the Court stops it. We cannot protect evidence; we cannot go anywhere and preserve evidence for the purpose of throwing light on this question of identity under the issues in this case; we cannot take a single step in which we are not charged with corrupting witnesses by money power, and doing everything that ought not to be done, when everything objectionable throws light upon the question [as] issue. We have consulted upon this matter; our first impulse was to make this application and challenge investigation before the Court adjourned; but we postponed it and took time to consider it carefully; and fully considered it during recess, and we think it impossible for us to have a fair trial before this jury now.

By Mr. Barker: Let us assume that the juror who has been talked to believes as the Court does—that he has been approached. Now, it is no answer to that to say that he does not know by which side he has been approached; he may have his impression in regard to that matter. Now, I submit, to require a party to go on with the trial of the case before a jury, one member of which believes that he has been attempted to be bribed by one party or the other—that that jury is disqualified from sitting in the case.

By the Court: That position must be illogical; otherwise, in a case of importance, that is bitterly contested, and which keeps from three weeks to two months to try, it could be made possible that we would never come to the end of it.

By Mr. Barker: So far as that is concerned, that is only a question of the effect of those things, or the possibility of them; I think it ought not to change the fact; you are asking us to go on with the trial of the case before a juror who believes, and whom the Court thinks has attempted to be bribed. I submit that that juror's mind is not in a condition to receive evidence in this case; he is not in a condition to act fairly and impartially in this case; he believes one way or the other; if he has an impression of which side that came from, he will be striving and leaning against that side; in other words, he is absolutely disqualified from acting in this case, and, so far as that is concerned, that matter has now gone before the whole panel; it has got before the whole panel now in this case, that the Judge of this Court believes that a juror in the box has attempted to be—that there has been an attempt to bribe that juror. Now, I submit that a juror who has received an impression of that kind, however erroneous—and

I do not say that it is erroneous, so far as that is concerned, I do not say anything in regard to that, I do not criticize the views of the Court in regard to that matter—but I submit that these matters having occurred, that, the juror having heard these things, and having considered it of moment enough to refer it to the Court and the Court having considered it of moment enough to discuss it before the jury, that that jury is disqualified from going on and hearing this case, and acting fairly and impartially between the parties. As has been said by my colleague—it is not so long since you were at the bar that you cannot appreciate how much weight a remark of that kind coming from the Judge of the Court has; that the Judge of the Court being convinced, and expressing his opinion in that manner in which he did, would carry conviction to the minds of the jury, that a matter of that kind had taken place; and I am frank to say that so far as the defendants in this case are concerned, that they firmly believe from this time on, if this case goes on, they will not receive justice at the hands of the jury.

927 By the Court: The Court is not responsible for the language that was uttered by that man to the juror, and counsel for the plaintiff, counsel for defendants, and the litigants are not responsible for it; that the whole panel heard the remarks of the Court makes the situation, in principle, no different than it would be if the juror to whom the invitation was presented had alone heard it. Suppose that the juror who communicated this information to the Court had not done so until a verdict had been rendered in this case; nevertheless, he possessed the information at all times after the invitation—had been presented to him; would the fact that the juror had been approached be sufficient to authorize the granting of a new trial upon the claim made by counsel that he must have received certain impressions from the personnel of the parties to the case? I think not; so, in principle, there is no difference between a knowledge of the situation on the part of one juror, and a knowledge on the part of the entire jury, and I cannot agree with counsel that this incident prejudices one side or the other.

By Mr. Ware: There is another feature to this I would like to urge. Having heard what the Court said the language was, I have no doubt in my mind that that was right in the line with an attempt to bribe a juror; right in line with it. It is practically a contempt; it is within the presence of the Court, so to speak; it is a contempt of the Court. This matter has been discussed in open court; it will go into the newspapers. Now, why will not the Court bring that man right straight before this Court, or before the Judge and let the lightning fall wherever it will fall, and clarify the situation as to the public as well as the parties?

By the Court: I will consider that suggestion; I will not act on it now. The motion to discharge the jury is overruled. To which action and ruling of the Court the defendants and each of them and there duly excepted.

The jury were thereupon brought into Court.

928 The jury being in their seats the Court said: Gentlemen of the jury: In addition to what I said immediately before taking the noon recess to-day, I desire to say further that I have no idea that the communication that was made to the juror, the character of which I indicated to you, was inspired by any counsel connected with this case, or by any of the parties litigant, the plaintiff or either of the defendants, and I desire to instruct you that in the consideration of this case, and in your deliberations upon your verdict, you give no heed whatever to the incident that was mentioned.

Mrs. Sallie E. Smith on the stand.

Cross-examination concluded by Mr. Barker:

Q. I was asking you in regard to pictures; you have testified in regard to two pictures that you took down there, I believe one, at least, and you say that you took another picture down to the coroner's inquest, a picture of two people?

A. Yes, sir.

Q. What time did you take that down to the coroner's inquest, what time in the day?

A. I think that Mr. Clarke came in the forenoon, or just after noon, and I think he said for me to bring them down at two o'clock; I couldn't say positively.

Q. You think you went down there about that time, do you? A. I don't know.

Q. But he requested you to bring them to the court house?

A. And I took them.

Q. Was the coroner's inquest in session when you went down there in the afternoon at two o'clock?

A. I don't know whether I went in the afternoon at two o'clock.

Q. When you went down with the pictures, was the inquest in session?

A. They were sitting around a table—not around a table but around a small stand, and Dr. Morris and Mr. Green was there.

Q. Was the coroner's jury there?

A. Yes, sir, there was some men there.

929 Q. You took those pictures and gave them to whom?

A. I gave them either to the coroner or to the county attorney; they had them between them there.

Q. You mean they had them and examined them?

A. Yes, sir, I handed them—

Q. Didu't the jury examine them also?
A. I don't know as to that at all.
Q. Don't you remember the jury looking at those pictures?
A. No, the last time I saw them Mr. Green and the coroner had them in their possession.
Q. The other men were sitting around there?
A. Yes, I suppose so, but I don't have any remembrance just how—
Q. You say that is the last time you saw that picture?
A. Yes, sir, the last; they had it there.
Q. I will ask you if that coroner's inquest was not in session two or three days?
A. I don't know; I was just once there.
Q. I will ask you if you were not down there twice?
A. No, I think not.
Q. You don't know whether it was in session two or three days or not?
A. No, I don't know anything about that; I know I went down there, and was there quite a while and came away; I don't know anything more about it.
Q. And you say that is the last you saw of that picture?
A. Yes.
Q. Now, do you remember of testifying before that coroner's jury? A. Yes, sir.
Q. When was that; was that the same day that you took the pictures down or the next day?
A. It was the only time I was there.
Q. I ask you if it was the same day or the next day?
A. I wasn't there but the one time, so it must have been the time I took the pictures.
Q. It was in the afternoon of that day?
A. I don't know whether it was the afternoon or the forenoon; it was the time I took the pictures.
930 Q. And at the time you took the pictures, you testified? A. Yes, sir.
Q. Before the coroner's jury? A. Yes, sir.
Q. I will ask you if at the time you testified the jurors were looking at the various pictures that had been brought there?
A. I don't know anything about that; I just gave them to him and they took them; I don't remember anything about that.
Q. Don't remember about the jurors looking at the pictures. A. No.
Q. At the time the inquest was being held?
A. No, sir; I don't know anything about that.
Q. Now, in regard to your testifying; you remember of testifying before the jury? A. Yes, sir.
Q. Now, I will ask you if on that occasion, at the coroner's inquest at Lawrence, Kansas, in April, 1879, if you were not

asked upon the witness stand if you knew the height of your husband, and if to that question, you did not say No, I do not know his height; I never saw him measured.

A. No, I did not say that, Mr. Barker.

Q. I will ask you if you did not state that in substance?

A. I did not in substance.

Q. I want to ask you in regard to your husband's teeth, and your testimony on that subject before the coroner's inquest. I will ask you if you were not asked at that time what kind of teeth your husband had, and if you did not say that you did not know what kind of teeth he had, but you didn't think he had false teeth?

A. No, sir; I do not think that anybody asked me about his teeth.

Q. I will ask you if you were not asked that question.

A. No, sir; I was not asked that question.

Q. And if you did not make that statement in substance at that time before the coroner's jury?

A. I did not, because the question was not asked me.

Q. Now, I will ask you if you were not asked in regard to the weight of your husband, and if you did not tell the jury that you did not know his weight?

A. No, I think not, because I think I knew his
931 weight.

Q. I am not asking you why?

A. I don't think anything was asked me about his weight.

Q. I will ask you if you were not asked this question before the coroner's jury, if you were not asked in regard to the color and character of your husband's hair? A. Yes, sir.

Q. And if you did not say that you thought his hair was dark and that is all you knew about it, except you knew he had more hair than Mr. Green, pointing to Mr. Green, who was there then. Did you not make this answer in substance?

A. No, sir; they asked me about the color of my husband's hair and—

Q. I am not asking you what the color was; I asked you if you did not say that in substance and you say no. Mr. Green was there? A. Yes, sir.

Q. Don't you remember of comparing your husband's hair with his?

A. No, sir; I do not; he asked me if his hair was as dark as his and Mr. Green's hair was red.

Q. He was as bald headed as he is now?

A. Nearly so; it was in ridicule.

Q. I am not asking in regard to the manner; I am only asking what you said. Do you remember the circumstance?

A. I do.

Q. Now, after that coroner's inquest, or during the coroner's inquest, did you see Mr. Brown. A. Yes, sir.

Q. When and where did you see John H. Brown during the inquest. A. He was around the court room.
Q. Were you there when he was examined? A. No, sir.
Q. You did not hear his testimony?
A. I don't think I heard the testimony.
Q. You knew Mr. Borgolthaus, didn't you. A. Yes, sir.
Q. He was an attorney in Lawrence?
A. Later on he was my attorney.
Q. I am not asking about that. He was an attorney in Lawrence, was he not? A. I suppose so.
932 Q. He was present at this coroner's inquest, was he not, and sat there by you?
A. Oh, no; he sat nowheres near me.
Q. He was at the coroner's inquest, was he not?
A. He was there part of the time that I was there; I don't know whether he was there all the time or not, but he was there when I came away.
Q. He was there part of the time you were there?
A. He came in.
Q. He put certain questions, did he not?
A. Nothing more than when you got to asking me to examine that trunk, to get up and identify it, and I told you I could not, then he insisted it was ridiculous for you to ask me that; that is all he said; he objected to that just out of humanity's sake.
Q. You were asked to examine the trunk?
A. Yes, sir; Mr. Green asked me to examine it.
Q. Was it present?
A. It was right there in the room, and Mr. Green says, You can go and look at it.
Q. And you refused?
A. No; I couldn't tell anything about the trunk; there are hundreds of trunks of the same kind and I couldn't tell.
Q. Couldn't you identify your husband's trunk?
A. He only bought it in the morning of the day he went away, and I told them so, but they insisted on my going and looking at it, and Mr. Borgolthaus said it was not right.
Q. Mr. Levi Baldwin was in town?
A. I don't know whether he was there while I was there or not; I don't have any remembrance about that.
Q. You don't remember about his being at the coroner's inquest?
A. No, not while I was there; I don't think so.
Q. Do you remember of his testifying before the coroner's inquest? A. No, sir.
Q. Is it not a fact that Mr. Levi Baldwin had possession of these policies at that time and took them to various attorneys to get them to act in this case; didn't he take them to Judge Thatcher?

933 A. No, sir; he did not have those policies.
Q. Had he employed Mr. Borgolthaus?
A. No, sir; I employed him myself, later on.
Q. He was acting for you at that time, was he not?
A. Who?
Q. Mr. Levi Baldwin?
A. No, sir; not that I know of.
Q. You stated you did not know how long that coroner's inquest lasted? A. No, I don't.
Q. Well, at that time, you understood there was a controversy, did you not, in regard to whose remains they were; there was a disput- in regard to those being the remains of your husband?
A. I don't know what the dispute was; they claimed that it was not.
Q. You knew that it was claimed it was not your husband?
A. Yes, sir.
Q. That it was somebody else's body and not your husband's? A. Yes, sir.
Q. You knew that? A. Yes, sir.
Q. And you knew that question was being examined before the coroner's jury?
A. I didn't know how that was at that time.
Q. Now, when, after the coroner's inquest, did you next see John H. Brown. I want to put that a little more intelligently: When, after the coroner's inquest had closed, did you next see Mr. John H. Brown?
A. I owed him some money and I paid him off the evening I think he went away; I think that was the same evning I was down that day that I was at the inquest.
Q. You think you paid him some money?
A. At the time I saw him down there; he was around the court room.
Q. And he went away, did he?
A. I think he went home that evening.
Q. When did you next see him?
A. I think he came up afterwards, but I did not see him.
Q. I did not ask you when he came up; I asked you when you next saw him, Mrs. Smith?
A. I don't know but the one time that he went home; then he came back again, but I don't know whether it was the first or last time that I paid him.
934 Q. Do you remember when you next saw him after he went away?
A. I don't think I did until at Mr. Baldwin's place; that was the next time.
Q. We will not go into that matter now. Now, you stated on your direct examination that you made the acquaintance

of Mr. Buchan in Wyandotte in the spring of 1879; is that right? A. Yes sir.

Q. And when do you say he was at your house?

A. I think it was in the latter part of May or first of June that I went down to Wyandotte to Mr. Buchan's office with old Mr. Brown. Then later, in August, Mr. Buchan came to my house; in August.

Q. Mr. Buchan came to your house in August, did he?

A. Yes sir.

Q. Of 1879? A. Yes sir.

Q. And you had a little talk with him there or considerable talk?

A. Not very much talk; just a short time.

Q. You didn't have very much talk with him there?

A. No.

Q. What did you tell him there; did you not tell him if he wanted to know anything about this case to see your attorney, Mr. Borgolthaus?

A. Yes, or Mr. Wheat, or any of them, or Mr. Riggs.

Q. Didn't you tell him at that time if he wanted to know anything in regard to this case to see Mr. Borgolthaus?

A. No, I told him to go and see my attorneys.

Q. Didn't you tell him to go and see Mr. Borgolthaus?

A. I don't think so; I told him to go and see my attorneys and they could tell him all about it.

Q. You need not go further now. Is it not a fact that you met him there in the afternoon? A. Yes sir, I did.

Q. How did it happen if you did not tell him to go and see Borgolthaus, that you met him at Borgolthaus' office the same afternoon?

A. Because he told me he would meet me at Mr. Borgolthaus' office if I would meet him there.

Q. Haven't you testified in this case three times before that you told him if he wanted to know anything about
935 your case to go to your attorney, Mr. Borgolthaus, and that you went down there and saw him there in the afternoon?

A. I told him he could see my attorneys and then he said he would—

Q. How did he know who your attorneys were?

A. I dont' know.

Q. You don't know that he knew?

A. I suppose he knew, though.

Q. You think you did not tell him?

A. I may have told him Mr. Borgolthaus was one of them.

Q. You don't recollect in regard to that? A. No.

Q. You recollect meeting him there? A. I do.

Q. You had but very little if any talk at the house before he went there?

A. He came up to see me and talk about the case.

Q. What did you say?

A. I told him I didn't know much about it but the attorneys could tell him, and he could see them; then he asked me if I would meet him at Mr. Borgolthaus' office.

Q. And you went down and met him in the afternoon?

A. Yes sir.

Q. Did you have any talk in regard to the case?

A. No; I think he just asked me something about how we were getting along, stayed around a few minutes, and then said it was train time and he must go and went away.

Q. When did you next see Mr. Buchan?

A. I think I next saw him at Leavenworth.

Q. On the 15th day of September, 1879? A. Yes sir.

Q. Now, you saw Mr. John H. Brown on the 12th day of September, 1879, at Mr. Levi Baldwin's residence in Leavenworth county, Kansas, did you not?

A. I came to Leavenworth on Monday.

Q. Now, if you say it was the 15th on which you were at Leavenworth and signed these releases, then I will ask you if you did not see John H. Brown on the evening of Friady before that?

A. Yes, and then I went to Leavenworth the following Monday; that would be—I don't know whether it would be the 12th or 13th; it was two days before I went to Leavenworth.

Q. Where were you on the morning of Friday, the 12th day of September, 1879? A. I was in Lawrence.

936 Q. At Mrs. Judson's? A. Yes sir.

Q. Did you see Levi Baldwin that day?

A. Yes sir.

Q. What time did he come there to your house?

A. Why, I think along about noon.

Q. About noon of the 12th day of September, 1879?

A. I don't know whether it was the 12th.

Q. It was the same day on which you saw John H. Brown?

A. Yes sir.

Q. Then, what did you do; did you go from Mrs. Judson's out to Levi Baldwin's house? A. Yes sir.

Q. Did you go with Mr. Baldwin, Levi Baldwin?

A. A part of the way, I did.

Q. Part of the way; you went from your house down to the ferry with Mr. Levi Baldwin? A. No, sir.

Q. How did you go?

A. He came—He usually came in on Fridays and took us to the country; the bridge was down and he came on horse-

back; he came up and told us he couldn't take us out on Friday; so that, I wanted to go out home, out to my mother's and I went down on the street and met him; I told him I was going out home; he says, You can't go; he says, I am in on horseback; the bridge is down and I couldn't go; you can't go; I will get you next Friday. I said No, I am going out home.

Q. You went out, did you? A. Yes sir.
Q. On that Friday evening? A. Yes sir.
Q. You rode out in a spring wagon or a lumber wagon?
A. We crossed—
Q. I ask you how you rode out from the city of Lawrence to Mr. Levi Baldwin's? A. I think I went in a big wagon.
Q. You think you went in a big wagon?
A. I know I did.
Q. You rode out in a big wagon from Lawrence to Mr. Levi Baldwin's? A. No, I did not.
Q. From North Lawrence? A. No.
Q. Where did you go?
A. I went part way, about three miles—

Q. Wait a moment. How did you start from the
937 city of Lawrence on that occasion?

A. I walked down the street and met Mr. Baldwin; we went down to the river bank and went over in a little row boat and when we got over there he said—
Q. I am not asking what he said; I am asking how you went over there.
A. I was going to tell you. We got up on the north side, and looked around, and he says, Sallie—
Q. I am not asking for what he said; I am asking you how you went out.
A. I am trying to tell you how I came to get there.
Q. Go on and state how you got there.
Q. He says, There is nobody here; none of the neighbors and I can't take you—

By the Court: It is not proper to repeat what Mr. Baldwin said to you; just state how you got out.

Q. Not the conversation, but how did you get out?
A. He found a neighbor living within about three miles of his house and he asked him if I could go—
Q. I asked you how you got out. You have testified eight times in this case, have you not? Once before the coroner's jury, once before Snyder, and six times in this case; this is the sixth time before this court, is it not?
A. I don't know whether I testified to this or not.

By the Court: You walked down to the river, you crossed the river in a row boat, and got on the north side of the river; then what did you do?

A. We found a neighbor who was going out to within three miles of Mr. Baldwin's and I got into the wagon and rode that far with him, and then Mr. Baldwin came for me in the evening; he went home, got his carriage and came back for me.

By the Court: State it that way, without stating the conversation.

Q. What kind of a wagon did you ride out in, a spring wagon, or a lumber wagon? A. A lumber wagon.

Q. You rode out in a lumber wagon within three
938 miles of where Mr. Baldwin lived, is that correct?

A. It was some distance.

Q. What distance should you say?

A. I don't know; I could not tell exactly; it was not very far from Baldwin's.

Q. Where was Mr. Baldwin when you rode out with this neighbor in the lumber wagon?

A. He rode alongside of the wagon.

Q. You could not state what was said?

A. They were talking while we were going down there, but I don't know that I said very much or not.

Q Who was this man that you rode out with?

A. Mr. Baldwin introduced him to me, but I don't remember his name.

Q. You don't know who you rode out with on that occasion? A. No, I don't.

Q. You could not describe the man?

A. No, I could not describe him.

Q You never have been able and you have been asked that question on every trial of this case, to tell who that man was that you rode out with; you have never been able to tell, have you?

A. I never inquired; I never met the man afterwards that I know of.

Q. I say you have never been able to tell?

A. I never inquired; I never asked his name.

Q. I ask if you have ever been able to tell?

A. I never heard his name afterwards, I don't believe.

Q. Now, where did that man leave you?

A. He took me to his house.

Q. Whereabouts was his house with reference to Levi Baldwin's? A. It was between Levi Baldwin's and Lawrence.

Q. How far was it from Levi Baldwin's to Lawrence?

A. Between nine and ten miles, I think.

Q. And you say this house was between Levi Baldwin's and Lawrence? A. Yes, sir.

Q. How long did you remain at that house?
A. We got there just in the evening; I don't know just how high the sun was; Mr. Baldwin went on home.
939 Q. I asked you about how long you remained in the house? A. I can't tell.
Q. Haven't any idea how long you remained?
A. Oh, yes, I have some idea; I remained until after supper; it was dark when we went away.
Q. Do you remember of eating supper?
A. No, I didn't eat any supper.
Q. Then Mr. Baldwin came after you and took you to his residence? A. Yes, sir.
Q. In Leavenworth county, Kansas? A. Yes, sir.
Q. And when you got there you found John H. Brown there, did you not? A. Yes, sir.
Q. Had you seen John H. Brown from that time when you saw him at Levi Baldwin's had you seen him since the coroner's inquest? A. I don't think I had.
Q. The last thing you done before that time, was to give John H. Brown some money? A. Yes, sir.
Q. No, what time should you say you got to Levi Baldwin's that night, what was it in your just judgment?
A. It was in September.
Q. I know, but I am asking you what time in the night it was? A. I don't know.
Q. Haven't you any idea whether it was late or early?
A. About nine o'clock at least.
Q. You think it was about nine o'clock?
A. I don't know; it must have been nine o'clock or half past nine; he went home, did his chores and came back.
Q. When did you first learn that John H. Brown was out there?
A. I don't know; I don't know whether I learned it from Mrs. Baldwin or whether Mr. Baldwin told me as we were going home.
Q. You don't recollect? A. No, sir.
Q. Then you saw John H. Brown that night, did you?
A. Yes, sir.
Q. Now, go on and state as definitely as you can the conversation that you had with John H. Brown at Levi Baldwin's that night, being the 12th of September, 1879?
940 A. I don't know that I can give it any more than I went into the room; he spoke to me, and then he said that Mr. Buchan had sent him up there to see me in regard to this case.
Q. Had you seen Mr. Buchan, now, between the time that you had referred him to Mr. Borgolthaus, and this time?
A. No.

Q. Go on and state what else he said?

A. He said that Mr. Buchan wanted to see me at some place, and I told him Mr. Buchan could see me at Lawrence; he said, No, Mr. Buchan didn't want to see me at Lawrence.

Q. At that time, Mr. Wheat was one of your attorneys and had possession of the policies, did he not? A. Yes, sir.

Q. Mr. Wheat lived here at Leavenworth? A. Yes, sir.

Q. Your cousin, Levi Baldwin, lived in Leavenworth county four miles from Tonganoxie? A. Yes, sir.

Q. That is correct, is it not? A. Yes, sir.

Q. Go on and state what was said now between you and John H. Brown?

A. He said that Mr. Buchan had sent him up there to see me and wanted me to meet him at some place about this case; I told him that he could come to Lawrence, and he said no, he didn't—Mr. Buchan said he didn't want to meet me at Lawrence, but he would meet me at any other place. I asked him why, what he wanted to see me about, and he said he couldn't explain, but Mr. Buchan would explain it. I don't think there was much more said that evening.

Q. At that time did Mr. John H. Brown tell you what he had done? A. No, not at that time; the next morning.

Q. Did he tell you what he proposed to do?

A. Not that evening, I don't think.

Q. You don't think he told you that evening he had made a contrary statement, he had made a statement and would swear to it that that was not the body of your husband but the body of somebody else?

A. I don't think he made that statement that night.

941 Q. I understood you to testify in your direct-examination that it was claimed that this body at Lawrence was the body of a man by the name of Nichols. When did you first hear that claim advanced, if you remember?

A. I don't know.

Q. I will call your attention again to what took place there Friday night when you first saw John H. Brown. You have stated a part of it; now, if there is anything else, state it?

A. I think that was about all of the conversation we had that evening.

Q. Did John Brown remain there at Mr. Baldwin's over night? A. Yes, sir.

Q. Levi Baldwin was there at home that night?

A. Yes, sir.

Q. And his family was there? A. Yes, sir.

Q. And he stayed and ate breakfast there the next morning, John H. Brown did, he not?

A. I don't know about eating breakfast.

Q. But he stayed there until the next morning?
A. I saw him about nine o'clock the next morning.
Q. You had another talk with him there, did you?
A. Yes, sir.
Q. Now, what was that conversation?
A. I asked him what—I wanted him to explain himself, what he meant by the conversation we had the evening before; he said he couldn't explain himself but he said if I would see Mr. Buchan that he could explain it to me; then I wanted—I kept insisting on knowing and he went on to say then he had made a contrary statement from the one he had made at Lawrence and at Medicine Lodge.
Q. Did he make that statement at Levi Baldwin's house?
A. Yes, sir.
Q. In the sitting room? A. Yes, sir.
Q. Where was Levi Baldwin at that time?
A. I don't know; he was not there.
Q. He was not in the room?
A. No, sir, he was not in the room.
Q. Was Mrs. Baldwin in there? A. No.
Q. Nobody in there except you and John H. Brown?
A. No, sir.
Q. And he told you then that he had made a statement and would stick to it?
A. Well, I don't know about sticking to it, but he said he had made a contrary statement, and if I would go and
942 see Mr. Buchan, Mr Buchan would explain it to me and that Buchan would have the statement at Leavenworth, or wherever we went.
Q. Was there anything else said there? A. I don't know.
Q. What arrangement did you make then to meet Mr. Buchan at Leavenworth?
A. Well, now, in the conversation he spoke of—that there was a warrant out for him, and that Mr. Buchan was then at Lawrence while he was there, while he was at Mr. Baldwin's, that Buchan was at Lawrence to keep the officers from arresting him while he was up there; he said Mr. Buchan was at Lawrence while he was up there to Mr. Baldwin's; that there was a warrant out for him. I told him I didn't believe there was any warrant out for him; he said, Yes, there was, and he said that was the reason he had made this contrary statement.
Q. What I asked you, Mrs. Smith, was if you made an arrangement there to meet Mr. Buchan in the Planters house, and if so, when.
A. Yes.
Q. What arrangement did you make with Mr. Brown about meeting Mr. Buchan at Leavenworth?

A. Well, at last, he insisted, would not explain any more, and said if I would meet Mr. Buchan at any place besides Lawrence he would explain the whole matter to me—

Q. Will you please tell the jury what arrangement you made as to meeting Mr. Buchan and when and where you told Mr. Brown you would meet him?

A. After this conversation he insisted on so much I told him I would meet him at Leavenworth.

Q. Did you tell him where you would meet him?

A. No, just Leavenworth; I think Mr. Wheat's office, perhaps.

Q. You didn't say anything about Mr. Wheat's office, did you?

A. No—

Q. Never mind then; you made an arrangement with Mr. Brown to meet Mr. Buchan at Leavenworth on the following Monday?

A. Yes, sir.

Q. Did you tell him what train you would be over on?

A. No, I said there was just one train.

943 Q. You went to Leavenworth the next Monday morning, did you?

A. Yes.

Q. Who took you to the depot that morning?

A. My cousin, Mr. Baldwin's little son, oldest boy.

Q. Mr. Baldwin's oldest boy took you to the Tonganoxie depot on the following Monday morning to go to Leavenworth to meet Mr. Buchan?

A. Yes, sir.

Q. You say you went over there; did any one go with you?

A. No, sir.

Q. Where was Mr. Baldwin that Monday morning; where did you leave him?

A. He was there because I wanted him to take me to the train and he wouldn't do it.

Q. He was at home, was he?

A. I don't know whether he was, but he was there at home when I asked him to take me over to the train and he wouldn't take me.

Q. When you got to Leavenworth, you met Mr. Buchan at the depot?

A. He met me at [at] the depot, yes sir.

Q. You had had no further communication with anybody in regard to your going to Leavenworth after Brown left, had you?

A. I told Mr. Baldwin I was going to Leavenworth.

Q. Now, after Buchan met you, I understand you went to the Planters Hotel?

A. Yes, sir.

Q. And you had a talk with Mr. Buchan there, did you?

A. Yes, sir.

Q. Mr. Brown came there?

A. Yes, sir.

Q. You had a talk with Mr. Buchan in the presence of Mr. Brown?

Q. Now, what did Mr. Buchan say to you in the presence of Mr. Brown? and what did you say to him; just be as brief in regard to it as you can. Mr. Buchan said that he had sent for me to come to Leavenworth to explain what he and Brown had done; he went on to say that—He says, Has John Brown told you? I said, No, I can't understand it. He said, Well, that Brown had made a contrary statement from the one he had made at Medicine Lodge and Lawrence.

Q. Mr. Brown wasn't there at that time?

A. Yes.

Q. Mr. Brown heard the statement?

A. Yes, he came in and when he was making that statement he was there.

944 Q. Then he said Mr. Brown had made a contrary statement.

A. Yes.

Q. You are positive about that?

A. Yes, sir.

Q. Go on and state what else he said.

A. He said he being Mr. Brown's attorney, and that there was a warrant out for Brown, and that Brown had made a contrary statement to the one he had made at Medicine Lodge and Lawrence, and I had better surrender those policies.

Q. What did you do in regard to that?

A. I told him I wouldn't do it.

Q. What did Mr. Brown say in regard to his having made a contrary statement, when Buchan said that Brown had made a contrary statement. What reply did Brown make to that, what did he say or do?

A. I don't know just when—whether he did or not; he came in and sat down and held his head down; he didn't talk very much.

Q. Have you stated all that was said by each one that you remember of?

A. Oh, no.

Q. I want you to try to state all that was said on that occasion, now, in regard to giving up these policies, and what was said particularly in regard to Brown having made a contrary statement.

A. He told me that Brown had made a contrary statement and that there was a warrant out for him, and that he was

Brown's attorney and that he was going to get him out of this trouble.

Q. You said you would not give them up?

A. Yes, sir, I told him they had no right to them.

Q. That was before dinner, was it not? A. Yes, sir.

Q. Did you have any conversation after dinner?

A. Yes, sir.

Q. Was any part of the conversation in the afternoon in the presence of Mr. Brown?

A. I think all the conversation about this case was while Brown—I will tell you; Brown was in there part of the time and part of the time he was walking backwards and forwards out in the hall.

Q. State substantially what was said after dinner, 945 after you had had lunch.

A. I didn't have lunch.

Q. After the other's had lunch then; I understand that you were sick at that time?

A. Yes, sir.

Q. On Friday you had ridden over from Lawrence to Levi Baldwin's in a lumber wagon, and this day you were sick?

A. I was not well at any time.

Q. State what was said there after dinner.

A. I think it was about the same as during the forenoon, he insisted on my giving up the policies, said they wouldn't be any used to me, as if I ever did sue on the policies, he would put Brown on the stand, and Brown would testify that was not the body of my husband, but was the body of a man my husband had killed.

Q. Was Mr. Brown there when he made that statement?

A. Mr. Brown was right there.

Q. You are positive? A. Yes, sir.

Q. What did Mr. Brown say when Mr. Buchan made a statement of that kind?

A. Mr. Brown said he had made that statement and he would have to stick to it.

Q. Have you stated substantially all he said after dinner?

A. Not all of it.

Q. If there is anything else that occurred after dinner, state it.

Q. I can't state any more than I told him I knew that was the body of my husband and I should keep the policies.

Q. You had seen your husband there at Lawrence?

A. I had seen him at Lawrence.

Q. And you had seen Levi Baldwin and Alva Baldwin, and knew they had been down there?

A. He said he was my main witness, and if he put him on the stand, he would put him on the stand—if I ever brought suit for these policies, he would put him on the stand and he

would swear that that was not the body of my husband but was the body of a man that my husband had murdered.

Q. Afterwards, that same afternoon, you signed the releases?

A. Yes, sir.

946. Q. All the releases that have been shown here. I will ask you if those releases were witnesses by John H. Brown?

A. No sir, they were not; John H. Brown was not—I did not see him sign his name.

By Mr. Hutchings: They show on their face that they were witnessed by him.

By Mr. Barker: Do you admit it?

By Mr. Hutchings: Yes.

Q. Where were these releases signed?

A. At the Planters House.

Q. Amout what time? A. Along in the afternoon.

Q. You signed three releases there, did you not, that day?

A. I could tell by the date. They were all dated at that time.

Q. Will you look at these papers?

A. Yes, it is September 15th.

Q. There are three? A. These all have my signature.

Q. They are all witnessed by John H. Brown, are they not?

A. His name is there but I didn't see him sign it.

Q. You don't know of any other John H. Brown being there that day?

A. That is John H. Brown's handwriting, but I didn't see him signing them.

Q. At the same time, you signed this order that is already in evidence? on Clough & Wheat? A. Yes sir.

Q. What time in the day did you sign that?

A. I don't know.

Q. After you had signed that order you went down to Clough & Wheat did you? A. Yes sir.

Q. You went down with Mr. Buchan? A. Yes sir.

Q. Did John H. Brown go down there? A. No sir.

Q. You asked Mr. Wheat for the policies?

A. I asked Mr. Brown to go with us and he wouldn't go.

Q. You asked Wheat for the policies? A. Yes sir.

Q. You have stated what the conversation was, that Mr. Wheat said he thought this was a fraud, and that he had a lien on them for ten thousand dollars?

A. Not himself; the attorneys.

947 Q. The attorneys had a lien on them for ten thousand dollars? A. He said about that.

Q. About ten thousand dollars. You didn't get the policies? A. No sir, didn't get them.

Q. You went down there for the purpose of getting them. How did you come to go down there?

A. Mr. Buchan insisted on my going with him.

Q. You knew the policies were there? A. Yes sir.

Q. You had given them to Mr. Wheat in Borgothaus' office long before that, hadn't you?

A. Yes, sir, I had given them to Mr. Wheat.

Q. Over in Borgolthaus' office? A. Yes sir.

Q. You gave them to Mr. Wheat in Borgolthous' office along in the month of June, 1879?

A. I think about the 14th or 15th of May.

Q. About the 14th or 15th of May, 1879, you gave them to Mr. Wheat in Borgolthaus' office? A. Yes sir.

Q. After having signed these papers, you went back to the hotel, did you A. Yes.

Q. And you say that the train had gone when you went back?

A. I don't know just when it went; when I spoke of going home he said the train had gone.

Q. How long did you stay at the hotel after you came back the first time? A. Just a short time.

Q. Then the train had gone?

A. I presume so; he said it had.

Q. Then you went to Kansas City with Mr. Buchan, did you? A. To Wyandotte.

Q. What is Kansas City, Kansas, now? A. Yes sir.

Q. You stayed at the hotel that night? A. Yes sir.

Q. The next morning I understand you to say that you saw Mr. Buchan in his office? A. Yes sir.

Q. That is a fact? A. Yes sir, that is a fact.

Q. You met him and Mr. J. H. Brown at Mr. Buchan's office? A. Yes.

Q. Were any papers shown or read to you at Leavenworth before you signed these releases?

A. None whatever.

948 Q. You are positive in regard to that?

A. Yes sir, he told me I didn't need to read them, to just sign them.

Q. I know, but were there any other papers excepting these releases; you saw them; were there any other papers?

A. He just put them on a table and said sign them; he said I didn't need to read them.

Q. Were any other papers shown to you excepting the releases and the orders you signed?

By Mr. Hutchings: Where?

Q. At Leavenworth, at the Planters House, on the 15th of September, 1879?

A. No, I didn't see any other papers; he said he didn't have Brown's statement there; he said it was at Wyandotte and if I would go home with him he would give it to me.

Q. And you went with him, did you?

A. Yes sir.

Q. There was a paper produced there, was there?

A. Yes sir.

Q. That paper was read, was it?

A. There was two papers; Mr. Brown's statement was there; he got that.

Q. You read that, did you? A. No.

Q. You didn't read Mr. Brown's statement?

A. No, just a part of it.

Q. You just read part of Mr. Brown's statement?

A. Yes sir.

Q. You say there was another paper there?

A. Yes sir.

Q. You have described it as the Munn paper, have you not; that is the paper that you have already identified and marked as an exhibit.

A. That is the one; Mr. Buchan read that to me.

Q. That was the first time, was it, that you had ever seen or heard of this paper?

A. Yes, sir, the first and only time.

Q. That was at Mr. Buchan's office after you had signed all these releases and this order? A. Yes sir.

Q. Had you gone with him to Mr. Wheat's office to get the policies? A. Yes sir.

Q. Then he showed you this paper at Wyandotte?

A. He gave it to me.

Q. He gave it to you and you gave it back to him, did you?

A. I told him I didn't want it; I had no use for that
949 paper; that my husband was dead.

Q. You said that the other was torn up, did you?

A. Yes sir. The statement he took away from me; he said I couldn't keep it; he said I couldn't have it; he had promised to give it back to Brown and he would keep it or destroy, and Brown tore it to pieces, one of them, and put it in the stove.

Q. It was put in the stove there? A. Yes sir.

Q. And you went back to the hotel?

A. I went back to the hotel, yes sir.

Q. How long did you remain at the hotel?

A. I think I was there two days and then he took me to his home.

Q. How long did you remain there at his home?

A. I don't know just how long, a week or two, until I got to feeling better.

Q. Then you went down to Ottawa, did you?

A. Yes sir, I went to Ottawa.
Q. You had a sister living down there at Ottawa?
A. Yes sir.
Q. Where was your mother living then?
A. She lived in Leavenworth county.
Q. Where from Tonganoxis?
A. Six miles west of Tonganoxie.
Q. On a farm near Baldwin's? A. Yes sir.
Q. You had a married sister living in Ottawa?
A. Yes sir.
Q. What was her name? A. Winslow.
Q. Do you know where she is now? A. Yes sir.
Q. Where? A. Portland, Oregon.
Q. How long did you remain there?
A. Not very long; I can't tell just how long I did remain there; not very long.
Q. Several days? A. Oh, yes, several days.
Q. Well, about how long? A couple of weeks?
A. No, I don't know; I went to Wyandotte on the 16th of September, and then I came back.
Q. You say you don't remember how long you stayed down there? A. No sir.
Could not have stayed very long.
950 Q. But you stayed there until you got a letter from Mr. Buchan, did you not? A. Yes, sir.
Q. Have you shown that letter in evidence? Is it a fact that the letter which he wrote you was destroyed?
A. I presume it is.
Q. Do you know anything in regard to it?
A. No, I looked for it; I think it was destroyed.
Q. Was that burned up?
A. Yes, sir; I think it was with the other letters.
Q. That was burned up at the same time some other papers were burned up? A. Yes, sir.
Q. It seems that all of your papers were not burned, but only a portion of them?
A. What I had at mother's were burned up; there some that I didn't have there that were not burned up.
Q. When you got this letter, you came to Wyandotte again, did you? A. Yes, sir.
Q. Can you tell how long it was from the time you left Wyandotte until you came back again?
A. It was not very long.
Q. Did you sign some other papers after you came back up there? A. Yes, sir.
Q. Look at this paper now shown you?
A. That is my signature, and it seems it was on September 25th, so I must have been back at Wyandotte on the 25th.
Q. Is that the paper you signed at that time?

A. I think it is; yes, sir.

Q. Look at Exhibit 24 and state if that is a paper which you signed in Mr. Buchan's office in Wyandotte on the 25th day of September, 1879, after you had returned from your sister's in Ottawa?

A. I don't know whether I signed it at his office or whether he wrote it up to the house.

Plaintiff objects to the examination as not proper cross-examination. The Court overruled the objection, to which ruling the plaintiff at the time duly excepted.

951 A. I don't remember where I signed it; I don't have any recollection of ever going to his office after that.

Q. Is that the paper which you signed in Wyandotte on the 25th day of September, 1879, after you had visited your sister in Ottawa, Kansas; state whether it is or not?

A. I don't know; I signed it there at Wyandotte.

Q. Did you sign it on the date of it?

A. I presume so, though I don't know as to that now, because I didn't write it; I didn't write it, but it is made out at Wyandotte, September 25th; I did not read the paper and don't know anything about it.

Q. Did you sign it after you had visited your sister?

A. I don't know.

Q. I will ask you, for the purpose of refreshing your memory, if Mr. Buchan didn't write you to come back there and finish up some papers, and if you did not go up there and sign that identical paper in Wyandotte?

A. I know he did write me that there was a paper that he wanted me to sign; I don't know whether this is it or not?

Q. Didn't you go up there to sign that paper?

A. I don't know whether to sign that paper; I signed that paper.

Q. Will you look at that signature; is that your signature?

A. That is my signature.

Q. But you don't know whether you signed that paper after you came back from your sister's or not?

A. I presume I did.

Q. Don't you know that you did?

A. I can't say positively.

Q. Just to refresh your memory, I will ask you if you did not state on the trial of this case before Judge Williams in 1896 that you went down to your sisters, and that you got a letter from Mr. Buchan and that you came back up to Wyandotte and signed this very paper which was then marked 14?

A. Oh, I don't think I made it that strong, because if I did, I surely made a mistake, because I can't tell.

Q. You can't tell in regard to it?

A. I did sign a paper when I came back, and I sup-
952 pose that is the one.

Q. How long did you remain at Wyandotte then?
A. I don't know.
Q. About how long. A. Quite a while, then.
Q. Then I understand you went to your sister's in Trenton, Missouri? A. No, sir; you didn't so understand.
Q. Where did you? A. I went to my aunt in Trenton.
Q. How long did you remain there?
Q. How long did you remain there?
A. I came back about the holidays.
Q. I ask you how long did you stay in Trenton?
A. I don't know, because I don't know when I went there.
Q. Can't tell about that? A. No, I can't tell.
Q. Haven't you any idea about how long you remained?
A. No, I can't tell how long I remained.
Q. Then you came back and went to your mother's?
A. I came back to mother's; yes, sir.
Q. Where was your mother living then?
A. Living on the old home place.
Q. Out there by Levi Baldwin's? A. Yes, sir.
Q. Was he living there then? A. Yes, sir.
Q. And continued to live there, did he? A. Yes, sir.
Q. Do you know where Alva Baldwin was living then?
A. Yes, sir.
Q. Living out there in Kanwaka township, Douglas county?
A. Yes, sir.
Q. Had you been at his house?

Question objected to and withdrawn.

Q. Do you remember when this suit was brought originally? A. When do you mean; the first trial?
Q. About the time the suit—about the time of the first trial? A. Yes, sir; it was tried the first time in 1882.
Q. I will ask you if shortly before the trial of this case you were at or near Valley Falls in Jefferson county? A. No.

Q. I will ask you if you are acquainted with one W.
953 W. Nichols?

A. I don't know just when I went to Valley Falls.
Q. I ask you if you are acquainted with one W. W. Nichols?
A. Not personally acquainted with him; I met him.
Q. When did you meet him?
A. One time when I went to Valley Falls.
Q. When was it with reference to the first trial of this case?
A. It was before the trial of this case.
Q. It was before the first trial of this case? A. Yes, sir.
Q. In the summer before? A. I don't know.
Q. You remember the circumstance of your going to his house, do you? A. Yes, sir.
Q. Were you there more than once? A. No, sir.

Q. Then you went to his house near Valley Falls in Jefferson county before this case was tried? A. Yes, sir.

Q. And you learned from him, did you not, that he was well acquainted with your husband?

The plaintiff objects to the question as not proper cross-examination and hearsay. The Court sustained the objection.

By Mr. Barker: I will withdraw the question entirely.

Q. You went there to see Mr. Nichols, did you not?

A. Yes, sir.

Q. And you had a conversation with Mr. Nichols in regard to your husband's appearance, did you not?

A. Well, I asked him if he could give a description of my husband.

Q. Now, in that description, didn't he state to you that your husband had a scar upon one hand or the other, caused by the explosion of a cartridge; if he didn't tell you that?

The plaintiff objects to the question as not proper cross-examination and hearsay.

By the Court:

It would be cross-examination, but it is hearsay evidence. By that, I do not mean to exclude any declarations that this lady may have made.

By Mr Barker: Does the Court exclude that question?

By the Court: Yes.

954 To which ruling of the Court the defendants and each of them at the time duly excepted.

A. I will ask you if you did not request him, if he was called as a witness, not to tell about that scar upon his hand?

A. I did not.

Q. You did not make and such request of him?

A. No, I did not.

Q. You had him subpoenaed as a witness, did you?

Question objected to, and not pressed for answer.

A. I will ask you if, at the first trial of this case, on the streets of this city of Leavenworth, during the first trial of this case, if you did not go to Mr. W. W. Nichols and request or ask him not to tell or testify in regard to the scar which your husband had upon his hand? A. I did not.

Q. Did you have conversation of that kind?

A. No, not at that time but in his house he asked if I—

Q. You say you had no conversation of that kind while here in the city? A. No, I did not.

Q. Now, at the first trial of this case, Mr. Hillmon's sister Mrs. Nixon, was here, was she not?

The plaintiff objects to the question as not proper cross-examination. The court overruled the objection, to which ruling the plaintiff at the time excepted.

A. I do not think her name was Nixon; Nichols I think the name was.

Q. Well, you know Mrs. George Nichols, do you, Mrs. George Nichols?

A. Well, I never met her; I met her at the different trials but I never talked to her but once.

Q. Will you answer my questions, please. Do you know Mrs. George Nichols? A. Yes, I know her.

Q. Do you know what relation she is to Mr. Hillmon?

The plaintiff objects to the question as not proper cross examination. The Court overruled the objection to which ruling of the Court the plaintiff at the time duly excepted.

A. Mrs. George Nichols was Mr. Hillmon's sister.

Q. Do you know Mrs. Nixon?

A. No, I saw her at the same time but I have no ac-
955 quaintance with either one of them.

Q. Mrs. Smith, you spoke about burying this body; who went out to the cemetery with you at that time?

A. Mother, Mrs. Judson, Mr. Arthur Judson, Levi Baldwin and Mr. Brown.

Q. John H. Brown? A. Yes sir.

Q. Do you remember who was the sexton at that time of Oak Hill cemetery?

A. No I don't remember; that was the first time I had been there.

Q. Do you remember the location of the lot or the number of the lot he was buried in? A. I have the number.

Q. Was it a single grave or a lot? A. Just a single grave.

Q. Can you tell in what part of the cemetery it was?

A. It was the eastern part.

Q. You say you have that number?

A. I have it, yes sir.

Q. The number of the grave?

A. Yes sir, I did have it somewhere; I haven't it with me.

Q. Will you find and produce it some time before we close finally; you need not delay court today?

A. I don't know as I can; I can get it by going to Lawrence; I have it somewheres but I don't know just where it is.

Q. Will you produce it during the trial, if you can?

A. Not unless I can go to Lawrence and get it.

Q. Where are you living now, Mrs. Smith?

A. About three miles out in the country on a farm.

Q. Here in Leavenworth county? A. Yes sir.

Q. How long have you been living here in Leavenworth

county on that farm? A. Over a year.

Q. You formerly lived here in the city, did you not?

A. Yes sir.

By Mr. Barker: I want to offer in evidence and read, the last exhibit identified by the witness.

The plaintiff objects to the admission of the same as incompetent, irrelevant and immaterial. The court over-
956 ruled the objection to which ruling of the Court the plaintiff at the time duly excepted and still excepts.

Said paper was thereupon read in evidence to the jury and is in words and figures as follows, to wit:

This paper is Ex 24, and is as follows, to wit:

"Exhibit No. 24, Oct. 99. W. C. H. Judge."

Wyandotte, Ks. Sept. 25th, 1879.

In consideration of one dollar to me in hand paid the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the New York Life Insurance Company of New York by reason of Policy No. 134,418, dated on the 30th day of November, 1878, and policy No. 134,548, dated on the 16th day of December, 1878, and for five thousand dollars each, issued on the life of my husband John W. Hillmon, and I hereby enter satisfaction in full and order the dismissal and discontinuance of any and all suits or proceedings commenced or that may hereafter be begun by any person or persons in my behalf for the collection of the same.

SALLIE E. HILLMON.

Attest:

W. J. Buchan.

957 The Connecticut Mutual Life Insurance Company, defendant, adopts the cross examination as its own.

And in answer to re-direct interrogatories propounded to [him] by Mr. Hutchings, Counsel for the plaintiff, the witness testified as follows, to wit:

Q. They have just read a paper signed by you. I will get you to state whether you ever received anything for that paper? A. I did not.

Q. You may state whether you were ever promised anything for it? A. I was not.

Q. You may state whether you ever received anything for any paper that you signed in the presence of Mr. Buchan?

The defendants object to the question as not a re-examination. The Court overruled the objection, to which action and

ruling of the Court the defendants and each of them at the time duly excepted.

A. I never received anything or promise of anything from any of them for the surrender of those policies, those releases; I never received anything or the promise of anything.

Q. Well, did you receive anything or the promise of anything, for any paper that you signed? A. No, never.

Q. Now, there is a couple of questions which I thought I asked you on direct examination but my associates say not. I will ask you them now. I will get you to state whether Mr. Hillmon had any scar on his hand or head? I was of the impression that I had asked that question.

A. No sir, he had no scars on his hands or on his head.

Q. I will get you to state whether or not he had a mole on his back, and if so, where was it located?

The defendants object to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

958 A. He had a mole on his back.

Q. On what part of his back as near as you can tell?

A. Just below the shoulder blade near the spine.

Q. You may state whether you were personally acquainted with any of the relatives of your husband, John W. Hillmon?

A. I am acquainted with his youngest sister some.

Q. I am speaking about whether you were at the time of your husband's death? A. No, I had never met any of them.

Q. Had you ever seen any of them?

A. No, I had not seen any of them.

Q. On your cross-examination, you said that you paid John Brown some money, I believe, on the occasion that you saw him last before you saw him at Baldwin's? A. Yes, sir.

Q. You may state what the money was for; what the payment was for?

[Q.] It was some back pay that my husband owed him after he employed him to go with him south, so I paid him off.

Q. It was wages that your husband owed Brown?

A. Yes, sir.

And in answer to recross interrogatories propounded to him by George J. Barker, counsel for the defendants, the witness testified as follows, to wit:

Q. I believe you have been present at the trial of all these cases? A. I have.

Q. This is the sixth trial of the case? A. Yes, sir.

Q. You were present in this court when what is known as the Fort Madison depositions were read the first time the case was tried, were you not?

A. I don't know whether I was there at that time.

Q. You were present at the time that those depositions were read on the first, second, third, fourth and fifth trials of this case, were you not?

A. I don't know whether I ever heard all of those depositions read or not.

Q. You have been present at all the trials of this case, have you not?

A. Yes, sir, have been present but not all the time.

959 Q. Nearly all the time; when the plaintiff was putting in her case, when you were putting in your case, you have been present all the time have you not?

A. Yes, or nearly so.

Q. You have heard one C. R. Walters testify in this case four or five times, have you not, the brother of Frederick Adolph Walters?

The plaintiff objects to the question as not proper cross-examination. The court overruled the objection, the plaintiff then and there duly excepting.

A. In part, yes, sir.

Q. You heard him testify that his brother, Frederick Adolph Walters had a mole on his back, did you not?

The plaintiff objects to the question as not proper cross-examination and hearsay. Objection overruled, the plaintiff duly excepts.

A. Yes, sir.

Q. I will ask you to state, Mrs. Smith, if you have ever in the trial of this case before testified that your husband had a mole on his back? A. Yes, sir.

Q. State when and where; on what trial?

A. On several trials.

Q. You say on several trials of this case, that you have testified that your husband had a mole on his back?

A. Every time that I was asked.

Q. Were you ever asked that question before?

A. Yes, sir.

Q. Will you state on what trial you first testified to that?

The plaintiff objects to the question as not proper cross-examination and not impeaching testimony. Objection overruled, the plaintiff duly excepting.

A. I don't remember but I have testified to it.

Q. Did you testify to it before Judge Foster?

A. I don't know whether it was asked me at that time.

Q. Did you testify before Judge Foster on the trial of this case in 1882 that your husband had a mole upon his back?

A. I don't remember; if I had been asked the question I should.

960 Q. You don't remember whether you did or not?

A. No, I don't remember whether the question was asked.

Q. Did you testify that your husband had a mole upon his back before Judge Brewer?

The plaintiff objects to the question as not proper cross-examination; objection overruled; plaintiff duly excepts.

A. I did if I had been asked the question.

Q. Will you answer whether you did or not, or don't recollect, whatever the fact may be?

A. My impression is that I did. If I had been asked the question I would have answered it.

Q. I wish you would answer my questions. Did you or did you not testify before Judge Brewer that your husband had a mole upon his back?

A. If I had been asked the question I should have answered it; I can't tell now.

[—] On the trial before Judge Shiras did you testify that your husband had a mole upon his back? A. I think I did.

Q. On the trial before Judge Thomas did you testify that your husband had a mole upon his back? A. I think I did.

Q. Now, I will ask you if it is not a fact that the first time that a question of that kind was raised was when this man Covey testified upon the trial before Judge Thomas and that they did not ask you anything about that on the direct examination, about this question of a mole; that Covey went upon the witness stand and testified, and that, after he had testified in regard to it, if you were not called back, and asked for the first time in regard to your husband having a mole upon his back, in court?

The plaintiff objects to the question as calling for secondary evidence. Objection overruled, the plaintiff duly excepts.

A. I think that I answered at every trial that I was asked.

Q. I am only asking you now in regard to this particular trial.

A. No, I can't remember anything about it, but I presume I answered yes, I think I answered every time I was asked.

Q. At the trial before Judge Williams, Mr. Covey

961 did not testify did he? A. I don't remember.

Q. Do you not know he was in jail at Lawrence at that time and that he did not testify?

The plaintiff objects to the question as not proper cross-examination; objection overruled, the plaintiff duly excepts.

A. I never heard of anybody being in jail until here the other day.

Q. Leave out that then; you know that he did not testify at this trial before Judge Williams, nor was his testimony read in evidence? A. I don't know as to that.

Q. You don't remember in regard to that?

A. No, I don't remember.

Q. Now, at the last trial of this case before Judge Williams in 1896, did you testify anything in regard to your husband's having a mole upon his back? A. Yes, sir.

Q. You did? A. I am sure I did.

Q. Before Judge Williams, what do you say in regard to that, before Judge Williams in 1896; you are positive? Are you clear that you testified that your husband had a mole upon his back? A. Yes, at every trial.

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection overruled, the plaintiff duly excepts.

A. Now, you state that he had a mole? A. Yes, sir.

Q. Have you stated on what portion of his back or body it was? A. Yes, sir.

Q. Whereabouts was it? A. It was right—

Q. Describe it if you can; I want to get it in the record. Locate it as well as you can.

A. It was just below the shoulder blade just close to the spine.

Q. It was below the shoulder blade close to the spine, was it?

Q. Now, describe it as accurately as you can?

A. It was a little soft mole.

962 Q. Quite a large mole? A. No, sir.

Q. Quite a long [—] mile? A. Not very.

Q. Not very large nor very long, a soft mole?

A. Not as big as half of a pea; a small pea.

Q. In regard to the color; what color was it?

A. Well, I don't know, rather dark, I should think.

Q. You should think it was rather dark?

A. I rather think it was dark.

Q. You think you remember that it was dark, do you?

A. Yes.

Q. Did he have more than one?

A. That was all I ever saw on his back.

Q. That is all you ever saw? A. Yes, sir.

And in answer to further direct-interrogatories propounded to her by Mr. Hutchings, Counsel for the plaintiff, the witness testified as follows, to wit:

Q. I will get you to state whether at each one of these trials you have been examined and cross-examined by counsel in the same matter that you were examined this time?

A. I don't understand, Mr. Hutchings; you mean by the same parties?

Q. By the Court: You mean with reference to rulings?

By Mr. Hutchings: I mean that she gave her testimony by being interrogated by counsel? A. Yes, sir.

Q. You may state whether at each trial, of this case you have been interrogated by counsel for yourself and for the other side? A. Yes, sir.

Q. Now, I will get you to state whether upon every trial of this case, you have answered every question that was asked that the judge permitted you to answer? A. Yes, sir.

Witness excused.

963 Here, the defendants moved the Court to take from the jury Exhibit 1,5 known as the Munn paper, for the reason that the plaintiff fails to connect the exhibit in any way, or to show that she ever saw or knew of the existence of the paper before the releases were signed, and therefore could not have influenced her in her action and is therefore incompetent, and irrelevant in the case. The Court overruled the motion, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

By the Court: I think there is one matter that should be withdrawn from the jury. I allowed J. D. Patterson, who will be recalled as the dentist who made a plaster-cast of the mouth of the cadaver, to testify that in his opinion the body which was at Lawrence was the body of the taller of two men whose picture he saw in the possession of Dr. Morris. It was stated at that time that the identity of that picture would be shown; that the taller of the two figures in the picture was an accurate photograph of Hillmon. It has been shown that there was a picture containing two figures, one taller than the other, and that in the picture, the taller man was Hillmon and the other one was Brown, but it is not shown sufficiently to my mind that that was the picture that Mr. J. D. Patterson saw, and for that reason, gentlemen of the jury, I direct that you do not consider the testimony of Mr. Patterson wherein he stated that the body that he saw at Lawrence was the body of the taller of two men whose picture he saw. The remainder of his testimony that was admitted, stands, of course.

To which ruling of the Court, the plaintiff duly excepted.

Here, the plaintiff having concluded her evidence in chief, rested her cause.

And thereupon each defendant for itself demurred to the evidence adduced and offered by the plaintiff for the
964 reason that the same is not sufficient, in law, to entitle the plaintiff to a verdict against it.

And thereupon, the plaintiff asked leave to offer proof on the subject of the citizenship of the parties, which leave was by the Court granted.

And thereupon, Mrs. Sallie E. Smith, was again called to the stand, and in answer to direct-interrogatories, propounded to her by Mr. Hutchings, her Counsel, testified as follows, to wit:

Q. When did you say you came to the State of Kansas?
A. In the fall of 1872 or 1873; I think it was 1873.
Q. You may state whether you have been a resident of the state ever since?
A. I have never been out of the state excepting in Missouri and Ohio once since I came here.
Q. Never been out of the state but once?
A. I have lived in Lawrence and Leavenworth.
Q. At the time this suit was brought, where did you reside? A. Lawrence, Kansas.
Q. How long had you been residing there at that time?
A. Since 1876; I had lived in the city of Lawrence since 1875.
Q. State whether you have ever resided in any other state since you came to Kansas in 1872? A. No, sir, I have not.
Q. At the time you brought this suit you were a single woman; you were not married?
A. Yes, sir; I was not married.

The, defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: The jury will not consider the answer to that question as evidence upon the question of the death of John W. Hillmon.

By the Court: You had not married Mr. Smith at that time? A. No, sir. I had not.
965 By the Court: Where was your home, madam, at the time of the institution of this suit, your permanent home? A. Lawrence, Kansas.

Witness excused.

966 Ike S. Lewis, a witness produced by the plaintiff, being first duly sworn, testified as follows, to wit.

Direct-Examination

By Mr. Wheat:

Q. What is your name? A. My name is Ike S. Lewis.

Q. Where do you reside? A. At present at Topeka.

Q. What position do you hold at present?

A. Chief clerk in the State Insurance Department.

Q. Of what state? A. The state of Kansas.

Q. Have you some papers from that office? A. Yes, sir.

Q. Are they those in your hand? A. Yes, sir.

Q. Let me ask you if those are papers that are on file in your office? A. Yes, sir.

Q. I will ask you where you found those papers?

A. I found these papers in the vault in the Insurance Department, in the proper vault box.

Q. Of this State of Kansas?

A. State of Kansas, yes, sir.

Q. The chief of that office, the superintendent—what is his name? A. W. V. Church.

Q. Let me ask you where the superintendent is at present?

A. At present he is in Michigan.

Q. Now, his assistant, deputy or whatever you call him, his assistant at this time at Topeka, Kansas, was he there last night?

A. Yes, sir, he was called away at four o'clock yesterday afternoon.

Q. At what time?

A. At about four o'clock he left Topeka.

Q. When did the superintendent leave?

A. The superintendent left about three weeks ago.

Q. And has not been back since? A. Yes, sir.

Q. I will ask you if as chief clerk you are in charge of the office?

A. Yes, sir, during the absence of Mr. Church and his assisant.

Q. You are in charge? A. Yes, sir.

967 Q. I will ask you where you got these papers that you have just handed me?

A. They were gotten out of a vault box with other papers there.

The papers are marked respectively, Exhibits 25, 26, 27 and 28.

The plaintiff offers said papers, and each of them, in evidence.

The defendants, and each of them, object to said papers, and to each of them, because they and each of them are incompetent, irrelevant and immaterial, because they do not in any way tend to prove the incorporation or citizenship of the defendant companies or either of them.

The Court overruled the objections, to which action and ruling of the Court the defendants and each of them then and there duly excepted.

Said papers were thereupon read in evidence, and are respectively in words and figures as follows, to-wit:

968

Letter of Attorney.

To Acknowledge Service of Process.

Know All Men by These Presents:

That the Mutual Life Insurance Company of New York, a corporation created by and organized under the laws of the state of New York and hereby authorized to transact the business of life insurance, desiring to transact such business within the state of Kansas, pursant to the laws thereof, does by these presents irrevocably consent that actions may be commenced against said company in the proper court of any county in the state of Kansas, in which the cause of action shall arise, or in which the plaintiff may reside, by service of process upon the Superintendent of Insurance of the State of Kansas, and the said, The Mutual Life Insurance Company of New York, does hereby, in consideration of the privilege of doing business in the state of Kansas as aforesaid, stipulate and agree that such service of process shall be taken and held in all courts to be as valid and binding as if due service had been made upon said company according to the laws of said state of Kansas, or of any other state.

In witness whereof, The said company, in accordance with a resolution of its board of directors, duly adopted by said board on the twenty-first day of July, A. D. 1875 (a certified copy whereof is hereto attached), hath to these presents affixed its corporate seal, and caused the same to be subscribed and attested by its president and secretary, at the City of New York in the state of New York on the 22d day of July, 1875.

P. W. AUSTIN,
President.

Attest: J. W. M. STUART, Secretary. [Seal.]

Copy Resolution Within Referred to.

Resolved, That the president of the Mutual Life Insurance Company of New York be and he is hereby authorized to execute and file in the Insurance Department of the state of Kansas, as required by the laws of that state, the written consent of the company, that actions may be commenced against said company in the proper court of any county in said state in which the cause of action, if any, shall arise, or in which the plaintiff may reside, by service of process upon the Superintendent of Insurance of said state; and stipulating and agree-

ing, as required by the laws of Kansas, that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or secretary of the company.

A true copy. J. W. H. STUART,
Attest: Secretary.

Indorsed: Letter of attorney from the Mutual Life Insurance Company of New York in the State of New York. Filed July 21, 1875. Orrin T. Welch, Superintendent. [Seal.] Exhibit No. 28, Oct. 99, W. C. H., Judge.

969 At a meeting of the board of directors of the Connecticut Mutual Life Insurance Company, held the fourth day of June, A. D. 1875, a quorum being present, it was "Voted: That the officers of the company be authorized to execute a power of attorney to the Superintendent of Insurance of the State of Kansas, to accept service of legal process in accordance with the laws of that state."

A true copy. JOHN M. TAYLOR,
Attest: Asst. Secy.

Letter of Attorney.

To Acknowledge Service of Process.

Know All Men by These Presents:

That the Connecticut Mutual Life Insurance Company, a corporation created by and organized under the laws of the the State of Connecticut, and thereby authorized to transact the business of life insurance, de[x]iring to transact such business within the State of Kansas, pursuant to the laws thereof, does by these presents irrevocably consent that actions may be commenced against said company in the proper court of any county in the State of Kansas, in which the cause of action shall arise, or in which the plaintiff may reside, by service of process upon the Superintendent of Insurance of the State of Kansas; and the said Connecticut Mutual Life Insurance Company does hereby, inconsideration of the privilege of doing business in the State of Kansas as aforesaid, stiuplate and agree that such service of process shall be taken and held in all courts to be as valid and binding as if due service had been made upon said company according to the laws of said State of Kansas, or of any other state.

In witness whereof, The said company, in accordance with a resolution of its board of directors, duly adopted by said board on the fourth day of June, A. D. 1875 (a certified copy whereof is hereto attached), has to these presents affixed its corporate seal, and caused the same to be subscribed and attested by its president and secretary, at the City of Hart-

ford, in the State of Connecticut, on the fourth day of June, 1875.

[Seal]

JAMES GOODWIN,
President.

Attest: JOHN M. TAYLOR, Asst. Secretary.

Indorsed: Letter of Attorney from the Connecticut Mutual Life Insurance Company of Hartford, in the State of Conn. Filed June 18th, 1875. Orrin T. Welch, Superintendent. [Seal.] Exhibit 27, Oct. 99, W. C. H., Judge.

970 At a General Assembly of the State of Connecticut, holden at New Haven, in said state, on the first Wednesday of May, in the year of our Lord one thousand eight hundred and forty-six.

Incorporating the Connecticut Mutual Life Insurance Company.

Resolved by this Assembly: Sec. 1. That Edson Fessenden, Richard M. Browb, E. O. Goodwin, E. B. Pratt, David. S. Dodge, Guy R. Phelps, Thompson J. Work, L. B. Goodman, Hoyt Freeman and James A. Ayrault and all others who may become members or associates with them as hereinafter provided, and their successors forever, be and they hereby are created, ordained, constituted and declared to be a body corporate and politic by the name of The Connecticut Mutual Life Insurance Company, to be located in the city of Hartford, in this state, and by that name they and their successors shall and may forever hereafter be capable in law to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in all courts of record and in every other place or places whatsoever; also, to devise, have and use a common seal, and the same to break, change, alter and renew at pleasure; also, to obtain, establish and put in execution all such by-laws, rules and regulations as shall be necessary and convenient for the government of said corporation, and for the proper management of the concerns thereof; also to purchase, hold and convey any estate, real or personal, for the use of said corporation; Provided, the real estate so holden be only such as be necessary for the purpose of erecting buildings thereon, in which to meet and transact the business of said corporation, or such as shall have been bona fide mortgaged to it by way of security, or conveyed in satisfaction of debts contracted in the course of its business, or taken in execution on judgments or decrees, which shall have been obtained for such debts or for other cause.

Sec. 2. That Edson Fessenden, E. B. Pratt and Guy R. Phelps, or either two of them, shall have power to call the first meeting of said corporation, by giving notice of the time and

place of holding the same, in two newspapers published in Hartford, at least fifteen days before the time of holding the same; which said meeting shall be held at the city of Hartford; and shall be called within twelve months from the passage of this act, when said corporation shall elect by ballot twelve directors, who shall be members thereof, a majority of whom shall be citizens and residents of this state, and none of whom shall hold a like office or agency in any other life insurance company, who shall manage the concern of said company until others are elected, and no member shall be eligible as a director for more than four successive years, except the directors holding the office of president and vice-president.

Sec. 3. The election of directors shall be holden in Hartford, on the first Wednesday of January in each year, at the office of the company, or such other place in the city of Hartford, as a majority of the directors may designate; public notice
971 of which shall be given by the secretary in one or more newspapers printed in the city of Hartford, at least two weeks previous to the time of holding such election. And if any of said directors shall die, the remaining directors shall have power to fill such vacancy or vacancies until the next annual meeting. And in case an election of directors shall not be held on the day designated by this act, the corporation shall not be dissolved for that cause, but such meeting may be held thereafter on any day within one year, to be designated by the board of directors for the time being, they giving two weeks' previous notice by publishing the same in one or more newspapers, printed in Hartford.

Sec. 4. That the directors shall have power to choose a president, vice-president, secretary and such other officers and servants as they may deem necessary for the prosecution of their business. The president and vice-president shall hold their respective offices for the term of one year, and until others are chosen in their stead, but may always be re-elected or chosen; and the other officers and servants of said corporation may be changed by the board of directors at their pleasure. And said directors shall at all times superintend and manage the funds, property and effects of said corporation; five of whom shall constitute a quorum for the transaction of business.

Sec. 5. That all and every person or persons who shall at any time hereafter become insured in or with said company, shall be deemed and taken as members of said corporation, for and during the time specified in his or their respective policies, and no longer, and shall at all times be concluded and bound by the provinces of this act.

Sec. 6. That it shall be lawful for the members of said company to cause their respective lives to be insured therein, and to grant policies upon all and any insurance appertaining to or connected with life risks, annuities and premiums of whatever kind or nature.

Sec. 7. That it shall be lawful for said corporation to loan their funds and moneys, or any part thereof upon bond and mortgage of unincumbered real estate, but the same at the time shall be worth at least double the amount loaned thereon, and upon State stocks and bank stocks, such stocks to be worth twenty-five per cent. above the amount loaned thereon at the time, and may call in and reinvest the same at pleasure under the provisions of this section.

Sec. 8. That policies may issue to any married woman in her name or in the name of a third person as trustee, to cause to be insured for her sole use the life of her husband for any given period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance shall be payable to her and for her own sole use and benefit, free from any claims of either or any of the creditors or representatives of her husband, and in case of the death of the wife before the decease of her husband, the amount of
972 the insurance may be made payable after her death, to her child or children, for his or their benefit, and to his, her or their guardian or guardians, if under age. Provided, that this section shall not apply to insurance when the annual premium on the policy shall exceed the sum of one hundred dollars, unless paid from the private property of the wife.

Sec. 9. That the corporation may take the promissory notes or other obligations of the insured in part or for the whole of the premium of insurance at the discretion of said company.

Sec. 10. That all policies of insurance which shall be made by this company, in pursuance of this act, may be made on such terms and conditions and for such periods of time and confined to such persons as shall be from time to time ordered by the by-laws of said corporation. And if at any time there shall be a just claim on this company for losses sustained to a greater amount than they have funds on hand to discharge, in such case the directors for the time being shall immediately assess such deficiency in a ratable proportion, on all persons or their representatives, who are indebted by note or other obligations to this company, given in advance according to the amount of each note or obligation; (Provided, that such assessment shall not exceed the amount of the aforesaid notes or other obligations respectively) of which assessment written notice shall be given by said company to each person so assessed as aforesaid, said notice stating the amount required to

be paid by the person so assessed and notified. And each and every person or his or her legal representaives so notified, shall pay the same to the company within sixty days after said notification, and in default thereof shall forfeit all right and claims to any policy that he or she may have obtained, be no longer a member of said corporation and shall be liable to the amount of such assessment and for all future assessments, with lawful interest till paid, to be recovered by action with costs, before any court of competent jurisdiction. And said company may at any time collect the whole or any part of the debts due them according to the terms of such contract.

Sec. 11. That all policies issued by said corporation, shall be with or without the seal thereof and on being signed by the president, or vice-president and countersigned by the secretary, shall be obligatory and binding upon said corporation, according to the tenor and true intent of said policies.

Sec. 12. That all suits at law, or in equity, may be prosecuted and maintained by any member against said corporation, and every member thereof, not being in his individual capacity a party to said suit, shall be competent as a witness therein, in like manner, in any suit, in law or in equity, prosecuted and maintained by said company as plaintiff or complainant against any member of said company.

Sec. 13. That the company may receive notes or other securities for premiums in advance from persons intend-
973 ing to receive its policies, for which such persons may be allowed a sum not exceeding six per cent. per annum. And said company may negotiate the same for the purpose of paying claims only. This section to be in operation for the term of two years only from the time of the commencement of business by the company.

Sec. 14. On the first Wednesday of January after the organization of said company, or within one month thereof, and in like manner and at like time in each succeeding year, the said company shall cause an estimate to be made of the profits and true state of their affairs for the preceding year, which estimate shall be conclusive and binding upon all persons entitled to receive certificates as is hereinafter provided, and shall thereupon cause a balance to be struck of the affairs of said company in which they shall charge each member with a proportionate share of the losses and expenses according to the original amount of premiums paid by him or her, (but in no case shall such share exceed the amount of such premium), and such member shall be credited with his or her proportionate share of the amount of the premiums earned, after deducting the losses and expenses and of the profits of said company derived shall be credited to each member for his

or her proportionate share of the premiums earned, and he or she shall be entitled to a certificate on the books of the company; such certificate to contain a proviso that the amount named therein is liable at any future time for any future losses of the said company. No certificate, however, shall be issued for any sum less than one dollar or for any fractional part or parts of dollars, but all such fractional parts shall be placed to the contingent account of the company and applied to the expenses and other charges of the then current year. No interest shall accrue or be allowed on such certificates.

Sec. 15. The said company shall annually cause to be made a general balance sheet or statement of their affairs, which shall contain the amount of premiums received during the year, the balance remaining with the company, and the kind and condition of the security on which the same is invested, and also the amount of cash on hand, a copy of which shall be delivered to each member on demand.

Sec. 16. Whenever the net profits of said company shall exceed in amount the sum of two hundred thousand dollars, the excess may be applied from year to year towards the redemption of each year's certificates in the order of their dates and according to their respective priorities, and all certificates issued, are liable to be called in or reduced in amount pro rata, in consequence of subsequent losses sustained by the company beyond their profits.

Sec. 17. That in case any person entitled to a certificate of profits shall be indebted to said company, they may withhold the certificate and deduct such indebtedness therefrom, or cancel the same according to the amount of said indebtedness; but no person entitled to a certificate shall be personally answerable by reason thereof, or of any thing contained therein, except for the payment of premiums or other notes, or obligations given in advance for premuims.

974

Sec. 18. If a loss accrues under any policy, the certificates of profits issued under the same shall become payable at the same time with such policy, if such policy expires by lapse of time without loss, then the certificates issued under the same shall remain outstanding, and liable to assessments and entitled to payment according to the provisions of this resolution.

Sec. 19. That every member of said company shall at all times have the liberty to inspect the books and records of said company, and in case of any suit against or in favor of said company, any court of record shall have power to compel

by any proper order the production of the books and records of said company.

Sec. 20. It shall be the duty of said company to make an annual report, containing a full, true and accurate statement of its condition and affairs to the General Assembly of this State.

Sec. 21. Said company shall not be entitled to banking privileges, nor shall anything contained in this act be construed to grant such privileges.

Sec. 22. This act shall be subject to alteration, amendment or repeal at the will of the Legislature.

At a General Assembly of the State of Connecticut, holden at New Haven, in said State, on the first Wednesday of May, in the year of our Lord one thousand eight hundred and forty-eight.

Upon the petition of the Connecticut Mutual Life Insurance Company praying for certain alterations in the charter of said company, as per memorial on file.

Resolved by this Assembly: Sec. 1. That the charter of the Connecticut Mutual Life Insurance Company be so amended as that the president of said company, when authorized by a vote of the directors, shall have power to call a meeting of the members of said company at any time, giving the same notice of the time and place of holding said meeting, as is now required previous to the holding of the annual meeting.

Sec. 2. That whenever a vacancy shall occur in the board of directors by resignation or otherwise, the same may be filled by the directors until the next annual meeting.

Sec. 3. That the annual meeting of said company shall be held on the third Wednesday of February of each year, instead of the first Wednesday of January.

Sec. 4. That the proviso of the eighth section of the charter of said company, be so amended as that said section shall not apply to insurance when the annual premium shall exceed the sum of one hundred and fifty dollars unless paid from the private property of the wife, instead of the sum of one hundred dollars, as is now provided.

This resolve may be altered, amended or repealed, at the pleasure of the General Assembly.

At a General Assembly of the State of Connecticut, holden at New Haven, in said State, on the first Wednesday of May, in the year of our Lord one thousand eight hundred and fifty-two.

Resolved by this Assembly: That the time for holding the annual meeting of the members of the Connecticut Mutual Life Insurance Company, be, and is hereby changed from the

third Wednesday of February to the fourth Wednesday of March, in each year.

At a General Assembly of the State of Connecticut, holden at New Haven, in said State, on the first Wednesday of May, in the year of our Lord one thousand eight hundred and fifty-six.

Upon the petition of the Connecticut Mutual Life Insurance Company praying for certain alterations and amendments, of the charter of said company, as per memorial on file.

Resolved by this Assembly: Sec. 1. That the charter of the Connecticut Mutual Life Insurance Company, be, and is hereby so altered and amended, as that policies of insurance may be issued by said company, either for the whole continuance of life or for a definite term of years, stipulated to be without participation in the profits or earned premiums of said company, and upon such terms and conditions as shall be ordained by the directors, and no person by reason of such an insurance, shall be deemed a member of said company or thereby entitled to any of the benefits and privileges conferred by the act of incorporation of said company as a mutual company, to the members thereof, and the fifth and fourteenth sections of the charter of said company, are hereby so construed and amended as to accord with this resolution.

Sec. 2. That section fourteenth of said charter, be further amended as that dividends or earned premiums may be credited to the members of the company, at the discretion of the directors and that such dividend credits or certificates may be made due and payable at such times and in such manner as the directors, by their votes, shall determine, and nothing in said section shall require a dividend to be credited to a member, until he or she shall have been insured for the period of one year, and have paid two premiums to said company.

Sec. 3. If a loss occurs under any policy, upon which but one premium has been paid, the certificates of earned premium or dividend credit to said policy shall not be due and payable with said policy, but said dividend credit to
976 the insured by said policy, shall be deemed and treated as invalid and canceled, and section eighteen of the charter of said company is so altered and amended as to conform to this resolve.

Sec. 4. That every male adult member of said company, who is a citizen of this state, shall be eligible to the office of director of said company, and no restriction shall exist to the eligibility of a member to be chosen a director for any number of successive years, so long as he remains a member of said company, and section second of the act of incorporation

of said company is so amended as to conform herewith. This resolve may be altered, amended or repealed at the pleasure of the General Assembly.

State of Connecticut,
Office of Secretary of State—ss.

[Seal]
I hereby certify that the foregoing is a true copy of record in this office.

In testimony whereof, I have hereunto set my hand, and affixed the Seal of said State at Hartford, this 29th day of September, A. D. 1871.

D. W. EDGECOMB,
Asst. Secretary of State.

Insurance Department, Kansas, Oct. 9, 1871. Received and filed.

Examined and approved. W. C. Webb, Supt.

Indorsed: Charter of the Conn. Mutual Life Ins. Co. of Hartford, Conn. O. K. Exhibit, 25 Oct., '99. W. C. H., Judge.

977 Chapter 246.

An Act to incorporate the Mutual Life Insurance Company of New York.

Passed April 12, 1842, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

Section 1. William H. Aspinwall, James Brown, John W. Leavitt, Elihu Townsend, James S. Wadsworth, Philip S. Van Rensselaer, Gouverneur M. Wilkins, John V. L. Pruyn, Thomas W. Olcott, Charles L. Livingston, Joseph Blunt, Jacob P. Giraud, John C. Cruger, Alfred Pell, David C. Colden, Jacob Harvey, Robert B. Minturn, Mortimer Livingston, Rufus L. Lord, Arthur Bronson, Henry Brevoort, Theodore Sedgwick, Stacy B. Collins, Robert C. Cornell, James Boorman, James Campbell, William Moore, Morris Robinson, Xebedee Cook, Junion, Jonathan Miller, Fitz Green Hallock, John A. Kong, T. Romeyn Beck, Richard V. De Witt, Gideon Hawley and James J. Ring, and all other persons who may hereafter associate with them in the manner herein after prescribed, shall be a body politic and corporate by the name of "The Mutual Life Insurance Company of New York."

Sec. 2. In addition to the general powers and privileges of a corporation, as the same are declared by the third title of the eighteenth chapter of the first part of the Revised Statutes, the corporation hereby created shall have the power to insure their respective lives, and to make all and every insurance appertaining to or connected with life risks and to grant and purchase annuities;

The real estate which it shall be lawful for the said corporation to purchase, hold and convey, shall be:

1st. Such as shall be requisite for its immediate accommodation in the convenient transaction of its business, or

2d. Such as shall have been mortgaged to it in good faith by way of security for loans previously contracted, or for moneys due, or

3d. Such as shall have been conveyed to it in satisfaction of debts, previously contracted in the course of its dealings, or

4th. Such as shall have been purchased at sales upon judgments, decrees or mortgages obtained or made for such debts.

The said corporation shall not purchase, hold or convey real estate in any other case or for any other purpose, and all such real estate as shall not be necessary for the accommodation of said company in the convenient transaction of its business shall be sold and disposed of within six years after the said company shall have acquired title to the same, and it shall not be lawful for the said company to hold such real estate for a longer period than the above mentioned.

978 3. All persons who shall hereafter insure with the said corporation, and also their heirs, executors, administrators and assigns, continuing to be insured in the said corporation as hereinafter provided, shall thereby become members thereof, during the period they shall remain insured by said corporation and no longer.

4. All the corporate powers of the said company shall be exercised by a board of trustees and such officers and agents as they may appoint. The board of trustees shall consist of thirty-six persons, all of whom must be citizens of this State. They shall elect a president annually, who shall be a member of this corporation and shall have power to declare by by-law, what number of trustees less than a majority of the whole, but not less than nine, shall be a quorum for the transaction of business.

5. The persons named in the first section of this act shall constitute the first board of trustees.

6. The trustees shall, at their first meeting, divide themselves by lot, into four classes of nine each. The term of the first class shall expire at the end of one year, the term of the second class shall expire at the end of two years, the term of the third class shall expire at the end of three years, the term of the fourth class shall expire at the end of four years, and so on successively each and every years. The seats of these classes shall be supplied by the members of this corporation, plurality of votes constituting a choice, but an insurance of at least one thousand [dollar] dollars in amount shall be necessary to entitle any member to vote. This sec-

tion shall not be construed to prevent a trustee from going out or from being eligible to a re-election. The board of trustees may fill any vacancies in their number, occasioned by death, resignation, or removal from the State. The election of trustees shall be held on the first Monday of June in each year at such place in the city of New York as the board of trustees shall designate, of which they shall give at least fourteen days previous notice, in two of the public newspapers printed in said city, and the board of trustees shall at the same time appoint three members of the said corporation inspectors to preside at such election; and if any of the said inspectors decline or fail to attend, the trustees may appoint others to fill such vacancies.

7. Every person who shall become a member of this corporation by effecting insurance therein, shall the first time he effects insurance, and before he receives his policy, pay the rates that shall be fixed upon and determined by the trustees, and no premium so paid shall ever be withdrawn from said company, except as hereinafter provided, but shall be liable to all the losses and expenses incurred by this company during the continuance of its charter.

8. The trustees may determine the rates of insurance and the sum to be insured.

979 9. It shall be lawful for the said corporation to invest the said premium in the securities designated in the following sections, and to sell, transfer and change the same and reinvest the funds of said corporation when the trustees shall deem expedient.

10. The whole of the premiums received for insurance by said corporation, except as provided for in the following sections shall be invested in bonds and mortgages on unincumbered real estate within the State of New York, the real property to secure such investment of capital shall, in every case, be worth twice the amount loaned thereon.

11. The trustees shall have power to invest a certain portion portion of the premiums received, not to exceed one-half thereof in public stocks of the United States, or of this state or of any incorporated city in this state.

12. Suits at law may be maintained by said corporation against any of its members, for any cause relating to the business of said corporation; also suits at law may be prosecuted and maintained by any member against said corporation for losses by death, if payment is withheld more than three months after the company is duly notified of such losses; and no member of the corporation shall be debarred his testimony as witness in any such cause, on account of his being a member of

said company. And no member of the corporation not being in his individual capacity a party to such suit, shall be incompetent as a witness in any such cause on account of his being a member of said company. And no member of the corporation.

13. The officers of said company at the expiration of five years from the time that the first policy shall have been issued, and bear date, and within thirty days thereafter, and during the first thirty days of every subsequent period of five years, shall cause a ballance to be struck of the affairs of the company in which they shall charge each member with a proportionate share of the losses and expenses of said company according to the original amount of the premium paid by him, but in no case to exceed the amount of the premium. Each member shall be credited with the amount of said premium, and also with an equal share of the profits of the said company derived from investments and earnings in proportion to said amount; and in case of the death of any member of the said company, the amount standing to his credit at the last preceding striking of ballance as aforesaid, together with the proportion which shall be found to belong to him at the next subsequent striking of said ballance, shall be paid over to his legal representatives or assigns within three months after the said last mentioned ballance shall be struck. Any member of the company who would be entitled to share in the profits, who shall have omitted to pay any premium, or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such previous payments made by him shall go to the benefit of the company.

14. On same day in the first thirty days after the expiration of the first five years from the time when the said company shall issue their first policy, and within the first thirty days of every subsequent five years the officers of the said company shall cause to [—] made a general ballance statement of the affairs of the said company, which shall be entered in a book prepared for that purpose, which shall be subject to the examination of any member of the company during the usual hours of business for the term of thirty days thereafter. Such statement shall contain:

1st. The amount of premiums received during the said period.

2d. The amount of expenses of the said company during the said period.

3d. The amount of losses incurred during the same period.

4th. The balance remaining with the said company.

5th. The nature of the security on which the same is invested or loaned, and the amount of cash on hand. The said

company shall also make and transmit to the Comptroller of the State on the first day of January in each year a full statement of its affairs in the same manner as moneyed corporations are required to do under the second title of the eighteenth chapter of the first part of the Revised Statutes. The books of the said company shall be open to the examination of any member thereof during the usual hours of business in the same manner as the books of moneyed corporations are required by the Revised Statutes to be kept open for the inspection of the stockholders thereof.

15. The sections of the Revised Statutes from nineteen to twenty-five both inclusive, of the first article of the second title of the eighteenth chapter of the first part, shall not be applicable to the corporation hereby created.

16. The operations and business of the corporation shall be carried on at such place in the city of New York as the trustees shall direct.

17. No policy shall be issued by said company until application shall be made for insurance in the aggregate of five hundred thousand dollars at least, and the trustees shall have the right to purchase for the benefit of the company all policies of insurance or other obligations issued by the company.

18. The legislature may at any time alter or repeal this act.

19. This act shall take effect immediately.

State of New York,
Office of the Secretary of State—ss.

I have compared the preceding with the original law
981 on file in this office, and do hereby certify that the same is a correct transcript therefrom, and of the whole of the said original law.

Given under my hand and the seal of the office of the Secretary of State, at the city of Albany, this 14th day of June in the year one thousand eight hundred and ninety-two.

[Seal]

FRANK RICE,
Secretary of State.

Chapter 60.

An act to amend the act entitled "An Act to Incorporate the Mutual Life Insurance Company of New York," passed April 12, 1842:

Passed March 25, 1851.

The people of the State of New York represented in Senate and Assembly do enact as follows:

1. Section thirteen of the act entitled "An act to incorporate the Mutual Life Insurance Company of New York," passed

April 12, 1842, is hereby amended, and shall hereafter read as follows, viz.:

13. The officers of said company, at the expiration of five years from the time that the first policy shall have been issued and bear date, and within sixty days thereafter, and during the first sixty days of every subsequent period of five years, shall cause a ballance to be struck of the affairs of the company, and shall credit each member with an equitable share of the profits of the said company. And in case of the death of the party whose life is insured, the amount standing to his credit at the last preceding striking of balance, as aforesaid, shall be paid over to the person entitled to receive the same, and the proportion which shall be found to belong to him at the next striking of balance shall be paid when the same shall be ascertained and declared. Any member of the company who would be entitled to share in the profits who shall have omitted to pay any premium or any periodical payment due from him to the company, may be prohibited by the trustees from sharing in the profits of the company, and all such pervious payments made by him shall go to the benefit of the company. No member except officers and agents thereof shall be personally liable for the losses of the company, and such officers and agents severally, shall only be liable for the losses arising by reason of their own respective neglect or misconduct.

State of New York,
Office of the Secretary of State—ss.

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a
982 correct transcript therefrom, and of the whole of said original law [therefrom and of the whole of said original law.]

Given under my hand and the seal of the office of the Secretary of State, at the city of Albany, this 14th day of June in the year one thousand eight hundred and ninety-two.

[Seal]

FRANK RICE,
Secretary of State.

Chapter 131.

An act in relation to the Dividends of the Mutual Life Insurance Company of New York:

Passed April 2, 1862; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The Mutual Life Insurance Company of New York may appropriate its dividends either to the purcha-

of additional insurance payable with the policy, or at the option of the insured, in reduction of, or towards the annual payment of premiums on policies, such dividends may be declared every five years or oftener at the option of the said company provided, that said company shall not make such appropriation in reduction of any annual premium without the consent first had and obtained of the superintendent of the insurance department, after each dividend, as to all persons entitled to such dividend.

2. This act shall take effect immediately.

State of New York,
Office of the Secretary of State—ss.

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom, and of the whole of said original law.

Given under my hand and the seal of office of the Secretary of State, at the city of Albany, this 14th day of June in the year one thousand eight hundred and ninety-two.

[Seal] FRANK RICE,
Secretary of State.

Indorsed: Copy of Charter Mutual Life of New York. Exhibit No. 26. Oct. 99, W. C. H., Judge.

983 Q. What are these papers?

A. These are copies of the record of the certificate of authority issued to the companies, issued to the Mutual Life.

Q. Did you compare these copies with the record in your office? A. Yes, sir.

Q. They have a record or register there, do they?

A. Yes, sir.

Q. These are copies of three of those?

A. Yes, of the Mutual Life.

Q. In the office of the superintendent of insurance of this state? A. Yes, sir.

Q. What are these?

A. Those are copies of the records of the certificates of authority issued to the Connecticut Mutual Life.

Q. These three? A. Yes, sir.

Q. I suppose there are records of other certificates there besides these? A. Oh, yes.

Q. There are three of each? A. Yes, sir.

The plaintiff offers the six papers in evidence.

The defendants and each of them object to the admission of said papers and each of them in evidence for the reason that they and each of them are wholly incompetent, irrelevant

and immaterial, and because they do not tend to prove the citizenship of either of the defendants. Objection sustained, the plaintiff excepts.

By Mr. Wheat: I offer in evidence the return of the marshal of the service of summons in each of these cases.

By the Court: They are part of the record of this case, just as much as if they were received in evidence. I don't understand it is necessary to offer any part of the original process or pleadings in evidence.

Cross-Examination by Mr. Barker.

Q. What do you say your name is, sir?
A. Ike S. Lewis.
Q. Where do you live, Mr. Lewis?
984 A. I live at Topeka, at present.
Q. Where did you live before you went to Topeka?
A. St. John, Kansas.
Q. What business were you engaged in up there?
A. The last business I was in was teaching school.
Q. When were you appointed to this position that you now hold? A. March 14th.
Q. Is it an appointment or are you simply hired by the superintendent of insurance?
A. I hardly know; I rather think I am just hired.
Q. You are chief clerk there? A. Yes, sir.
Q. How long have you been chief clerk?
A. Since March 14th.
Q. Since July 1st?
A. No, excuse me, since July 1st.
Witness excused.

Here, the plaintiff, having concluded her evidence rested her causes.

And thereupon the court overruled the demurrer to the evidence interposed by each defendant to which and ruling of the Court the defendant and each of them then and there duly excepted.

985 And thereupon, the defendants and each of them, to maintain the issues upon their part, produced and offered evidence as follows, to-wit:

Theodore Wiseman, a witness produced by the defendants, being first duly sworn to testify the truth the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by E. F. Ware, Esq., counsel for the defendants, testified as follows, to-wit:

Q. Please state your name, age and residence.

A. Theodore Wiseman. I am 68 years old; I reside at Omaha, Nebraska.

Q. Major, where was your residence in October, 1878?

A. In Louisiana, Pike county, Missouri.

Q. Did you serve in the army, Major? A. I did.

Q. What was your final rank?

A. Brevet major, and assistant adjutant general U. S. Volunteers.

Q. By whom commissioned?

A. I have a commission from President Lincoln, and one from President Andrew Johnson.

Q. I will ask you, Major, if on October 31st, 1878, you were in a stable in Lawrence, Kansas, owned by one John Eldridge?

A. I was not.

Q. Did you upon October 31st, 1878, have any transaction in the presence of John Eldridge?

A. I did not.

Q. Did you upon October 31st, 1878, write any policy for John Hillmon in the New York Life Insurance Company?

The plaintiff objects to the question as leading; objection overruled, the plaintiff excepts.

Q. I will ask you whether upon October 31st, 1878, you measured John Hillmon with a square?

The plaintiff objects to the question as leading.

By the Court: The question should be if he ever measured Hillmon and when.

Q. I want to fix the date October 31st, which is Mr.
986 Eldridge's testimony.

By the Court: You are engaged in contradicting some other witness.

By Mr. Ware: Yes, sir.

By the Court: He may answer.

A. I did not; I didn't know him.

Q. Did you receive any applications from any person for insurance in Lawrence, upon October 31st, 1878?

The plaintiff objects to the question as leading; objection overruled; the plaintiff excepts.

A. I did not; I had never been there.

Q. Did you receive any applications for insurance from any one in Lawrence in October, 1878?

A. I did not.

Q. Or in November, 1878? I did not.

Q. Where were you on October 31st, 1878?

A. I left home on the 21st of October, 1887, and I was at Moberly about that time, on that day at Moberly, soliciting.

By the Court: You said 1887.

A. 1878, I mean; not 1887.

Q. I will ask you when you first came to Lawrence, Kansas?

A. On the third day of December, 1878, my first visit to Lawrence.

Q. You first came to Lawrence? A. Yes, sir.

Q. I will ask you whether or not you brought with you any advertisements or insurance literature of any kind?

The plaintiff objects to the question as leading; the court overruled the objection, to which ruling the plaintiff at the time duly excepted.

A. I did.

Q. In a general way you may state the nature of it.

The plaintiff objects to the question as incompetent, irrelevant and immaterial and not the best evidence. Objection overruled, the plaintiff excepts.

A. It was a circular about that long and about that long (illustrating) setting forth that I was special agent of the Mutual Life Insurance Company of New York and was at Lawrence in the interest of that company, and would be
987 at the service of those who might want insurance.

Q. Did you bring those to Lawrence with you or did you have them printed in Lawrence?

A. I brought them with me.

Q. What did you do with them when you got to Lawrence?

A. I gave them to a young man by the name of Winchell or Winchett and the young man told me—Objection.

Q. If you know what was done with those circulars and advertisements, you may state?

A. They were distributed in the business portion of the city generally.

Q. When did you first see John Hillmon?

A. On the morning of the 5th day of December, 1878.

Q. When did you first see Levi Baldwin?

A. At the same time.

Q. Do you remember when you first saw a man named Griffith? A. I do; Griffith the banker, do you mean?

Q. Yes. A. Yes.

Q. What took place on the occasion that you first saw Baldwin and Hillmon?

A. I took an application in the Mutual Life Insurance Company of New York for John W. Hillmon for insurance, ten thousand dollars.

Q. State the circumstances occurring at the time, state where you were and what was said and done?

A. It was in the morning about ten o'clock on the 5th day of December, 1878; I was in the back room of the bank, the Merchants Bank of Lawrence, situated on the south east corner of Warren and Massachusetts Streets; I was sitting at a table in the back room when Mr. Griffith the cashier, one of the officials, came back with two men; the men walked into this door like there was a railing up, and Griffith walked from behind the counter into this back room and these two men walked in at the side door and he there introduced me to these two men, introduced me to one as Mr. Baldwin, and the other as Mr. Hillmon. I shook hands with them;
988 Mr. Baldwin had one of these circulars I had distributed in his hand; he wanted to know whether I was the agent that represented that company: I told him I was. He said they had come to talk life insurance with me, and I told him I was very glad to hear it. We talked on; he asked me some questions, what he wanted and so on, what kind of a policy, and I explained—

The plaintiff objects to the statement because it is indefinite as to the person talking.

A. I was introduced to him by Mr. Griffith, to Mr. Baldwin.

Q. State as near as you can what each person said and what the matter under discussion was?

The plaintiff objects to the last part of the question as calling for the conclusion of the witness. Objection overruled, the plaintiff duly excepting.

A. The subject of the discussion was, we talked about life insurance.

A. What was said between the parties present in regard to the various kinds of insurance, if anything, and as regards rates? A. They inquired of me.

The plaintiff objects to the use of the word "they" as indefinite.

By the Court: If you are able to distinguish between the remarks made by each party, you may do so; if you are not, then what was said by one in the presence of the other would in effect be said by both.

A. Mr. Baldwin asked me about the different kinds of policies the Mutual Life of New York insured, and the rates; I explained to him the different forms, premiums or rates, and I asked whether he wanted—finally, after conversing probably five or ten minutes about this matter, I asked him if he wanted to get his life insured and he said no, but Mr. Hillmon did. I then invited Mr. Hillmon to sit down in front of me and I sat down at a table and got a blank that I had in

my pocket of the Mutual Life, and Hillmon and I got to talking about the kind of a policy, and he wanted to
989 take one on the ordinary life plan, premium payable semi-annually; that is my best recollection, semi-annually, I took out this application and filled out the part required to be signed by the party desiring his life to be insured; filled that out in my handwriting, Mr. Hillmon signed it, and I signed it as a witness.

Q. Who propounded questions to Mr. Hillmon, if any one, when this blank application was signed up? A. I did.

Q. Did you ask him in regard to his height? A. I did.

Q. What response did he make?

A. He gave me his height.

Q. What did he say?

A. I think he said five feet, eleven inches and probably a fraction; a quarter, I think.

Q. I will ask you if you questioned him in regard to his age? A. I did.

Q. Did you write his answers in the application?

A. I did.

Q. Could you tell that application if it should be shown to you?

A. I believe I would, yes, sir, I would know my handwriting.

Q. I now hand you a paper marked Exhibit 9, and call your attention to that portion marked Application for Insurance, and ask you to examine the exhibit, that portion of it, and say in whose handwriting this exhibit is?

A. That is my own handwriting.

Q. At the bottom of it here are whose signatures?

A. John W. Hillmon and my own, Theodore Wiseman.

Q. I will ask you if the application was signed in that room at that time or later?

A. It was at that time and in that room.

Q. Did you sign it then? A. I signed it, yes, sir.

Q. Do you remember how long you were in making out that application from the time that the parties came in until it was signed up?

A. From a half an hour to an hour probably, talking and writing it out.

Q. I will ask you who were present during all that time?

A. Mr. Levi Baldwin.

Q. Was Mr. Griffith present?

A. I think not to my recollection. He was in the
990 room adjoining this.

Q. Were there two doors into your office?

A. There was one, the gangway that ran in front of the counter, and then there was one behind the counter that ran into the back room.

Q. Did Levi Baldwin remain with you in that room and with Mr. Hillmon until the application was completed and signed up? A. Yes.

Q. When the application was completed what then did you do with it?

A. Mr. Hillmon and I went up to Dr. Miller's office on Massachusetts Street over Yates' drug store, I think.

Q. How far was that from your office?

A. Well, it was a little over half a block on Massachusetts street.

Q. What took place in the doctor's office, if you remember?

A. Dr. Miller was in there; I told him that I wanted him to examine Mr. Hillmon for insurance; he had made application—

The plaintiff objects to any conversation between Dr. Miller and the witness. Objection sustained, the defendants duly except.

By the Court: Were Hillmon and Levi Baldwin there?

A. Hillmon was Levi Baldwin was not; he left us.

Q. Was Hillmon present at the interview between you and Dr. Miller?

A. He was the whole time; we went there together.

Thereupon, the Court overruled the objection, to which ruling of the plaintiff duly excepted.

Q. What took place in the doctor's office, if you remember?

A. Dr. Miller examined Mr. Hillmon for insurance as required by the application and the rules of the company; examined him.

Q. I will ask you whether or not Mr. Hillmon was measured up there in the office at that time?

A. Not at that time that I remember.

Q. How long were you and Mr. Hillmon in Dr. Miller's office? A. About half an hour or such a matter.

Q. Where did you and Mr. Hillmon go, if you remember?

A. We went down stairs, and it being near dinner time, near noon, I went to my hotel; I don't know where he went.

991 Q. What was done with the application?

A. I sent it to the general agent of the Mutual Life Insurance Company of New York at St. Louis, Byron Sherman, his name was, that I was working for.

Q. How long up to that time had you been engaged in the life insurance business?

A. About ten years to the best of my recollection.

Q. Was there anything unusual in this transaction in your office in the bank?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. The court sustained the objection, to which ruling of the Court the defendants and each of them at the time duly excepted and still excepts.

Q. I will ask you, Major, whether you had sent any person previous to December 5th, to Mr. Hillmon about life insurance?

[A.] The plaintiff objects to the question as leading.

By the Court: That is not leading; I do not know how you could ask it in any other way. To which ruling of the court the plaintiff at the time duly excepted.

A. I did not.

Q. Did you know that there was such a man living in Lawrence as John W. Hillmon on the morning of December 5th, before he came in there? A. I did not.

Q. I will ask you if you subsequently saw or became further acquainted with Mr. Hillmon? A. Afterwards?

Q. Yes. A. Yes sir.

Q. After the application?

A. Yes sir, I became acquainted with him more.

Q. Can you state how well you became acquainted with him?

A. Well, I met him a number of times in the streets of Lawrence, and once upon the cars coming from Wichita; that was in 1879. I met him in December, 1878, a number of times on the street; I don't know how often I met him.

992 Q. Met him on the streets?

A. And would speak to him.

Q. State whether or not you ever had conversations with him? A. Why, I did.

Q. Tell stories to each other?

The plaintiff objects to the question as leading and immaterial.

By the Court: It would serve to show the extent of the acquaintance; if they got to telling stories to each other it indicates a certain amount of previous acquaintance; objection overruled. The plaintiff then and there duly excepted.

A. Yes, we were both old soldiers and used to tell pretty tough ones.

Q. Please state if you can tell, from your observation, what was the condition of the front teeth of John W. Hillmon?

A. They were a good pair of teeth except one that was either broken off close to the gum or was gone entirely; my recollection is it was one of the front three teeth on the left hand side on the upper jaw.

Q. I notice you made a gesture with your right hand; explain that.

A. If I was facing him, of course, my right would be where his left was, you know, facing him.

Q. On which side of the jaw was that tooth missing?

A. My recollection is that it was on the left upper.

Q. State to what extent Mr. Hillmon in conversation and laughing showed his upper teeth?

A. Well, he was what I call a high-mouth man, exposing his gums and teeth when he was laughing or chatting. There is two kinds of people, high-mouthed, and low-mouthed; some people don't expose their teeth, but he would; when he would laugh, his upper lip would go up and expose his teeth and a portion of the gum.

Q. Would expose his upper teeth? A. Yes sir.

Q. Can you tell from what you saw or noticed whether that tooth had been broken off, or whether it had come out entirely, root and all?

A. Not that I know of; it was either broken off close to the gum or gone entirely.

993 Q. Please state whether or not, at any time, after taking the application, you did in fact see Mr. Hillmon measured? A. I did, I measured him myself.

Q. Please state where that took place?

A. At Dr. Miller's office.

Q. The same Dr. Miller to whom you formerly referred?

A. Yes sir.

Q. And at the same office? A. Yes sir.

Q. How much did John W. Hillmon at that time measure?

A. My recollection is five feet, nine inches in his footwear.

Q. Can you tell about what time that happened?

A. I can't tell the day, no.

Q. State whether you had any conversation with Mr. Hillmon after that time? A. I did.

Q. When and where did it take place, and how many conversations did you have?

A. I could not say how many conversations I had with him from that time on; I remember of one or two conversations I had with him.

Q. Well, state about how frequently you saw Mr. Hillmon and where he lived and where you lived?

A. I saw him probably four or five times in December, 1878, and then I saw him probably ten or twelve times or more in 1879, in the winter of 1879.

Q. What month in 1879?

A. Well, in January and February.

Q. I will ask you whether at any time you met Alva Baldwin in Lawrence? A. I did.

Q. Did you ever meet John H. Brown in Lawrence?
A. I did.
Q. When did you first meet John H. Brown?
A. I am not positive as to when I first met him; I am quite positive that I met him there in the first week in April; I am positive of that, and it runs in my mind that I saw him before that, but I would not be very positive about it, but I think I did.
Q. Had you met Alva Baldwin before the first week in April? A. Oh, yes.

994 Q. You spoke of having met Mr. Hillmon in January or February, 1879; where did you meet him; at what places?
A. I met him sometimes on the streets and sometimes at the store of George W. Yates—drug store—where I used to spend my idle time, and probably at other places; can't remember where.
Q. I will ask you if you ever had a talk with him in January or February, 1879, in regard to policies of life insurnace?
A. I did.
Q. You may state what was said.
A. The one that I remember specially was on the 26th day of February; I met him on the corner of Winthrop and Masschusetts streets, where the postoffice was, Bowersock's opera house, and he told me that he was going away, going to the west on business, and we had a talk about life insurance, or proofs of loss, what was necessary for the widow to do to prove the loss.
Q. What did he say to you and what did you say to him?
A. He asked me a number of questions in regard to it, and very pointed ones, and I explained to him—

The plaintiff moves to strike out the words, "and very pointed ones," as a conclusion of the witness.

By the court: Yes; you tell what the questions were and let the jury say whether they are pointed or not.

A. He asked me what his, what evidence his widow would have to furnish in the event he died, or was killed; he said he was going out west where there was a pretty rough country, where a man was liable to be killed at any time. I told him what was necessary, the evidence that was necessary for the company to have to pay the loss.
Q. What did you say to him was the necessary evidence, if you remember.?
A. I told him that it would require a certificate of the physician who attended him before death or at death, or if he was killed, a coroner's inquest, the verdict of a coroner's jury. Well, he said, he was going out to a country where ther

was no doctors and no officials, a wild country, and I remarked there wasn't much danger of his getting killed out there, as he was able to take care of himself as he was a western man;

I told him he needn't worry about it. I explained to
995 him what was necessary, what the company would require in the way of proof.

Q. I will ask you whether at any time any conversation took place between you in which Mr. Hillmon stated the reason why he had so much insurance? A. Yes sir.

Q. State where the conversation took place and what was said.

A. It took place in the city of Lawrence, to the best of my recollection in the office of the hotel, the Eldridge House, or Luddington House.

Q. What did he say?

A. He said he took the life insurance, explained to me, to protect his relatives who advanced him money in stock that he had out west.

Q. Where did he say he had money in stock?

A. In cattle out west, he said.

Q. Cattle out west?

A. Yes, I don't know as he stated the exact locality out west. That was in December, 1878, before I left Lawrence; he gave me a reference to Mr. Bergman, a merchant whom I could see, and I did see him.

Q. I will ask you whether you noticed in your various interviews with Mr. Hillmon, in regard to a scar on his nose and cheek?

A. I don't remember of ever noticing any scar on him.

Q. Referring to the conversation of February 26th, 1879, I will ask you if anything was said in regard to vaccination?

A. He told me that he had been vaccinated a day or two before, and pulled up his sleeve and showed me on his left arm some red marks, little red marks, and he said the New York Life Insurance Company required him to be vaccinated. I told him that the Mutual Life of New York did not require that he should be vaccinated, but they were always glad to have him vaccinated to protect him; for protection.

Q. What company were you working for?

A. The Mutual Life of New York.

Q. You were not working for the New York Life?

A. Never did.

996 Q. You never did? A. No sir.

Q. How long after this conversation of February 26th, did you first hear of the report that Mr. Hillmon was dead?

A. The 27th of March, 1879, following.

Q. Where were you on the 27th of March?

A. At Osage City, Kansas.

Q. Where were [—] on the 28th of March?

A. At Lawrence, Kansas.

Q. If you went anywhere at that time or soon after, you may state where you went.

A. To Medicine Lodge, Barber County, Kansas.

Q. When did you leave Lawrence?

A. We left Lawrence on the evening of the 29th of March, and arrived at Hutchinson the following morning, and left for Medicine Lodge that morning with a team.

Q. You left on the 29th?

A. Yes sir, that is my recollection.

Q. Who went with you to Medicine Lodge?

A. Colonel Walker, Samuel Walker and a Mr. Tillinghast.

Q. Do you know where Colonel Walker had been living prior to that? A. Yes sir.

Q. Where? A. Lawrence, Kansas.

Q. In what kind of a conveyance did you, Colonel Walker and Mr. Tillinghast go to Medicine Lodge in?

A. A two-horse open spring wagon.

Q. Was Mr. Tillinghast in your employ? A. No sir.

Q. Did he represent the Mutual Life of New York

A. He did not.

Q. The company that you represented?

A. Not to my knowledge.

Q. How far is it from Hutchinson to Medicine Lodge, if you remember? A. Eighty-five miles across the country.

Q. Do you remember the condition of the settlement of the country through which you passed at that time north of Medicine Lodge? A. The country?

Q. Yes. A. Very sparsely settled here and there.

Q. Did you go through Kingman?

A. Yes, what there was of it, a few houses on the north side of the Ninnescah, the main town.

Q. What was the condition of the country from Kingman to Medicine Lodge?

997 A. I don't think there was a house until we got twenty miles from Hutchinson to a place called Castell; twenty miles, said to be. There was a store there and a few houses; then I don't remember another house until we got to Kingman on the south side of the Ninnescah. There was no house on the north side of the Ninnescah.

Q. How was it settled from Kingman to Medicine Lodge?

A. The country?

Q. Yes, the country.

A. I remember but one ranch, the Updegraff ranch, right where the town of Ross is now.

Q. At what time of day did you arrive in Medicine Lodge?

A. About 11 o'clock in the morning of the last day of March, the 31st of March.

Q. Whom did you find in Medicine Lodge that you knew, if any one? A. I met John Brown there.

Q. Who else? A. I met Levi Baldwin and Alva Baldwin.

Q. Now, Major, without further questions, you may state all that took place and came under your observation in Medicine Lodge up until noon of that day.

A. On our arrival, we drove up to the livery stable, and I got out of the wagon and left Colonel Walker to have the team attended to, and I went to the hotel to secure accommodations for our party; went up the little street a little ways to Mr. Updegraff's; I then returned before dinner, and found in the barnyard Colonel Walker, Tillinghast and Brown talking, aside of a little wagon, close to a wagon.

Q. Do you know what wagon that was?

A. It was said to be the wagon Hillmon; personally, I don't know whose it was.

Q. Was it the wagon that took the body back to Hutchinson afterwards? A. Yes sir.

Q. Where was that wagon at that time?

A. In the barnyard at the livery stable on the south side of the stable.

Q. How far was Brown from that wagon when you first saw him there?

A. Oh, standing right close to the wagon, within a few feet.

998 Q. Did you hear enough of the conversation between Colonel Walker, Tillinghast and John Brown to know what they were talking about; I do not ask you to give the conversation, but to know what they were talking about?

A. I did.

Q. What did you do after you saw Colonel Walker and Tillinghast there talking with Brown; what did you do or where did you go?

A. When we left we went to the hotel and got dinner.

Q. You may state whether or not you joined in this conversation that took place between Brown and the other two men?

A. I made some remarks; I don't remember exactly; they were together and I did take part in it, but very little; very little.

Q. Do you remember whether or not that wagon was measured as to its height? A. It was, in my presence.

Q. In your presence? A. Yes sir.

Q. How high was it from the ground to the top of the box?

A. You mean the side boards?
Q. Yes.
A. My best recollection is it was four feet and ten inches and a half from the ground to the top of the side boards.
Q. Was Colonel Walker present when it was measured?
A. Yes sir, he done the measuring.
Q. He did the measuring in your presence? A. Yes sir.
Q. If you remember the depth of the wagon bed, say.
A. He did not measure the depth of the wagon bed, no sir, not to exceed about two foot, about 2 foot from the bottom of the wagon to the top of the side boards; that would be about it; two feet; it was about six inch side boards, and then about eighteen inches, regular body wagon something like that.
Q. Then what took place after dinner, if anything?
A. We had the team hitched up and Colonel Walker and Tillinghast and I went out to a grave yard half a mile or so from the town.
Q. About how far was the grave yard from the hotel in Medicine Lodge?
A. Oh, about three-quarters of a mile, probably, or a mile; something like that.
999 Q. Who did you find, if any one, out at the grave yard?
A. I found Mr. Levi Baldwin there, Alva Baldwin and John Brown with a wagon.
Q. About what time in the day did you arrive at the grave yard? A. Between one and two o'clock in the afternoon.
Q. Up to two o'clock had you seen in or around Medicine Lodge, either Levi Baldwin or Alva Baldwin?
A. I don't remember; I don't think I did; no, I don't think I saw them in the town, not until I saw them at the grave.
Q. What is your best recollection upon that, as to whether you first saw them out at the grave yard?
A. My best recollection is that I did not see them until I saw them at the grave yard.
Q. State what was done or took place at the grave yard after your arrival there? A. I had engaged Doctor Davis—

Answer objected to as not responsive.
By Mr. Ware: I withdraw the last question.

Q. Who went out to the grave yard with you?
A. Walker and Tillinghast, Brown, Levi Baldwin, Alva Baldwin, Doctor Davis and a colored man that I remember of.
Q. I asked you who went out to the grave yard with you?
A. Tillinghast and Walker, and the man who drove our team from Hutchnson.
Q. Did Levi Baldwin go out to the grave with you?

A. No.
Q. Did Alva Baldwin go out to the grave with you?
A. No.
Q. Did John H. Brown go out to the grave yard with you?
A. He did not.
Q. Who was Davis?
A. He was a doctor; I found him in a drug store there; I don't know whether he owned it or not.
Q. Who besides Davis went out with you?
A. Who besides Davis?
Q. Yes.
[—] He didn't go out with us; he came out by himself.
Q. How did he come there; in what kind of a conveyance?
A. I don't remember; I think he walked; he and the colored man walked.
Q. Do you know whether any tools were taken out?
A. Yes.
1000 Q. What did they consist of?
A. Shovel, spade, a couple of shovels.
Q. What took place on your arrival at the grave yard?
A. Why, I requested the doctor—

The plaintiff objects to what was said.

A. The grave was opened; the dirt was thrown out of the grave.
Q. Who directed the dirt to be taken from the grave?

The plaintiff objects to the question as calling for the conclusion of the witness; objection overruled, the plaintiff duly excepts.

Q. I did; I requested that it be done.
Q. You may state whether or not the coffin was lifted up?
A. Yes, sir.
Q. Where was the coffin placed when it was lifted up?
A. Say this is the grave (illustrating). Here is the east, here is south; it was lifted out, and lifted at the head of the grave, and a little to one side.
Q. State whether or not the lid of it was taken off?
A. It was.
Q. I will ask you what you saw when the lid was taken off?
A. I saw a corpse lying in the coffin with a white cloth over its face.
Q. Where were Alva and Levi Baldwin at that time?
A. At the particular time when this cloth was lifted off, do you mean?
Q. Yes. At that time.
A. Alva Baldwin and I were standing at the foot of the grave, a few feet from the foot of the grave, and Levi was be-

tween us and where the coffin was; he was moving around to and fro talking to somebody; Colonel Walker and Davis—

By Mr. Atwood: You were not asked for Davis.

A. Levi Baldwin.
Q. Where was John Brown during this time?
A. Standing near the wagon west some 50 or 60 feet at the tail-end of the wagon or near it.
1001 Q. What was he doing there, if anything?
A. He was standing there wasn't doing anything that I saw.
Q. Did he come up to the grave when it was being opened?
A. He did not.
Q. Was he at the grave when the coffin was opened?
A. No, he was not; well, he was 50 or 60 feet away.
Q. If, when that white cloth was removed from the face of the corpse, any sudden ejaculation was made by any person present you may state who made it?

The plaintiff objected to the question as incompetent, irrelevant and hearsay.

Recess to 2 o'clock p. m.

Afternoon session.

Theodore Wiseman on the stand.

Direct examination continued by Mr. Ware:
Q. I will withdraw that question and put it in a different form. If Alva Baldwin made any instantaneous ejaculation or exclamation when the face of the corpse came to his view there at that time, you may state what he said?

The plaintiff objected to the question as incompetent, irrelevant and immaterial, and hearsay. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. As I said, I was standing aside of him; him and I were right close together.
Q. State what was said, Major.
A. He says, "Hell, that ain't Hillmon." Says I, "What?" He says, "That ain't John Hillmon." I says—

The plaintiff moves that the last part of the answer be stricken out as not responsive to the question. Motion
1002 sustained, the defendants and each of them duly except.

Q. Did you see the corpse at that time?
A. Yes, sir, I did.

Q. Was that the body of any person whom you had known during its life? A. It was not.

Q. Was that corpse the body of John W. Hillmon?

A. It was not the John W. Hillmon that I knew.

Q. The John W. Hillmon of Lawrence, Kansas?

A. No, it was not.

Q. Did you ever know any other John W. Hillmon?

A. I did not.

Q. State what was the condition of the coffin and corpse as regards its being wet or dry? A. It was dry.

Q. How was the dirt that was in the grave, was that wet or dry? A. Dry.

Q. Did the coffin show signs of dampness or moisture?

A. No, sir.

Q. Did you notice whether the clothes of the corpse looked wet or dry? A. Looked dry.

Q. What was the character of the soil in which the grave was dug?

A. Well, it was clay mixed with sand, the soil of Western Kansas, on a hill.

Q. Was it rocky? A. No.

Q. Clay, was it? A. Yes, sir.

Q. I believe you said that Davis and the colored man took the coffin up?

A. Well, there was others that assisted them; yes, they were engaged in taking it up but others assisted in pulling the coffin up out of the grave.

Q. Who paid for the taking up of that coffin? A. I did.

Q. I will ask you if you had any conversation with Levi Baldwin in regard to the taking up or removal of the body?

A. I did.

Q. You may state what was said by Mr. Baldwin and yourself? A. Mr. Baldwin and I—

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and because no foundation has been laid for impeachment.

1003 By Mr. Ware: I believe I will withdraw that question for the present, and proceed with the examination on other points.

The witness being sick and unable to proceed, he was excused for the time, and at a later day, resumed the stand and his direct examination was continued by Mr. Ware as follows:

1004 Q. Major Wiseman, going back to the time, now at which you were in the grave yard at Medicine Lodge, I will ask you to fix the date as near as you can, the day of the month of that day?

A. The 31st day of March, 1879.

Q. You may state whether any conversation took place between you and Levi Baldwin on that occasion in regard to the removal of the body? A. Yes, there was.

Q. You may state what that conversation was.

The plaintiff objected to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

A. Levi Baldwin when I got out there, asked me what I was going to do; I told him I was going to dig up the body and take it to Lawrence. He said Mrs. Hillmon didn't want the body; he said he had brought lumber out—there was a pile of lumber; they brought lumber out to fence in the grave. I said that I thought enough of the widow to take Hillmon back there so she could plant flowers on his grave. That was the remark I made.

Q. Whereabouts was that lumber lying; how near the grave?

A. It was lying south of it, close by, as far as from the table to the chair there; there was some posts and some boards.

Q. I will ask you whether or not Alva Baldwin was present at the time that you had this conversation with Levi?

A. Yes, sir, he was there.

Q. Do you remember whether or not he participated in the conversation? A. No, he did not, to my recollection.

Q. What was done with the coffin after the body was exhumed in the grave yard, and you had finished viewing the body? A. Why, it was closed up again.

Q. Was it put into anything else?

A. It was put in a rough coffin afterward; not there; it was not put in anything there; not there.

Q. Where was it put into the rough coffin; at what place?

[Q.] In the town of Medicine Lodge, to the best
1005 of my recollection, at the drug store where Davis was.

Q. Then the body was taken back in the coffin to Medicine Lodge? A. Yes, sir.

Q. And the coffin was put into another box? A. Yes, sir.

Q. What was then done with the box?

A. I don't remember; I turned the matter over to Dr. Davis and told him—Am I permitted to tell what I told Dr. Davis?

By the Court: No, answer the question only.

Q. Well, you may state what became of that box, that was brought from Medicine Lodge; where was it taken to?

A. Taken to Hutchinson?

Q. How was it taken to Hutchinson? A. In a wagon.

Q. Did you see it in the wagon? A. I did.

Q. Did you see anything else in the wagon? A. I did.
Q. What did you see?
A. I saw a trunk and a pair of shoes.
Q. Do you remember of seeing a valise in the wagon?

The plaintiff objects to the question as leading. Objection overruled, the plaintiff excepts.

A. I would not be positive about it.
Q. Can you describe the shoes? A. Yes, sir.
Q. Please do so?
A. Well, they were a course, pretty badly worn pair of shoes, low cut, common shoes; and they were number ten size; I wear a number ten and I could have well worn them.
Q. Were they about the size of the feet of the corpse?

The plaintiff objects to the question as calling for the conclusion of the witness. Objection overruled; the plaintiff excepts.

A. I could not say because I never measured the shoes of the corpse.
Q. You never measured them? A. No.
Q. Detail the circumstances of your return from Medicine Lodge to Hutchinson, stating how you went and how the others went?

A. We started the next morning on the first of
1106 April, that is, Colonel Walker, Tillinghast and the driver, in a two horse rig in which we had come from Hutchinson; we started out; the two Baldwins started and John Brown drove the wagon that I saw in the livery barnyard at Medicine Lodge.

Q. This same wagon that you have described as the Hillmon wagon?

A. Yes, the Hillmon wagon. We started and on ahead we passed the team, and we put up for dinner or lunch at the Updegraff ranch, about where the town of Ross is now located; we put up; ate lunch, fed our team, and drove that evening to Kingman, that is, on the south side of the river; there was no buildings on the north side; we put at a store and hotel combined, the whole party of us; we left the next morning, our team taking the lead again; we crossed the river and we came to Castleton about twenty miles from Hutchinson where we had stopped before to dinner or lunch, and we there met again, the whole party of us; ate lunch, fed the team and watered them and then started for Hutchinson; that was 20 miles from Hutchinson, said to be, and we arrived at Hutchinson before the other parties.

Q. Now, then, when you stopped at those places along the roads were your teams together, and was John H. Brown and Levi and Alva Baldwin with you when you stopped?

A. No, we were always in advance. They came up afterwards, and the Brown wagon generally came in last.

Q. I am asking you about the time when you stopped for lunch, or when you stopped for meals on the road, whether you all stopped together?

A. Yes, that is my recollection; we stopped an hour or two.

Q. On arrival at Hutchinson, did you take the railroad train for any place?

A. We did, on the night of the second of April, my party—Colonel Walker, at the evening.

Q. Where did you come to?

A. Came to Lawrence, Kansas.

Q. Do you know whether John Brown and Levi Baldwin came on the same train or not?

A. I know Levi Baldwin was there; I don't remember whether John Brown was or not.

1007 Q. When you got to Lawrence what time of day was it?

A. About seven o'clock in the morning of the third of April, 1879.

Q. What road did you come in on? A. The Santa Fe.

Q. Where did you get off from the train?

A. I got off at the foot of Massachusetts street at the bridge.

Q. At what place? A. Lawrence, Kansas.

Q. Did you get off at the regular depot at Lawrence?

A. No, the train stopped there but it was not a regular depot; it was further east.

Q. How far was Massachusetts street, where you got off, from the depot?

A. Well, it was a quarter of a mile or so at that time; it is not now; it was then a quarter of a mile, I should judge.

Q. The train stopped to let off passengers at Massachusetts street did it? A. Yes, sir.

Q. Were you present at the depot when the body was received? A. No, sir.

Q. Did you have anything to do with unloading it?

A. I did not.

Q. Did you give any directions in regard to unloading it?

A. I did not.

Q. Did you give any directions in regard to the body being taken anywhere? A. I did not.

Q. Do you know who was at the depot when the body was unloaded? A. I do not; I wasn't there, anyhow.

Q. If you saw that body afterwards, you may state where you saw it?

A. I saw it in a little building used for a warehouse back of Bailey & Smith's undertaking establishment, furniture shop on Massachusets streets, on the east side of the alley.

Q. State what you had to do with regard to the removal of the body to Bailey & Smith's? A. Nothing whatsoever.

Q. Did you see it removed there? A. I did not.

Q. Did you give any directions concerning its removal?

A. I did not.

Q. How did you know it was at Bailey & Smith's?

A. How did I know that?

1008 Q. How did you find that out?

A. That the body was there?

Q. Yes. A. Colonel Walker told me, I think.

Q. Colonel Walker told you during the day?

A. That it was there, yes; I met him.

Q. Now, going back to the Medicine Lodge and Hutchinson trip, I will ask you whether the trunk came through on that trip that was in the wagon?

A. I didn't exactly catch that.

Q. I ask you whether the trunk came through on that trip from Medicine Lodge to Hutchinson. A. Yes, sir.

Q. I will ask you what became of the shoes, if you know.

A. I never saw them after I saw them in Medicine Lodge.

Q. Did you make any inquiry for them at Hutchinson when you got in there? A. We did.

Q. Whom did you inquire of?

A. Brown; Colonel Walker did in my presence; I don't know as I made the inquiry.

Q. Colonel Walker made it in your presence? A. Yes, sir.

Q. You heard an inquiry made?

A. Yes, at the depot.

Q. Did you make any search for those shoes in the wagon?

A. I don't remember that I did; I was busy with other matters.

Q. Do you know what became of those shoes?

A. I don't, except what Brown said.

Q. Do you remember of a coroner's inquest being held in Lawrence on or about that time? A. I do.

Q. I will ask you what you had to do with getting up that inquest and having it held at that time?

A. I had nothing to do with it.

Q. Did you know Mr. Green up to that time?

A. I did not.

Q. Had you had any talk with him as county attorney upon this subject?

A. I did not; I didn't know the man at that time; might have met him and not known it, on the street.

Q. Do you remember the degree of publicity attending the inspection of that corpse in Lawrence?

1009 The plaintiff objects to the question as calling for the conclusion of the witness. Objection overruled; the plaintiff excepts.

A. It was published in the paper and talked about a good deal and caused a great many people to go to the court house; and talked about a great deal.

Q. Do you remember whether or not there was any publications in the local newspapers? A. In the paper?

Q. Yes.

A. Yes, I read accounts in the paper from day to day.

Q. Do you remember whether there were any publications in the papers concerning the proceedings at the coroner's inquest.

Objection.

By the Court:

He has stated that it was generally known and talked about there in Lawrence, and mentioned in the newspapers.

Q. If you went to Wichita at any time during the month of April, you may state when? April, 1879?

A. Yes, sir; I went to Wichita during April, probably about the middle of the month; along there.

Q. Had you at that time seen any photographs of the cropse? A. Yes.

Q. Were you present when the body was exhumed in the Lawrence grave yard? A. No.

Q. Had you any particular object in going down to Wichita on this occasion in April? A. I did.

Q. What was that object?

A. I had a couple of photographs of the corpse and I went down for the purpose of finding out who the cropse might be by making inquiry, hunting up?

Q. Did you make any inquiries in Wichita upon that subject? A. Oh, yes; a great deal.

Q. Whom did you inquire of generally?

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and hearsay. Objection sustained, the defendants and each of the duly excepting.

Q. I will ask you to look at Exhibits G No. 29 and G No. 30, and ask if you have ever seen them before?

A. Either them or some just like them.

1010 Q. I will ask you to state whether or not you took these or photographs just like them with you when you went to Wichita? A. I did.

Q. State what you did with those photographs when you were in Wichita?

The plaintiff objects to the question as calling for hearsay evidence.

By Mr. Ware:
We propose to prove that Major Wiseman met a Mr. Walker in Wichita; that Mr. Walker had a talk with Mr. Wiseman, and that after that, a letter of inquiry came to Mr. Walker which was referred to Mr. Wiseman.

By the Court:
You may show that.

To which ruling the plaintiff at the time excepted.

Q. Did you, among others in Wichita, have a talk with any person by the name of Walker? A. I did.
Q. Do you remember what his business or occupation was?
A. He was in a bank there.
Q. A banker. Do you remember whether or not you showed him the photographs?

The plaintiff objects to the question as immaterial. Overruled, the plaintiff duly excepting.

A. To the best of my knowledge, I did; yes, sir.
Q. How long were you in Wichita on that occasion in April? A. You mean that time?
Q. Yes.
A. I was there in Wichita off and on; and I made trips to the country until about the first of May, several weeks; I made some trips out and came back; Wichita was my headquarters; that was the way of it.
Q. Did you afterwards return to Lawrence? A. I did.
Q. If, after you returned to Lawrence, a letter was handed to you, by Dr. Morris, you may state about the date?

The plaintiff objects to the question because the witness has not stated that any letter was handed to him, and because it is leading.

1011 The Court sustained the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

[A.] You may state whether or not you were acquainted with a Doctor Morris in Lawrence? A. Yes, sir.
Q. You may state whether at any time you received any letter handed to you from him? A. Yes, I did.
Q. Where were you when you received the letter from him?
A. On the street in front of Doctor Morris' office.
Q. Was it handed to you on the st[r]reet by Doctor Morris? A. Yes, sir.
Q. About what date?
A. About the middle of December, 1879.

Q. Did you see the letter? A. Yes, sir.
Q. By whom was the letter signed?

The plaintiff objects to the question as hearsay evidence. Objection sustained, the defendants and each of them at the time duly excepting.

Q. Was it a letter written to you by Doctor Morris?

The plaintiff objects to the question as calling for hearsay evidence. Objection overruled; the plaintiff excepts.

A. Two letters were handed to me; one was from Walker, the banker at Wichita.

By the Court:

The question was whether it was a letter written to you by Dr. Morris.

A. Oh, no.

Q. I believe you said there were two letters, one enclosed in the other? A. Yes, sir.

Q. You may state what became of those letters, if you know?

A. To the best of my knowledge and belief they were burned when my house, my dwelling burned.

Q. At what time?

A. At Omaha, Nebraska, November 20th, 1894, the night of November 20th. I lost nearly everything I had.

Q. You may state by whom those letters were signed, if you know?

1012 The plaintiff objects to the question for the reason that no sufficient foundation has been laid.

By the Court: A sufficient foundation has not yet been laid.

Q. I will ask you, Major, if those letters are in your possession or under your control? A. Now?

Q. Yes.

A. Oh, no, I have not seen them since my house burned.

Q. I will ask you if you have seen them since the date of that fire? A. I have not.

Q. Are they among your papers or in your possession in any way? A. Not that I know of.

Q. Do you know anything about where they are?

A. I don't know that they are in existence; I think as already stated they burned with my house; it burned almost all my papers, nearly all but what I had in my grip.

Q. Were these papers among those papers in your grip that you preserved at the time of the fire?

A. No, they werent.

Q. I will ask you where you kept those papers before the fire, whether you kept them at the house or kept them elsewhere?

A. I kept them at my house in the third story in a large desk that I had.

Q. I will ask you what became of the desk?

A. Its contents burned up.

[Q] Preliminary cross-interrogatories by Mr. Atwood, Counsel for the plaintiff.

Q. Didn't you deliver those letters to the attorneys on the other side, Mr. Wiseman?

A. I showed them to Mr. Green; he wanted them.

Q. Did you ever deliver them to the counsel on the other side? A. Never delivered them; I showed them to him.

Q. Were they ever in the possession of Mr. Green or Mr. Barker? A. No sir, not to my knowledge, no sir.

Q. Is it not a fact that you have been present at all the trials of this case? A. I believe so.

1013 Do you remember whether or not those letters were ever introduced in evidence at any trial?

A. I don't remember; I don't think they were.

Q. You don't think they were? A. No, sir.

Q. You say you have no recollection of ever putting them in the custody of Mr. Green or Mr. Barker?

A. Never put them in their custody.

Q. When did you say you showed them—

A. I showed them to Mr. Green?

Q. When did you show them to him?

A. Immediately after I received them, I went right up the street and went to Green's office.

Q. Did you take them away when you left Green's office?

A. I did.

Q. And kept them in your possession ever after that?

A. Until they burned.

Q. They were not in the possession of counsel at the time of any of these trials?

A. Not to my knowledge.

Q. Did you ever have any other papers in your possesssion which pertained to this Hillmon case? A. Oh, yes.

Q. You had a number? A. Yes, sir.

Q. Were any of those papers in connection with the Hillmon case preserved from the fire?

A. A couple of photographs were.

Q. Anything else?

A. No, I had photographs of Hillmon and of this corpse in my satchel and my satchel being saved they were saved.

Q. These photographs were the only things in your possession in connection with the Hillmon case that was saved?

A. Yes, sir, that is my recollection.

Q. You say you never placed these letters in the hands of the attorneys on the other side of this case?

A. Not to my knowledge.

Q. They were never introduced in evidence in any trial of this case?

A. Not to my recollection, no. Will you allow me to make one other remark in connection with that; I want to answer fully. I was at outs with the companies; was lawing
1014 them for my services, and I wouldn't put them in possession of anything of value; I was fighting them and they were fighting me.

Direct Interrogatories Resumed by Mr. Ware.

[—] Now, I will ask you, Major, what were the contents of the two letters which you received at that time from Dr. Morris.

The plaintiff objects to the question as immaterial and hearsay.

By the Court: I presume it is proposed to connect these letters with inquiries from the Walters family?

By Mr. Ware: Yes, sir.

The Court sustained the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

Q. I will ask you if you read those letters which you received from Dr. Morris? A. I did.

Q. What time did you say it was in 1879?

A. About the middle of December.

Q. Now, please state the contents of those two letters which you received from Dr. Morris about the middle of December, 1879.

The plaintiff objects to the question as calling for heasay and secondary evidence, and because no sufficient foundation has been laid. The Court sustained the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

By Mr. Ware: We now offer to prove that a letter was received by Mr. Walker in Wichita, inquiring—

By Mr. Atwood: We submit that offers of testimony should be submitted in writing.

By the Court: I will allow you, in a proper way, to show that inquiry was made from Fort Madison for Frederick Adolphus Walters, but that does not involve, necessarily, the contents of written instruments.

1015 By Mr. Ware: Very well; I will get at that in another way. I will ask you when you first heard the name of Frederick Adolph Walters. A. When I first heard the name?

Q. Yes. A. I saw it in a letter the first time.

The plaintiff moves to strike out the answer as incompetent. Motion overruled; the plaintiff excepts.

A. I didn't hear it; I read it.
Q. About when did you read that?
A. On or about when I got that letter, the middle of December, 1879, to the best of my recollection.

By the Court: Did you learn at that time that it was claimed that a man by that name whose home was at Fort Madison, was missing. A. Yes, sir.

By the Court: I suppose that is what you desire to prove.
By Mr. Ware: That is it exactly. A. Yes, sir.

By the Court: If the plaintiff wants to know how you learned it, that is another question.

Q. You may state if you learned at that time whether any inquiry was being made for Frederick Adolph Walters by his family or friends. A. Yes, sir.
Q. How did you get that information? A. From the letter.
Q. From the letter that you received from Dr. Morris?
A. Yes, sir.
Q. Do you remember to where the letter was addressed that was enclosed by Mr. Walker to Dr. Morris?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection sustained the defendants and each of them at the time duly excepting.
of one of the letters.

Q. After hearing the name of Frederick Adolph Walters in December, 1879, what, if anything did you do concerning it? A. What did I do concerning it?
Q. Yes. A. I wrote a letter to Fort Madison to the writer of one of the letters, the letters enclosed and sent a couple of photographs.
1016 Q. What kind of photographs did you send in that letter? A. The ones I looked at here awhile ago.
Q. Photographs like exhibits G 29 and G 30? A. Yes, sir.
Q. Photographs of a body in a coffin? A. Yes, sir.
Q. Did you send one photograph or two? A. I sent two.
Q. Do you remember to whom you sent those photographs in Fort Madison?
A. I sent them to the writer of the letter that was enclosed by Mr. Walker, and his name I forget now.
Q. Could you tell the name if you heard it?
A. Not positiyely, no I wouldn't like to state; it was so long ago.
Q. Do you remember whether or not the name was Hobbs?
A. I could not positively state what the name was now.

Q. You sent the photographs to Fort Madison addressed to the person whose name appeared in the letter?

A. I sent them and they were returned to me afterwards.

Q. Major, there has something cropped out here about a disagreement between you and the insurance companies. I will ask you whether you have any connection or relation to any of these insurance companies in any way? A. Now?

Q. At present? A. None whatever.

Q. How long since you have been in the employ of any of the insurance companies mentioned in this suit?

A. I severed my connection with the General Agent with whom I was employed; I never was employed by the company; I worked for the General Agent—on the first of January,—the 31st of December, 1879.

Q. Well, since the first of January, 1880, have you been in the employ of the Connecticut Mutual or New York Life Insurance Company or the Mutual Life of New York?

A. No sir, in no way.

Q. Have you any interest whatever in the event of these suits? A. Have I what?

Question objected to, and not answered.

Q. Are you a policy holder in either of these companies?

A. I am not; not now.

1017 Q. Did you hear the testimony of John Eldridge read on this trial? A. I did not.

Q. I will ask you if he signed any application as a next friend in your presence? A. Not that I remember of.

Q. Did he sign an application as next friend? A. No sir.

Q. That you wrote? A. No sir.

By Mr. Ware: In order to preserve the point fully and to present it fully to the Court, so that it will go into the record properly, and that the Court may understand our position fully, we wish to ask the following question:

Q. Will you please state the contents of the letter enclosed by Mr. Walker to Dr. Morris, and handed to you by the latter in December 1879?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay, and because no sufficient foundation has been laid.

By the Court: The admissibility of that letter is not determined by its contents but is determined by the circumstances concerning its writing and its reception, and it will not be necessary to state the contents of the letter in arguing the question as to the admissibility of the letter.

By Mr. Ware: I shall not give the verbal contents of the letter but we offer to prove that this letter was written—

Objection.

By the Court: As I say, Mr. Ware, I do not [—] a proper discussion of the materiality or competency of that letter involves a statement of its contents, assuming that it was not written by Frederick Adolphus Walters, but was written by some one at Fort Madison to some one in Wichita, and was forwarded to the witness now upon the stand. If you desire to make a statement of the contents of the letter, you may do so to me during the recess.

1018 By Mr. Ware: That is perfectly satisfactory.

Q. Did you learn by whom at Fort Madison, and on whose behalf, the inquiry for Frederick Adolph Walters was instituted at Wichita?

The plaintiff objects to the question as immaterial and hearsay. Objection overruled, the plaintiff excepts.

A. Yes sir.

Q. I can't state the man's name who made the inquiry, but I do remember the name in whose behalf the writer of that letter made it.

Q. In whose behalf was the inquiry made?

Same objection by the plaintiff; objection overruled; the plaintiff excepts.

A. In behalf of a man by the name of Walters; I don't remember his initials.

Q. Was it father or son?

The plaintiff objects to the question for the reason that it assumes that it was one or the other, leading and hearsay. Objection sustained, the defendants and each of them duly excepting.

Q. Going back: I believe you said you saw the body at Bailey & Smith's undertaking establishment in Lawrence, Kansas? A. I did.

Q. You may state whether that was the same body that you saw in the grave yard at Medicine Lodge? A. It was.

Q. I will ask you if you examined or caused to be examined the mouth of the corpse at Medicine Lodge?

A. I viewed it; I didn't touch the body.

Q. I believe you testified, did you, Major, in regard to the measurement of Mr. John W. Hillmon; did you testify to that in your former examination? A. Yes, sir.

Q. Do you remember what your testimony was as to the height of Hillmon? A. Five feet, nine inches in his footwear.
Q. Did you testify in regard to his teeth?
A. I did, yes sir.
Q. What was the condition of his front teeth, do you remember?
A. There was one missing; either broken off or gone entirely in the upper left jaw.
1019 Q. There is a question between myself and my co-counsel as to whether or not the witness testified as to the measurement of John W. Hillmon, and I desire to ask that question now. How do you know he was five feet, nine inches high? A. I measured him.
Q. At what place?
A. At Doctor Miller's office in Lawrence, Kansas.
Q. At what time?
A. I could not give the date; during the winter of 1878-9; either in December, January or February; I can't remember the date.

And in answer to cross interrogatories propounded to him by John H. Atwood, counsel for the plaintiff, the witness testified as follows, to wit:

Q. Where do you reside, Mr. Wiseman? A. My home?
Q. Yes. A. Omaha, Nebraska.
Q. When did you leave your home to come to this trial?
A. I left my home on the 18th; last Wednesday. I think it was the 18th of October.
Q. For the purpose of coming to this trial? A. I did.
Q. Since you arrived here have you read over the testimony that you have given at other trials of the case?
A. I have not; not a word.
Q. Now, then you spoke a little time ago about being employed by the insurance companies and having differences of opinion with them about the value of your services?
A. Yes sir.
Q. Going back to the time of your employment: I understood you to say in your examination that you were employed under the general agent some ten years prior to the happenings that occasioned this trial, prior to 1879? A. Yes sir.
Q. Had you been employed by the companies as a detective prior to that time or by the general agent? A. I had not.
Q. You say that you never had been employed in
1020 that capacity by the companies, but you were employed by the companies at the time you went down to Wichita; is that a fact? A. The general agent.

Q. Just answer that question; you know you went down to Wichita, you went to Wichita, did you not, on behalf of the companies? A. Yes sir.

Q. And spent several weeks there making inquiries?

A. Yes sir.

Q. Looking around trying to find if anybody had been missed down there? A. Yes sir.

Q. Took pictures with you? A. Yes sir.

Q. And interviewed people? A. Yes sir.

Q. Did you ever do work of that kind for this company or anybody prior to the time you went to Wichita?

A. I did detective work for the United States.

Q. You had done some detective work?

A. When I was in the service of the United States.

Q. Over how long did your detective work extend with the United States, or anybody else prior to the time that you did this work for the United States?

A. I did more or less detective work from 1869 to the fall of 1875 or spring of 1876.

Q. About six or seven years? A. Yes sir.

Q. Then your business was largely soliciting insurance from that time on, and in 1879, after these occurrences down at Medicine Lodge, you did the work that you have described to the jury briefly. Is that a fact?

A. I was in the insurance business all the time; I was requested by the United States Government District Attorney to do—

Q. To do detective work occasionally?

A. Yes sir, occasionally.

Q. Then detective work was not your regular employment but you did it occasionally?

A. I was United States Guager and that brought me—

Q. In that capacity did you go down there to Medicine Lodge with Mr. Walker? A. I did.

1021 Q. Who hired him to go? A. I did.

Q. In what capacity was he hired?

A. I wanted some one to go with me down there; it was on the frontier and pretty rough characters.

Q. He was a deputy sheriff at that time, was he not?

A. He might have been.

Q. He had been connected with such offices as the sheriff's office and so forth, had he not?

A. Prior to that I knew him to be marshal.

Q. Then it was in his capacity as an officer or detective that you took him down there, wasn't it? A. No sir.

Q. You took him down there in the capacity of a detective or officer did you not? A. I did not.

Q. Did you hire him as a physician to go down there?

A. No sir.

Q. Did you hire him as an insurance agent? A. No sir.

Q. What did you hire him for if it was not in the capacity of an officer to go down there; as a body servant?

A. Oh, no, I took him with me as a companion to assist me in case I needed any assistance.

Q. What pay did you agree to pay this companion of yours? A. I think it was $3 a day and expenses.

Q. Did the company allow this expense bill and pay the $3 a day and expenses?

A. They did after I lawed them two or three years in the United States Court.

Q. It is a fact that they did?

A. My bill; Judge Foster decided the case.

Q. No matter about that, Major; what we are talking about is not what Judge Foster did but what the companies did with you; were you authorized by anybody to employ this companion at $3 per day and expenses? A. No.

Q. You were not authorized by any one?

A. I did that on my own responsibility.

Q. When you came to Lawrence, and from thence
1022 to Medicine Lodge, by whose direction did you go there to Lawrence; you have told me or the counsel that you were in Moberly or somewhere in Missouri at the time you first heard of this? A. Working up business.

Q. You were directed by somebody to go to Lawrence, were you not? A. I went from Osage City.

Q. Now, you went from Osage City to Medicine Lodge?

A. I asked permission of the general agent to go there and he telegraphed me and wrote me to go ahead.

Q. You were at Osage City at the time you heard of this occurrence at Medicine Lodge; is that right? A. Yes sir.

Q. How did you get this information?

A. From the press; the newspapers.

Q. Then you deemed it your duty to communicate with the general agent and you did so? A. Yes sir.

Q. And asked of him authority to go to Medicine Lodge?

A. Yes sir.

Q. And he wired you authority to go? A. Yes sir.

Q. And you went? A. Yes sir.

Q. And thus commissioned on behalf of the companies through the general agent to go there?

A. The general agent.

Q. Where did you pick up your companion Walker?

A. At Lawrence.

Q. You [—] from Osage City to Lawrence first?

A. I did.

Q. Did you go immediately upon receipt of advices from the general agent at Osage City of Lawrence?

A. At Lawrence; to my best recollection I left Osage City on the 27th of March immediately after I telegraphed the general agent.

Q. I understand you— A. And told him—

Q. What was the general agent's name?

A. Byron Sherman.

Q. And his headquarters were in St. Louis, you say?

A. Yes sir.

Q. You communicated with Sherman at St. Louis and went immediately from Osage City to Lawrence where you received your directions from the general agent?

A. I got permission to go.

Q. And then after you received that, you deemed
1023 your authority broad enough for you to employ a companion, did you? A. I did.

Q. And you did employ Mr. Walker at $3 a day and expenses? A. Yes.

Q. And you went down to Medicine Lodge in the way you have described? A. Yes sir.

Q. Did you pay him out of your own pocket and then have trouble in getting it back?

A. I paid him and charged it up in the bill.

Q. In your expense account?

A. Yes sir, expense account.

Q. And about how much did you pay him altogether as you remember; of course, you can't tell to a dollar, but in round numbers, Major?

The defendants object to the question as not proper cross-examination and as calling for incompetent, irrelevant and immaterial evidence.

The Court sustained the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

Here the Court took a brief recess, during which the following proceedings were had, in the absence of the jury:

By the Court: Now, Mr. Ware, you may state that.

By Mr. Ware, Counsel for defendants: We offer to show in answer to a former question put to Major Wiseman, that the master of a Masonic lodge in Fort Madison, Iowa, by the name of Hobbs, wrote a letter to the master of a Masonic Lodge in Wichita, Kansas, of which C. A. Walker was secretary, this being the same Mr. Walker who sent the letter to Mr. Wiseman and the substance of the letter from Fort Madison was that a man in Fort Madison by the name of Walters had a son by the name of Frederick Adolph Walters that had gone west and had written home from time to time, but of late, he had not written; that in his last letter, the said Frederick

Adolph Walters had said that he had gone west with a man by the name of Hillmon, and requested that the Wichita parties to whom the letter was addressed should see if he could not get information as to where this young man Frederick Adolph Walters who was now missing, was, and if he could get track of Frederick Adolph Walters, to let them
1024 know in Fort Madison, because the father was very much worried over the absence of his son.

The plaintiff objected to the offer as incompetent, irrelevant and immaterial and calling for hearsay. Objection sustained, the defendants and each of them duly excepting.

By Mr. Ware: We also expect to prove that a letter written by Mr. Walker, and enclosing the Fort Madison letter, was directed to the coroner of Douglas county, Kansas, and requested the coroner of Dauglas county to hand the enclosed letter to Mr. Wiseman of Hillmon fame.

The plaintiff objected to the offer as incompetent, irrelevant and hearsay. The Court sustained the objection, to which action and ruling of the Court, the defendants and each of them at the time duly excepted.

Cross-examination of Major Wiseman continued by Mr. Atwood:

Q. When did the employment of Colonel Walker or Mr. Walker, whatever his name is, who went with you as a companion to Medicine Lodge, cease?

A. When did we come back to Lawrence?

Q. How long were you gone in round days; I don't suppose you can state the exact time.

A. We started on the night of the 29th, night train for Hutchinson; 30th, on the 31st we were at Medicine Lodge; on the first and second we returned to Hutchinson, and on the morning of the third of April we came back to Lawrence; that was the trip.

Q. Five or six days? A. Yes, sir.

Q. Now, Tillinghast, a man by the name of Tillinghast was with you; is that the right name? A. Tillinghast.

Q. Who was he as regards the company; what company had he any connection with, if any one?

A. He represented the New York Life.

Q. These two defendants are the Mutual Life of New York and the Connecticut Mutual, and it was a third company that he had something to do with, that Tillinghast had to
1025 do with?

A. He was a special agent of the New York Life Insurance Company.

Q. You had nothing to do with paying his expenses, I suppose? A. Oh, no.

Q. Tillinghast was going on behalf of his company; is that a fact so far as you know?

A. I never requested him to go; he didn't want to go at first, but I told him that his company was interested and he had better go and he finally concluded to go.

Q. And did go? A. Did go.

Q. And the party consisted of yourself, Walker and Tillinghast? A. Yes, sir.

Q. When you came back from there, how long after that was it before you went to Wichita; you have mentioned going to Wichita and I have reference to that time, that occasion?

A. To the best of my knowledge a week or ten days or such a matter after I came back.

Q. That would bring it along some time in the month of April? A. Yes, sir.

Q. You went there by whose direction, if anybody's; your general agent, Mr. Sherman? A. No.

Q. Whose?

A. The matter was left to me, to my judgment; I had no instructions where to go by the general agent because he didn't know only what I told him.

Q. I see, yes; the general agent employed you with general powers to use your own discretion in the matter?

A. Oh, yes.

Q. And you went where you thought it best to go?

A. Yes, sir.

Q. And in pursuance of that general authority received from the general agent of the Mutual Life, you went down to Wichita? A. I did.

Q. And you spent some four or five weeks in this work of inquiry or detective work?

A. I did, until the first week in June.

Q. That would be five or six, would it not?

A. It would be more than that; it would be all of April and May; it would be eight weeks; well, eight or nine weeks; something like that.

1026 Q. And then you come back to Lawrence, or to where?

A. After my trip to Wichita, then of course, I came back to Lawrence about the end of the month.

Q. Coming back to your employment as a solicitor; your compensation for that was by commission, was it not?

A. Entirely.

Q. If you succeeded in writing a good deal of insurance you made a good deal of money, did you not?

A. I had a guarantee.

Q. All right, but it depended, in some measure, at least, upon the amount of insurance that you wrote, too?
A. Yes, sir.
Q. But this employment was independent of that, was it not, this employment, when you did that work? A. Yes, sir.
Q. Was done in pursuance of this independent employment? A. Yes, sir.
Q. But no terms were made between you and the general agent as to your compensation you were to receive for this work when you started to do it? A. None whatever.
Q. That was left for future adjustment? A. Yes, sir.
Q. Now, then, how long did this extra or special employment, outside of the solicitor's employment last; you say you were about eight weeks at Wichita, and then returned to Lawrence; did you still continue in this special employment?

By Mr. Ware: He did not say he was eight weeks in Wichita.

By Mr. Atwood: His answer was, April, May and June, six or eight weeks. Now, after you came back from there, did you still continue in this special employment, Mr. Wiseman?

A. Yes, sir, I continued during May and the first few days in June.
Q. Where did you go in pursuance of this employment, if anywhere, after you came back from Wichita?
A. I went back to Wichita?
Q. Went back again? A. Yes, sir.
Q. How long did you stay there the second time?
A. Well, I took a trip from Wichita out in the Medicine country; went to old Kiowa from the Medicine Riven some eight or ten miles.
Q. What I mean, of course, I suppose you didn't stay in Wichita all the time, but calling all that you did in
1027 that neighborhood the Wichita trip, how long were you gone on that second trip?
A. Well I devoted my whole time from the time I started first until I should say the first days of June, when I got into a row with attorneys from New York.
Q. That was the time your employment ceased; did you ever go to Fort Madison?
A. No; I passed through there once.
Q. I mean in pursuance of this employment? A. No.
Q. Then you worked in connection with this special employment from the time that you received your directions in Lawrence just after the killing down at Medicine Lodge until the early days of June; that would be all of the month of April, all the month of May, a little bit in the last of March and a little bit in the first of June? A. I think so.

Q. Did you do anything more in pursuance of that employment, Mr. Wiseman, after June? A. No, sir.
Q. You have never been employed by the company in a detective or other capacity of that kind from that time to this?
A. No, sir.
Q. Was any money advanced to you for your expenses at the time you were making these trips and doing this work?
A. I drew drafts for my expenses—

The defendants object to the question and answer as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

A. I drew drafts for my expenses on Byron Sherman, the general agent; he honored my drafts, but finally he wrote me that he would not do—
Q. Never mind that now. Your drafts were honored to such amount as you drew them, up to the time your employment ceased? A. Yes, sir.
Q. They were drawn, were thy, to cover the expenses during these trips? A. Yes, sir.
1028 Q. Hotel bills and all sort of things were paid by the insurance company in this way? A. Yes, sir.
Q. What did you get yourself for this work?
A. I got a judgment before Judge Foster.
Q. Did you get the money; judgments don't count unless you get the money? A. The judgment was $760.35.
Q. That was the amount that was paid; you sued for $2500, didn't you Major?
A. Yes, sir, I sued for $2500, but I didn't expect to recover that much.
Q. You thought you would swell it a little bit?
A. Yes, sir, and let the judge cut it down to what he thought was right.
Q. You had a habit of swelling things?
A. One moment: Judge Foster tried it in chambers; it was not a jury trial.
Q. If you had had a jury they would have paid you more?
A. We agreed to leave it to the Judge.
Q. I believe they would. Now, then, you spoke of having a falling out with the company?
A. Yes, not that company.
Q. You were talkng about these letters and you said you were at outs with them or used an expression equivalent to that.
A. They sent an attorney out here by the name of Munn and I and he got into a row.
Q. About your compensation? A. Yes, sir.
Q. Of course, he represented the companies; is that a fact?

A. As I say, I did it through the general agent.
Q. Who was Munn?
A. He represented himself to be an attorney for the Mutual Life Insurance Company of New York.

The defendants object to the question and answer as incompetent, irrelevant and immaterial. The Court overruled the objection to which ruling of the Court, the defendants and each of them at the time duly excepted.

A. He represented himself and transacted business with me as attorney for the Mutual Life Insurance Company
1029 of New York and directly or indirectly, for the New York Life, and the Connecticut Mutual in our discussion of the amount I wanted to get for my services.
Q. He was the one with whom you disagreed as to the amount of your compensation?
A. Yes, sir, and Mr. Barker there, too.
Q. And this disagreement was the cause of this suit that you afterwards brought? A. Yes, sir.
Q. What are Munn's initials?
A. I can't remember them now.
Q. H. B. were they not? A. Probably so.
Q. This employment ceased to exist by this difference between you and Mr. Munn early in June? A. Yes, sir.
Q. Did you use an expression a little while ago, Mr. Wiseman, that from that time on for a while at least, you were at outs with the company or with its management?
A. At outs with Mr. Munn because he hadn't treated me fairly.
Q. When did you get in with the company?
A. I had no dealings directly with the company; I didn't write to them; I had no communication with it only through—
Q. Of course, the company was acting through its agents, wasn't it? A. I suppose so.
Q. Of course, you couldn't have a row with a corporation because it—
A. I think it was Mr. Munn more than the companies.
Q. When was it that your affairs with the company or with Mr. Munn, or with the agents, were so adjusted that you were willing to give information and testimony; when was it that your differences with these people were so adjusted that you were willing to give information to the attorneys for the companies and appear as a witness?
A. I think I testified during that time once or twice.
Q. When was this judgment gotten before Judge Foster?
A. It was some time in the 80s; I can't remember when, but I think there was one or two trials; I know there was one because Judge Foster was familiar with the services I had rendered.

Q. You remember, Major, in your direct examination, when you were talking about letters that were burned in 1894? A. Yes, sir.

1030

Q. You said that you were at outs with the company and would not give them the letters, and did not give them to Green and Barker. When was that?

A. That was during the summer, and all the time from June on when I had the difficulty with Mr. Munn.

Q. Did I understand you to say that this fire that destroyed these letters was in 1894 or 1884?

A. 1894, 19th of November.

Q. You were at outs with the company up to 1894, then?

A. I was not at outs.

Q. You refused to give them information?

A. I am at outs with you about as much as I would be with anybody else.

Q. You and I are not at outs; you and I are good friends; I don't want you to class me with the insurance companies. Now, Major, didn't you use the expression, that the reason you did not furnish these letters to Mr. Green or Barker was that you were at outs with the company and didn't want to give them information?

A. Mr. Green wanted the letters and I wouldn't give him the letters but I let him know that I had at last found out who that man was.

Q. When did he use the expression that he wanted the letters?

A. At the time I got the letters, in 1879, December, immediately after I received them.

Q. Well, had you brought a lawsuit against the companies at that time? A. I can't remember the date.

Q. There were differences between you at that time that were unsettled? A. They were unsettled, anyhow.

Q. Did they ever request you to give the letters to them after that time, December, 1879?

A. I can't remember, but it runs in my mind that I was requested to do and wouldn't do it.

Q. You retained them in your possession notwithstanding they were not addressed to you?

A. I got them from Dr. Morris, and they were mine.

Q. When you took the body or when the body was taken from Medicine Lodge to Lawrence, who directed it to be brought there? A. I did.

1031

Q. What was your purpose in bringing it there; did you have in mind the idea of holding an inquest, or know that an inquest should be held?

A. I understood that an inquest had been held at Medicine Lodge; I wasn't familiar with the law and rules to know, but

I wanted to take him back where he lived and where they knew him to show it was not Hillmon.

Q. I ask you whether or not you had in mind the idea that another coroner's inquest could be or might be held in Lawrence? A. I don't think I did; I didn't know.

Q. Of course, Major, our memories are not as good as they were 20 years ago; when you testified at the other trials, those trials were nearer the time when the matters occurred than to-day; that is a fact, is it not? A. I think so.

Q. And your memory would naturally be better about these things at those earlier trials than at the present time; is not that a fact?

A. It might on some things. On any of the material things I don't think it would be any better than now.

Q. Let me put this question to you, if in 1895, you did not respond to this question in this language: "I will ask you whether or not it was your plan and intention, upon your return to Lawrence, to hold an inquest, or have one held? A. Yes, sir, that was my idea."

A. I don't remember whether I made any such remark as that or not or whether the question ever was asked.

Q. I will ask you if you have any recollection that would serve you as to whether or not you had any thought of an inquest being held in Lawrence?

A. My object; I wouldn't say.

Q. Then, as a matter of fact, if you said that five years ago, it would be pretty apt to be true, would it not, Major?

A. Yes, sir.

Q. Quite natural you should hold an inquest?

A. To the best of my knowledge, at that time, if my memory serves me.

Q. Certainly, that is the only way we can testify?

1032 Q. When you got back to Lawrence, where did you get off the train.

A. At Massachusetts street; at the bridge.

Q. That is, before it reached the depot? A. Oh, yes.

Q. To what place did you go in the city of Lawrence upon your alighting from the train?

A. My recollection is that I went home to my family.

Q. When did you visit Mr. Barker, if at all?

A. I saw him after I had been home and got my breakfast; between eight and nine o'clock; around there.

Q. That same morning? A. That same morning.

Q. And after you had breakfasted, you went directly to Mr. Barker's office. A. Yes, sir.

Q. Your purpose in going there was to employ him to help you in proving it was not Hillmon; is not that the fact?

The defendants object to the question as not proper cross-examination.

By the Court:
I think that portion of the question, about employing him to help in proving it was not Hillmon is not proper.

Q. Did you go to the office of Mr. Barker, Mr. Wiseman?
A. I did.
Q. And your purpose in going there was to hire Mr. Barker as an attorney to help prove that the body that was brought from Medicine Lodge was not the body of Hillmon?

The defendants object to the question as not proper cross-examination. Objection sustained; the plaintiff duly excepts.

Q. For what purpose did you go to Mr. Barker's office at that time?
[Q.] I needed legal advice and I went to him because he was a lawyer, to give me legal advice.
Q. And you showed excellent judgment, for he is a good lawyer. Now, then, in what matters did you feel that you needed advice; personally or as the agent of these companies.

The defendants object to the question as not proper
1033 cross-examination.

By Mr. Atwood:
I am not asking if it was a personal matter of his.

The Court overruled the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

A. I went there on business for the company.
Q. And was the business of the company in connection with this dead body? A. Yes, sir.
Q. And the insurance policies that were upon the life of John W. Hillmon? A. Yes, sir.
Q. Now, I will ask you the question whether or not you went there for the purpose of employing Mr. Barker to assist you in demonstrating that it was not the body of John W. Hillmon. You believed that the body was not the body of John W. Hillmon and you went to Mr. Barker for the purpose of assisting you in demonstrating that it was not the body of John W. Hillmon?

The defendants object to the question as incompetent, irrelevant and immaterial. The Court sustained the objection, to which ruling the plaintiff at the time duly excepted.

Q. As has been suggested, I will put the question this way: If in the course of that employment, you employed him to go to the inquest that was subsequently held, for any purpose?

A. I don't know that I requested him; if there was one held, I expected, of course, him to be there and to attend to the interests of the company for whom I was acting.

Q. When did you first learn that an inquest was to be held?

A. The morning of the third.

Q. Is that the morning the body got there? A. Yes, sir.

Q. From whom did you learn it?

A. I don't remember that.

Q. Did you and Mr. Barker talk over an inquest and the possiblity of an inquest or the propriety of holding one or anything of that kind?

The defendants object to the question as incompetent, irrelevant and immaterial. Objection sustained, the plaintiff duly excepting.

1034

Q. Did you talk over with Mr. Green at any time that morning anything about an inquest?

A. No, sir; I never spoke to him.

Q. Did you see Doctor Morris, the coroner?

A. I saw him; I don't know as I saw him that morning, but I saw him that day to the best of my recollection.

Q. Were you in the office when John Brown was in the office of Mr. Barker being interviewed; were you there, or were you in company with Doctor Morris at the time, at any time, that Mr. Barker was with you?

A. In Barker's office?

Q. Anywhere?

A. I don't exactly understand that question.

Q. Were you and Morris, the coroner, and Barker together at any time that day? A. No.

Q. Were you and Brown and Barker together at any time that day?

A. No, sir; not that I know of; possibly I was.

Q. You have no recollection of it?

A. I can't remember.

Q. You say that you don't remember now where it was you first learned that an inquest was to be held?

A. I learned it that day, that morning, I think; yes, the morning, there was an inquest to be held.

Q. And you went perfectly naturally to Mr. Barker's office?

A. I did.

Q. How long did you stay there, Mr. Wiseman, approximately; of course, you could not tell to the minute?

A. Not very long; perhaps half an hour.

Q. To what place did you go from there, if you recollect? That stirs up a pleasant memory, I should judge, from your smile.

A. I can't remember; you might as well ask me what I had for dinner that day.

Q. You don't remember. A. No, sir.
Q. You don't remember where it was that you first learned that an inquest was contemplated?
A. I learned it in the morning, but where I was or
1035 from whom I first learned it, I could not now state.
Q. You say that while you don't think you told Mr. Barker to go to the inquest, you expected him to do so in the event that one was held; is that a fact?

The defendants object to the question as incompetent, irrelevant and immaterial. Objection sustained, the plaintiff duly excepting.

Q. Was there anybody else besides you in the city of Lawrence authorized to employ attorneys for your company in connection with this Hillmon matter; besides yourself? A. No.
Q. Were you at the inquest? A. Was I at the inquest?
Q. Yes.
A. I was in and out of the court house, where the inquest was being held.
Q. I don't mean that you were there every minute, but you were in and out? A. Yes, sir.
Q. You know Mr. Barker was there? A. Yes, sir.
Q. Acting for the companies? A. Yes, sir.
Q. Now, then, you went to Mr. Barker, and employed him in connection with the companies' business there, in connection with the Hillmon case; that is a fact?
A. Yes, as my legal adviser.
Q. Nobody else but you was authorized to make such employment for the company, and Mr. Barker did appear [—] the inquest for the companies; that is a fact, is it?
A. Yes, sir; to look after the interests of the company.
Q In whose behalf, if anybody's, besides the state's, the government's, did Mr. Green appear, do you know?

The defendants object to the question as incompetent, irrelevant and immaterial and not proper cross-examination. The Court overruled the objection, to which action and ruling of the Court the defendants and each of them at the time duly excepted.

A. He seemed to me to be representing the county of Douglas and the state.
Q. Do you know when it was that Mr. Green became
6310 employed by the insurance companies? A. No.
Q. Mr. Green was there, however?
A. At the inquest?
Q. Yes. A. Oh, yes.
Q. And Mr. Barker was there? A. Yes sir.
Q. You say you don't now remember who it was that first told you about there going to be held an inquest?

A. No, I can't remember.

Q. Now, then, to shift from one subject to another, we will go back to the time that the insurance was issued by you to Mr. Hillmon or upon Mr. Hillmon's life; that was in December, I think you said; I want to get at the name of the month. What month was it in the latter part of 1878, when the policies were issued by you as special solicitor, on the life of John W. Hillmon? A. I never issued any policies.

Q. Took the application?

A. The fifth of December, 1878.

Q. I was in error in the use of words. It has been suggested that you delivered the policy afterwards; is that a fact?

A. Never saw it until I saw it in court.

Q. Now, that policy, is any part, or the whole of it in your handwriting? A. You mean the application?

Q. The application I mean, yes; pardon me.

A. A part of it is my handwriting; the first part.

Q. That is the part wherein you wrote in the figures, under the words, "Feet and inches" in pursuance, as you say in this direction or statement as to his height? A. Yes sir.

Q. Now, as a matter of fact, you have since ascertained he was five feet, nine? A. Yes sir.

Q. Did he at the time that he corrected the matter or at any other time, give you any explanation as to why he had told you he was five feet, eleven inches, when as a matter of fact he was two inches shorter?

A. When I measured him, I did not remember what was put in the application; I did not remember.

Q. The question was this:

A. The application had gone off—

1037 Q. You did not quite catch the purport of my question; my fault of course, and I will repeat it. Did he at any time, either at the time that the application was made out, or at the time it was corrected, at the time he came in and you found out he was five feet nine inches, did he, at any of those dates, explain to you why he should have said he was five feet and eleven inches, when he was two inches shorter?

A. No.

Q. He gave no explanation of that? A. No sir.

Q. As a matter of fact, those two statements were made by him, one that he was five feet, eleven inches, and the other that he was five feet, nine inches?

A. He didn't make a statement that he was five feet, nine; I measured him.

Q. Where did you measure him?

A. In Doctor Miller's office.

Q. Going back to the time the application was made out by you?

A. That was in Griffith's office, in the back room.
Q. Griffith was a banker and insurance man?
A. Local agent of the Mutual Life.
Q. It was in his place of business that the writings were made by you? A. Yes sir.
Q. Now, following the filling up of the application, when you got up to that point, you had to go to some physician for the purpose of having an examination made?
A. Went to Doctor Miller.
Q. How far was it from Griffith's office to Dr. Miller's office to which you went?
A. A little over half a block; about three or four hundred feet.
Q. Did you go with him there? A. I did.
Q. Did Baldwin go with you? A. He did not go.
Q. Hillmon and you went together?
A. After we went out of the bank Baldwin went off.
Q. And you and Hillmon walked up the street together?
A. Yes sir, together.
Q. What is your height or was it in the days you were erect? A. It is six feet, one and a half inch now.
1038 Q. You walked along beside Hillmon at the time you went up to Dr. Miller's office? A. I did.
Q. Were you in the office at the time the examination was made? A. By Dr. Miller?
Q. Yes. A. Yes sir.
Q. You saw the examination in progress? A. Yes sir.
Q. Miller among other things measured Hillmon about the chest? A. He did.
Q. Expanded and contracted? A. Yes sir.
Q. Stood up in front of him at the time it was being done, didn't he? A. Yes sir.
Q. They were both in your view at that time; that is a fact? A. Yes.
Q. Did you go anywhere with him after you left the doctor's office? A. With Hillmon?
Q. With Hillmon.
A. It was about dinner time and I walked out and I went home to dinner.
Q. Now, then, how many times did you see him, if at all, during the next week? A. Who?
Q. Hillmon.
A. I can't remember exactly how many times.
Q. Oh, no, of course, nobody can do that, but approximate it?
A. I must have seen him not less than half a dozen times.

Q. You both had been soldiers, I think you said?
A. I was and he said he was.
Q. He had the same statement from you that you had been; each told the other that you had been soldiers? A. Yes sir.
Q. And this acquaintance formed at Griffith's office, ripened into something of an acquaintance so that you use to stop on the street when you met and tell stories; is that a fact? A. Yes sir.
Q. Now, then, how long did you serve in the army, Major?
A. Four years and four months.
Q. In that capacity you had lined up men in front of you and looked at them a considerable number of times?
A. A good many of them.
1039 Q. Despite the fact of your observing men as you were obliged to do in your official capacity in the army, and despite the fact that you walked beside, and talked to this man in the way you have described, and stood up in front of him, you did not suspect that he was two inches shorter than he stated, during all the time, until he came to you to be measured; is that a fact?
A. When I measured him I never thought about the statement made in the application; it was gone, and I never kept it in my mind at that time.
Q. Did you make any minute or note of the measurement?
A. I did not.
Q. Now, where was that measurement made?
A. At Dr. Miller's office.
Q. What time do you fix that date, if you can fix it?
A. I got pretty well acquainted with him; I could not say positively as to whether it was in December or January.
Q. Did you measure him more than once or only once?
A. Only once.
Q. What time do you fix as the date as your best recollection serves you?
A. In 1878 or 1879, but to tell for certain what month or what day, I could not do that.
Q. Who took the measurement of him? A. I did.
Q. Doctor Miller present at the time? A. He was.
Q. To refresh your recollection, if Doctor Miller should say that it occurred on the 17th of December, 1878, how would your recollection serve you on that point, then?
A. I should take it for granted it was so.
Q. That it was the 17th of December, 1878? A. Yes sir.
Q. Is it your independent recollection, though?
A. It must have been about that time, somewhere from the 15th to the 20th of December, 1878; just as likely to have been then as later.
Q. You measured him but the one time? A. Yes sir.

Q. Did Dr. Miller make any note of the measurement at that time? A. Not that I know of.

Q. You have no recollection of any? A. No.

1040 Q. Did you communicate to the company the fact of the measurement? A. I did not.

Q. Now, as a matter of fact, the application of this particular man had gone on to the company and was in the application as indicating that the insured was five feet, eleven?

A. It had perhaps.

Q. You knew so, at that time, didn't you?

A. I never thought any more of it after I wrote it down; I don't suppose it entered my head again, the fact as to his height.

Q. What was the occasion of his being measured by you in Doctor Miller's office this time?

A. We were talking about our respective heights, and Dr. Miller was measured, I was measured and Hillmon was measured.

Q. You three alone in the office together? A. Yes sir.

Q. Doctor Miller was one of the examining surgeons of your company? A. Yes sir.

Q. While you are speaking of doctors, Dr. Mottram, who was also at the inquest, was another? A. Yes sir.

Q. And Doctor Stuart was another? A. No.

Q. He was the Connecticut Mutual doctor?

A. I don't know.

Q. Speaking of the inquest and the doctors there, at least three of them were Miller, Stuart and Mottram; is that a fact?

A. I don't know that I knew Doctor Stewart then.

Q. But Doctor Miller and Dr. Motram were both at the inquest, were they not? A. I can't say.

Q. In any event, those two men were both employed by your company as examining surgeons? A. Yes sir.

Q. And it was in the office of one of them, Doctor Miller, that this measurement took place?

A. One moment: I can't recollect positively whether they were there, but I believe they were at times.

Q. At the inquest? A. Yes sir.

Q. Of course, there is no dispute about that, but it was in the office of Doctor Miller that the measurement you have spoken of took place? A. Yes sir.

1041 Q. There was no application being made at that time? A. No; oh, no.

Q. You were merely visiting there, so to speak?

A. Oh, yes, talking.

Q. It was a social call? A. Yes sir.

Q. You were there in a social way and Hillmon was there in a social way? A. Yes sir.

Q. And Doctor Miller, the examining surgeon, of the company, was the host? A. He was.

Q. And while you were there, you chanced to get to talking about your comparative heights? A. Yes sir.

Q. And for the purpose of determining what the respective heights were, each of you measured? A. Yes sir.

Q. You ascertained, and it was that that fixed in your mind the height of Mr. Hillmon?

A. Well, like anything else I remember.

Q. Did you make a mark on the door post? No answer.

Q. What is Miller's height?

A. Miller was about five feet, ten; he was a little taller than Hillmon.

Q. Was he exactly five feet, ten, do you think?

A. Ten or ten and a half.

Q. You say that you made no minute of it? A. No.

Q. And you made no report of it to the company?

A. No sir.

Q. Didn't know that it was material and you made no minute of it? A. No.

Q. It just occurred in the way of a social exchange of ideas? A. Yes sir.

The hour of 12 m. having arrived, the Court arose and took a recess until 1:30 o'clock p. m.

Afternoon Session. Parties present as before.

Major Wiseman on the stand. Cross interrogatories continued by Mr. Atwood, counsel for the plaintiff.

1042 Q. Mr. Wiseman, is this the application that was filled up by you. You can tell by your handwriting, I presume. A. Yes, sir, that is my handwriting.

Q. Let me call your attention to— You see under the sub-division, "Describe color of eyes and hair and special marks of identification," a description of his eyes; that is true, is it not? A. Yes.

Q. Hair brown? A. Yes.

Q. Marks of identification, None; that is right, is it?

A. Yes. That is not in my handwriting.

Q. It is not? A. No sir.

Q. Whose handwriting is that, do you [—]?

A. It looks like Dr. Miller's.

Q. What part of the application did you fill up?

By Mr. Ware: Then we want that withdrawn from the jury, if what he has been testifying to is the observation of Dr. Miller.

By Mr. Atwood: We don't care.

Q. Were you present at the time this application was made; you say that is not your handwriting? A. No.

Q. Were you present at the time this application was filled out, that is, the portion that was filled out by somebody else?

A. No sir. Allow me explain. Dr. Miller made some memoranda on some paper, and he wanted me to come back and get the application when he completed it, and when I went back he handed it to me.

Q. Was it filled out altogether when you came back?

A. I suppose it was; he handed it to me; it was filled out, and sent by me.

Q. Do you know his handwriting well enough to know whether this is his?

A. That looks like his handwriting; that is my recollection of his handwriting.

Q. You have seen his handwriting, Dr. Miller's before?

A. Oh, yes.

Q. And in your judgment this is his handwriting?

A. It looks to me like it.

1043 Q. Did you ever notice any scar on Hillmon's hand?

A. Not that I know of.

Q. Never noticed anything of that kind? A. No sir.

Q. And as to the tooth business, I think you said that one was gone; on which side did you say?

A. The upper left jaw.

Q. That was quite noticeable when he laughed or talked?

A. In talking, yes, when his lips went apart, it was noticeable especially so.

Q. This absent tooth? I didn't quite understand whether you said the tooth was gone or was marked.

A. It was either broken off right close to the gum or gone entirely. I don't remember whether there was a snag in the gum, or not. I couldn't say.

Q. Do you remember of stating on one trial that it was not ordinarily noticeable? A. I have no recollection.

Q. Is it a fact that it was or it was not noticeable ordinarily?

A. When he was conversing or laughing and his upper lip went up, then it was very noticeable, yes sir.

Q. Every time he spoke would it be noticeable?

A. I don't know as every time he spoke; you might say when he would say "Yes" or something like that, it would not be noticeable.

Q. But in a prolonged conversation it was noticeable?

A. Yes.

Q. Going back to Medicine Lodge for a minute. State whether or not you sent a telegram to one of the company's agents or some person up in Lawrence?

The defendants objects to the question as incompetent, irrelevant and immaterial, and not proper cross-examination.

[A.] The question is, a telegram in relation to this Hillmon business up there; I am not asking what it was, but just whether it related to the matter that we are considering.

The Court overruled the objection, to which action and ruling of the Court the defendants and each of them then and there duly excepted.

1044 A. Yes sir. I sent a telegram from Hutchinson.

Q. Outside of this one tooth, how were the balance of his teeth, Major? A. They were reasonably fair.

Q. Nothing very noticeable about them in the way of their being bad?

A. Nothing that I now remember of: they were not as regular as some sets of teeth, yet the balance—

Q. I think you said Hillmon's mustache was a heavy one on your direct examination? A. It was heavier than—

Q. State whether or not you did describe it as a heavy mustache, and whether or not that is a proper description?

A. My recollection is that I described it as stubby, and different from that man's (illustrating). That is my recollection.

Q. I ask you now whether or not it was a heavy mustache; what you call a heavy mustache?

A. What I call a heavy mustache?

Q. I will ask you to state whether or not you did—what was the time you were examined here in part; last Friday, was it? A. Last Friday, yes.

Q. State whether or not you then said it was a heavy mustache? A. I have no recollection of sayinog that.

Q. What do you say was the color of the hair of Mr. Hillmon? A. They were brown; that I call brown.

Q. It was brown hair? A. Yes, sir.

Q. At this coroner's inquest, you say you were present some of the time? A. Yes, sir.

Q. And Doctor Miller, one of the company's examining surgeons was present part of the time? A. Yes, sir.

Q. That would be your best recollection? A. Yes, sir.

Q. And that Doctor Motram, another one of the examining surgeons of your company was present part of the time?

A. I believe he was; I would not be—

Q. And that Mr. Barker, whom you had employed in connection with this matter was present?

A. He was present; I can't say all the time I was
1045 in and out; sometimes I would see him.

Q. Did you testify at the inquest? A. Did I?

Q. Yes? A. Oh, no.

Q. You at that time knew that the body was not the body of John W. Hillmon? A. I did.

Q. You knew that the inquest was being held for the purpose of determining the identity of that body, didn't you?

A. Yes, sir.

Q. You knew that Mr. Barker was there for the purpose of looking after the interests of the company, didn't you?

A. I had employed him to look after the interests of the company and I presume he was.

Q. And yet you didn't testify at that inquest that it was not the body of John W. Hillmon, did you?

A. I didn't testify that I remember of, no.

Q. Referring to your compensation: After you had sued for $2500 and Judge Foster didn't treat you right, I want to ask you if it is not a fact that you did enough labor, performed services, I mean, there under that special employment, so that you deemed you were entitled to receive, and that you had earned $2500?

The defendants object to the question as incompetent, irrelevant and immaterial and not proper cross-examination. The court sustained the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

Q. Now, you have already stated Mr. Wiseman, that you did not think that body was the body of John W. Hillmon?

A. Yes, sir.

Q. State whether or not at any time you claimed that that body was the body of a man by the name of Joe Burgess?

A. No, I didn't claim it; I heard that it resembled—the pictures were shown parties that said the pictures resembled a man by the name of Joe Burgess.

Q. You investigated the matter until you found Joe Burgess? A. No, I never found Joe Burgess.

Q. You found it was not Joe Burgess?

A. I was satisfied after I traced up matters it was
1046 not Burgess; he was alive; I heard from parties who saw him.

Q. Didn't you afterwards go upon the supposition and theory that it was the body of a man named Nichols?

A. I thought it was Nichols, yes. I met him on the depot platform at Topeka, and he had heard of my hunting him, and he came up and introduced himself to me and said his name was Nichols; he was in the employ of the Santa Fe road as a detective at that time.

Q. So that it turned out neither Joseph nor Francis?

A. How is that?

Q. Neither Mr. Burgess nor Mr. Nichols?

A. I was satisfied it was neither of those after investigating.

Q. The seven hundred dollars that you received was a part and separate from the expense money you have described this morning as having been drawn upon the company? A. No.

Q. I understood you drew upon the company to pay your traveling expenses?

A. I drew upon the general agent, but what I had drawn from him was taken from the judgment.

Q. Out of the seven hundred dollars? A. Yes, sir.

Q. When was the time that the judgment was obtained and settlement finally made?

The defendants object to the question as not proper cross-examination.

By the Court: I think you have gone far enough with that.

To the ruling of the Court, the plaintiff duly excepted.

Q. Do you know a man by the name of A. J. Phillips who resides in Lawrence?

A. I do. I know a man by the name of Phillips, Dr. Phillips, I don't know his initials.

Q. Do you know more than one man in Lawrence by the name of Philips, one who is not a physician?

A. Yes, I know two.

Q. I will ask you then this question: Whether or not you met A. J. Phillips, who now resides in Lawrence, whether or not you met him in the stable of Colonel Walker, or Mr. Walker, in the City of Lawrence, on the day or the even-

1047 ing of the day that the body arrived in Lawrence—

A. I didn't know him then.

Q. Just answer the question, whether you met him or not?

A. I have no recollection; I might have met him without knowing it.

Q. You say you did not meet him on that occasion?

A. I have no recollection.

Q. I will ask you whether or not you met him the next day at that place? A. I don't recollect.

Q. Now, I will ask you if at that time, on the day that the body arrived, or on the succeeding day, in the office of the stable of Sam Walker, you asked him whether or not he was an officer, and he answered that he was?

A. I have no recollection.

Q. And then, whether or not you asked him the question, or rather made the remark, "Well you are the man I am looking for," and that you further said, that you wanted him to shadow Brown. Did you make any such statement to a man named Phillips or to any man at that time and place?

A. No recollection.

A. Did not? A. No, sir.

Q. Then, whether or not the man asked you if you wanted him to arrest Brown if Brown started to leave town; was that question asked?

Q. I will put the whole question in this way, and make it more clear, I think, to the Court: Whether or not he asked you if you wanted him to arrest Brown if he was about to leave, and you said "No, that is just what we want; we want him to leave." That is the question I desire to ask.

The defendants object to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court, the defendants and each of them at the time duly excepted and still except.

Q. Do you understand my question?

A. You asked me if I had a conversation of that character with Phillips?

1048 Q. Yes, that is the substance.

By Mr. Barker: Our contention is that it is not cross-examination. If they ask a question of that kind they make the witness their own, and cannot be heard to contradict him. The court overruled the objection, to which ruling the defendants and each of them at the time duly excepted and still except.

Q. If he asked you if you wanted him to arrest Brown if he was about to leave, and you said, "No, that is just what we want; we want him to leave town." Did you hear the question, Mr. Wiseman? A. I did.

Q. Will you answer yes or no. A. I can't answer yes or no; I want to have—

Q. You can answer that question yes or no; it is a categorical question and I have the right to a categorical reply.

A. I had no such conversation with Phillips.

Q. Now, the question is as follows: State whether or not he then did not say to you that if you wanted him arrested and would get out a warrant for his arrest, that he would do his duty and take him into custody immediately, that otherwise, that he would have nothing to do with running off witnesses. Did he say that?

A. I have no recollection of any such thing.

Q. And did you not then say to him that the companies did not want something for nothing, and that if he would perform this service, he would be well paid. Was anything of that kind said? A. No, sir.

And in answeer to re-direct interrogatories propounded to him by E. F. Ware, Esq., counsel for the defendants, the witness testified as follows, to-wit:

Q. Do you remember any such a conversation with such an alleged person?

A. I have no recollection at all that I had such a conversation as that with Phillips or anybody else.

1049 Q. Were you engaged in running off any witnesses anywhere?

A. No, I was engaged in trying to get witnesses.

Q. Did you want this man Brown to leave town?

A. No, sir, I did not; I wanted him arrested, if anything.

Q. Did you see Brown on or about that time?

A. I saw him at the inquest.

Q. At the inquest?

A. Yes, up to the latter part of the week, Saturday, probably.

Q. You were in Lawrence on the day that the body arrived and the next day, were you? A. Yes, sir.

Q. During those two days, did you have any conversation with anybody in Lawrence in any wise resembling the conversation which has just been asked of you on cross-examination by Mr. Atwood?

A. No, I had not; not of that character.

Q. They have asked you in their cross-examination concerning a man named Nichols. A. Yes.

Q. How long did you say you looked for him?

A. Oh, probably a week off and on, or ten days.

Q. Where did you say you found him?

A. I found him sometime after that on the platform at the depot at Topeka when I was going up on the train and he introduced himself to me; that was the first time I met him. He said, "I understand your name is Wiseman." I said, "Yes." He said, "I understand you have been looking for me," and he made some remark, "I don't look much like a dead man, do I," and I said "No."

Q. You have been asked in regard to a person by the name of Burgess. A. Yes.

Q. How long did you look for him?

A. I looked for him some length of time after I dropped the Nichols matter and had heard of him.

Q. You said that you found persons who said they had seen him alive?

A. I never saw him alive that I know of, but I saw
1050 a party who told me that they had seen him since the shooting at Medicine Lodge, and then I dropped that.

Q. Did they tell you where they had seen him? A. Yes, sir.

Q. When did you first hear the name of Joe Burges mentioned? A. Down at Wichita.

Q. About what date?

A. Well, it was during my visit there in April, I think, to the best of my recollection.

Q. I believe you said you were in the government service from 1869 to 1875. What place did you say you held?

A. I was a U. S. Guager of liquors.

Q. There has been some testimony here of some litigation between yourself and an insurance company; I will ask you whether or not the second trial of this case took place while your litigation was pending; the second trial, if you remember.

A. I could not positively state; I know of one; I am sure of that, before Judge Foster.

Q. I will ask you, Major, whether you attended those first two trials as a witness? A. I did.

Q. Did you attend voluntarily or under a subpoena.

A. I came under a subpoena.

Q. Were subpoenaed, were you?

A. Yes, sir, at least, that is my recollection.

Q. Referring to the coroner's inquest. You say you saw Mr. Barker there. A. Yes, sir.

Q. Did you see Mr. Borgolthaus there. A. I did.

Q. How much of the time were you present during the inquest?

A. I was in and out; in sometimes half an hour and then maybe in five minutes at a time.

Q. You did not testify at the coroner's inquest? A. No, sir.

Q. Referring to the Fort Madison letter and the letter received from Mr. Walker which enclosed it. I will ask you whether you showed those to Mr. Green? A. Yes, sir.

Q. How near to the time at which you received the
1051 letters did you show them to Mr. Green?

A. Immediately. I went right up to his office.

A. I was on the way up Massachusetts street, and his office was in the bank building on the corner, and I went right in there.

Q. Was he county attorney at that time, do you remember?

A. I could not say; he had been but whether he was at that particular time, I cannot remember.

Q. I will ask you, Major, whether or not you told Mr. Barker to go and be present at that coroner's inquest?

Question objected to and withdrawn.

Q. Do you know whether or not at the time that Mr. Hillmon was measured in Doctor Miller's office, whether or not Doctor Miller at that time made any note or memorandum of the fact in a book? A. I do not.

Q. You did not see him? A. No, sir.

Q. I will ask you whether or not you carried in your mind the height of Mr. Hillmon as he gave it to you on the first application. A. No, I did not.

Q. Did you have in mind when Mr. Hillmon was measured, the height that he gave you when you took the application?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled the plaintiff duly excepting.

A. No, sir, I did not.

Q. Had you taken more than one application from Mr. Hillmon? A. I had not.

Q. Had you been engaged in the insurance business from the time that you came to Lawrence in December 3rd, 1878, up until the time you went to Medicine Lodge?

A. Up to the time I left Osage City on the 27th; I was there soliciting at Osage City, and then I quit on the—

Q. To look up this matter? A. Yes, sir.

Q. During that time, from December 3rd, 1878, until you left Osage City, you had been engaged in canvassing for life insurance?

1052 The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. Yes, sir.

Q. Was it any part of your duties in working for the insurance company to send or deliver the policy? A. No.

Q. You had nothing to do with the policy?

A. No; well—

Q. Do you know when the policy came to Mr. Hillmon?

A. One moment: In towns where I obtained insurance, and we had no agent, then sometimes they were sent to me to deliver, but when we had an agent it was sent to him, and he done the delivering, and collecting and I had nothing to do with that.

Q. Going back now to your search for Nichols and Burgess. I will ask you when that search terminated as to those two persons?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. It terminated some time in May to the best of my recollection. Yes; May.

Q. How long had your search for Nichols and Burgess terminated before the Fort Madison letter was received by you?

A. Oh, seven months or so; eight months.

And in answer to recross-interrogatories propounded to him by J. H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. You say that where there is an agent in a place, policies were sent to him and he delivered, and collected?
A. Yes, sir.
Q. You didn't have to bother with it in this instance?
A. No, sir.
Q. Who was your agent at Lawrence at that ime?
A. Mr. Griffith, the banker.
Q. He was the agent of the company there? A. Yes, sir.
Q. You mean G. W. E. Griffiths, the man that is in the bank? A. I believe that is the initials.

1053 Q. Then he was not a mere broker of insurance, but your agent for this purpose?
A. He was an agent under Byron Sherman, the general agent, yes, sir.
Q. When was the premium paid, when the application was made or when the policy was received?
A. Sometimes they made payment when I took the application so as to be sure to be indemnified after examination: sometimes it was not done; it differed; it depended upon what I recommended in my letter of advice.

Witness excused.

1054 Dr. J. H. Stuart, a witness produced by the defendants, being first duly affirmed to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. You may state your name?
A. My name is J. H. Stuart.
Q. Residence? A. Minneapolis, Minnesota.
Q. Where were you residing in 1878 and 1879?
A. I was residing in the town of Lawrence, Kansas.
Q. When did you remove there to Minneapolis?
A. In the month of February, 1882.
Q. What is your occupation? A. Physician.
Q. How long have you been practicing medicine?
A. Thirty-one years.
Q. Of what university or school are you a graduate?
A. Of the Bellevue Hospital Medical College, New York.
Q. Did you practice your profession in Lawrence at the time you were residing there in 1878 and 1879? A. Yes, sir.
Q. How long had you been residing in Lawrence at that time? A. What time do you mean?
Q. In 1878, say, or 1879. Put it in 1879?
[—] I removed to Lawrence in the spring of 1872.
Q. Were you acquainted with a man by the name of John W. Hillmon? A. Yes, sir.
Q. Where did you become acquainted with him?

A. I first met him in a building on the corner of Winthrop and Massachusetts streets, opposite the post-office.

Q. Who was with you, if any one, at that time?

A. Mr. Selig, August Selig.

Q. Were you introduced to this John W. Hillmon at that time? A. I was.

1055 Q. Where did you go with him, if to any place, after the introduction? A. I went with him to no place.

Q. Did you afterwards meet him? A. Yes, sir.

Q. Where? A. I met him in my office.

Q. Was that the first time you met him after your introduction on the street? A. I think it was.

Q. What was the business which brought him to your office?

A. It was for the purpose of an examination for life insurance.

Q. Were you examining physician at that time for any life insurance companies; if so, state which one?

A. I was examining an applicant occasionally in the New York Life.

Q. Now, did you at that time examine him for a life insurance policy? A. At which time do you refer?

Q. At the time you met him at the office?

A. At my office, yes.

By the Court: Were you examining physician for the Mutual Life or the Connecticut Mutual at that time?

A. The first time—I examined him a number of times, was for the New York Life at the office of Mr. Selig before mentioned.

By the Court: My question was, were you examining physician for either of the other companies?

A. Not by regular appointment.

By the Court: Did you ever perform service, as such?

A. I did, yes.

Q. The first time you ever examined John W. Hillmon for life insurance, where was it?

A. It was in Mr. Selig's office on the corner.

Q. Now, when was that with reference to your having been introduced to him on the street?

A. Excuse me, I was not introduced to him on the street; I was introduced to him in Mr. Selig's office in a building on the corner of Massachusetts and Winthrop streets.

Q. I understood you to say before—I was mistaken probably—that you met him on the street and were introduced to him there?

A. No, sir, you misunderstood me; I did not say so.

Q. You then, as I understand you, met him first and

1056 were introduced to him in the office of Mr. A. L. Selig,

which was located in a building on Massachusetts street; is that correct? A. That is correct.

Q. Now, for what purpose did you go there to Selig's office?

A. I went there for the purpose of examining him.

Q. Now could you give me the date of that examination?

A. It was on or about the 31st of October, 1878.

Q. Look at the paper now shown you, and which is marked Exhibit A, and state what paper that is, please?

A. On this side it is the medical examiner's report on the application of John W. Hillmon for insurance in the New York Life; on this side, it is, I presume, the application by the agent.

Q. Give the date of the paper, please, doctor.

A. This is dated Lawrence, Kansas, 31st day of October, 1878.

Q. Now, did you examine John W. Hillmon for life insurance on that day, doctor? A. Yes, sir.

Q. Now, at that time, doctor, what examination, if any, did you make of John W. Hillmon?

A. I questioned him in regard to his history, personal history, his state of health, present condition, and then I examined him physically by inquiring of him for his height, measuring the circumference of the chest on expansion and expiration feeling of his pulse, counting the number of beats.

Q. Was that part of your duty as examining surgeon?

A. Yes, sir.

Q. Did you make a minute of that at that time?

A. I did.

Q. Is that contained in this paper, Exhibit A?

A. Yes, sir.

Q. Now, when did you next see him, if you saw him at all?

A. The next occasion on which I saw him was I think on or about the 4th of December following, the same year.

Q. Where did you see him at that time? A. At my office.

Q. Who accompanies him there, if any one?

A. Mr. A. L. Selig.

Q. What was his business, if any, at your office at that time? [Q.] To be again examined for life insurance.

Q. In what company?

1057 A. The same company, I think.

Q. Look at the paper now shown you marked Exhibit B, and state what that paper is?

A. That is a similar paper to the one described before. On this side is the medical examiner's report on the application for life insurance of John W. Hillmon in the New York Life, signed by myself, and filled out, bearing date Lawrence, Kansas, December 4th, 1878.

Q. Now what examination, if any, did you make of Hillmon at that time?

A. A similar examination to the one made before.

Q. What do you mean by similar; state what you did?

A. I filled out the same data that was filled out in the previous one.

Q. State what examination you made at that time?

A. Examined him as to his pulse, as to his chest measurements, his height, weight, color of his hair and eyes.

Q. Now, on the 31st day of October, did you examine him as to his height?

A. I made no measurement of him.

Q. How did you arrive at the fact of his height?

A. By his statement; by asking him and taking his statement.

Q. As I understand you, you did not measure him at that time? A. I did not.

Q. In regard to his chest expansion and contraction; did you measure him in regard to that? A. On what date?

Q. On the 31st day of October?

A. Yes, sir; I measured his chest.

Q. Now, in measuring him, in making his chest measurements, what did you do?

A. I took a tape line, an ordinary tape line, and passed it around his chest about the nipple, in the neighborhood of the nipple, and took two measurements, one on full expiration, and the other an ordinary measurement, or what we would call the smallest size.

Q. After you had done that, what did you do?

A. I wrote down the data.

Q. Where.

In that application; in the medical examiner's report.

1058 Q. Now, on the fourth day of December, when you say you examined him again for a policy, what did you do in regard to his height, if you remember?

A. I simply took his statement as I did on the previous occasion.

Q. What did you do in regard to the other measurements?

A. Those measurements were made in the office.

Q. That is to say, you measured his chest measurements again? A. Yes, sir.

Q. Both in the ordinary state and expansion. A. Yes sir.

Q. Did you weigh him at that time or either of those times?

A. No.

Q. Now, did you examine him on that occasion for any other company? If so, state what company. Excuse me, what date is that?

Q. When I say that occasion, I mean December 4th, 1878.

A. I think I did; I am not absolutely certain about that.
Q. For the purpose of refreshing your memory, I will ask you to look at Exhibit No. 5, and state what it is. You now have in your hand, exhibit 5. State, if you please, what that is?
A. This is questions to be answered by the medical examiner of the Connecticut Mutual Life Insurance Company on the application of John W. Hillmon, filled out on the 4th day of December 1878, and contains a description of the body as required by that company, including his height.
Q. Who acted as examining physician in that application?
A. I did.
Q. Now, what examination did you make of John W. Hillmon at that time? A. I recorded his height.
Q. Where did you get his height from?
A. From his statement. The first figure is weight.
Q. Did you weigh him at that time?
A. I did not; I took his statement. The circumference of his chest under forced expiration and under forced inspiration. The requirements of the two companies were slightly different.
Q. Did you take the actual measurement of the chest measurement?
1059 A. Well, I presume on this date—I am unable to say that I measured him twice; I should not think I did, at the same time. I think I measured him once and took his statement; I am unable to say that I measured the man twice; I don't think I measured him twice on that day.
Q. Then I understand you measured him once, and then from that you made out such data as you put in the Connecticut Mutual application? A. Yes, sir.
Q. Was his application for a policy in the New York Life, or his examination, rather, for a policy in the New York Life, and in the Connecticut Mutual, made on the same day?
A. Yes, sir.
Q. The fourth day of December?
A. The fourth day of December.
Q. Where did you see him on that occasion?
A. The fourth of December?
Q. Between the 31st day of October, and the fourth day of December, did you see him between the 31st day of October, and the 4th day of December?
A. I have no recollection of seeing him.
Q. You did see him on the 4th day of December?
A. I did.
Q. At your office? A. I did.
Q. Did any one accompany him there at that time?

A. Mr. Selig.
Q. Who was Mr. Selig?
A. Mr. A. L. Selig was a citizen of Lawrence.
Q. Living there in Lawrence? A. Yes, sir.
Q. Now, you may state if you examined him for a policy at any other time that you remember, doctor? A. I did.
Q. When was that as near as you can tell us?
A. On or about the 24th day of December following.
Q. Do you remember what company that was in?
A. I think it was in the Connecticut Mutual, also.
Q. Look at the paper which has been marked plaintiff's exhibit No. 7, and state, if you please, what that paper is?
A. This is the paper of examination for the Connecticut Mutual Life Insurance Company, on the life of John W.
1060 Hillmon, filled out on the 24th of December, 1878, and the same data and requirements as the one already described, filled out by myself on that date.
Q. Now, in making that examination, what did you do in regard to his weight?
A. I took the same data that I did on the 4th day of December.
Q. Did you take from his statement, or from a former paper or from your recollection?
A. From my records; from my former records in the case.
Q. Now, in regard to the height; how did you arrive at his height on that occasion?
A. In the same manner as on the previous occasions.
Q. What manner is that, please?
A. Well, it was on his statement. He had stated his height and his height was carried along in the statement and filled into the several applications.
Q. How about his chest measurements?
A. I think they were on this occasion taken from a previous examination; the same data taken in the fore part of this present month. That is, the application of the 24th of December, was in every respect a copy of the other, a copy of the one made on the 4th of December.
Q. Now you may state if, at any time, you measured him on his application for insurance again? A. I did.
Q. About what time was that?
A. That was on or about the 25th day of February, following, 1879.
Q. Look at the paper now shown you, which is plaintiff's Exhibit No. 8, and state what that is?
A. This is the examiner's record of the application of John W. Hillmon for insurance in the Connecticut Mutual Life Insurance Company bearing date the 24th of February, at the top and at the bottom the 25th of February, 1879.

Q. Is the medical examiner's report there also?
A. This is the medical examiner's report, signed by myself.
Q. Now, on that occasion—you may state whether he was present when that application was made?
A. He was.
1061 Q. You may state how you arrived at his weight at that time?
A. I took his statement as on the previous occasions.
Q. Did you measure him on that occasion? A. I did.
Q. How did you measure him? A. His height, you mean?
Q. Yes.
A. Measured him by a scale. I do not wish to be understood as stating in this answer that the measurement recorded in this paper was made on the 24th, or the 25th, certainly; it was made on my measurement of his body.
Q. But the question I asked you was, did you measure him at the time that he [—] the application for insurance?
A. I did measure him.
Q. At the time you made out that medical report?
A. That was my statement that I made awhile ago, that I measured his body for the data given in this certificate; my impression is I made it on the 24th of February, 1879; the statement of his height.
Q. You say you measured him then by a scale. What do you mean by a scale?
A. I had on my office door the data of feet and inches marked so that I could stand the applicant up against the door, and with a square over his head, mark his height on that scale, and read it from the scale.
Q. Now, how did you measure Hillmon at the time you measured him? A. In that manner.
Q. In what manner?
A. I had him stand with his back against the door on which this scale was marked and indicated his height by a book, I think it was; I generally used a square like that laid on his head, and marked upon the scale the lower edge of the book, which indicated his height.
Q. What did you find him to measure at that time?
A. Five feet and nine inches.
Q. Now, by examining the paper which is marked Exhibit No. 8, under the figures in the beginning of the medical examiner's report, under the word "height," I find the figures, 5 feet, 11. I will ask you who put those figures there?
A. The 11 is not in my handwriting; I did not put it there.
1062 Q. What did you put there? A. I put the figure 9.
Q. Did you put the figure 5 there?

A. I put the figure 5 there before the feet; 5 feet. Before the "I," I put the figure 9.

Q. When did you first discover that the 9 had been changed, doctor?

A. I think it was at Topeka, on the occasion of the trial of this case before Judge Thomas.

Q. Some time during that trial? A. Yes sir.

Q. Where were you when you discovered it, if you remember?

A. It was at the hotel at which I was stopping. The name has just passed from me.

Q. Throop? A. Yes, the Throop Hotel.

Q. Who was present? Did you discover it?

A. Yourself, Mr. Green.

Q. Any other persons there that you remember?

A. Yes sir.

Q. Who else?

A. Mr. Barker; I think Mr. Barker was there, and there were two or three others in the room I don't remember.

Q. Did you discover it or was your attention called to the fact that there was an apparent erasure there?

A. My attention was called to it; I did not discover the fact.

Q. Do you remember who called your attention to it?

A. You did, yes sir.

Q. Who was present, if any one, at the time you measured John W. Hillmon at your office? A. Mr. Selig.

Q. Did Mr. Selig come there with Mr. Hillmon, or was he there? A. He came with Mr. Hillmon.

Q. Do you remember on what day that was?

A. No, I am not sure about the date in regard to the measurement.

Q. Now, as I understand you, you examined him on the 31st day of October. For how much was that application made, if you remember?

Objected to as not the best evidence. Question not pressed.

Q. Now, when did you see John W. Hillmon the last time?

A. It was on the 25th of February, 1879.

[—] I think you said there was one application on the 31st of October, two applications on the 4th day of Decem-
1063 ber, one on the 24th of December, and one on the 24th of February. Was there any application made, do you remember, between the 24th of December and the 25th of February?

A. No sir, I made no examination between the 24th of December and the 25th of February.

Q. When was the examination made on the application as evidenced by exhibit No. 7?

A. When was the examination made?

Q. Yes. [—] The 24th day of December, 1878.

Q. Now, from the 24th day of December up until the time that you took the application in Feruary, had you seen John W. Hillmon at all? A. Yes sir.

Q. When did you next see him after you took his application on the 24th day of December?

A. I could not give you the date; it was the middle or late, I think February, at least. I think it was during the month of February sometime; I could not give you the date.

Q. Look at the certificate or paper which is pinned to exhibit No. 7 and state what that is?

A. This is a certificate of vaccination made by myself, bearing date February 25th, and signed by myself.

Q. By refreshing your memory from that paper, fix the date if you can, about when you saw him after the 31st of December? A. The 24th of December?

Q. The 24th day of December?

A. Well, I can tell circumstances that will fix—

Q. Can you tell about the date?

A. It was during the month of February; I could not give you the date certainly.

Q. Can you approximate to it from that certificate?

[Q.] He was to see me a number of times previous to the 20th of February, 1879, on the preceding days, running over a number of days; I don't know how many, perhaps a week or ten days, maybe, more or less.

Q. Now, you say you saw him frequently during that time?

A. I did.

Q. Where did you see him?

A. Some of the times in my office and some of the

1064 times near my office on the sidewalk.

[—] What was his business at your office, if anything?

A. His business on those occasions, all of them, I think, a number at least, most of them, was to consult me in regard to the effect of vaccination.

Q. Do you know whether he had been vaccinated previous to that time? A. He had not.

Q. Why was he consulting with you, if you know, if he stated to you why he was consulting with you upon that subject at that time?

A. It was necessary that he should be vaccinated, in order that his policies in the companies, some of them at least, to be valid; the companies required it.

Q. Now, you may state if you did vaccinate him at any

A. I did vaccinate him on the 20th of February, 1879.

Q. When did you next see him after you had vaccinated him, if you remember?

A. I next saw him on the 25th of February, five days later.

Q. That is the day on which you made this certificate?

A. Yes sir.

Q. And at that time, did you make an examination?

A. I made an examination of the vaccine sores.

Q. And upon that, you made the certificate? A. I did.

Q. Now, that was on the 25th day of February?

A. 25th day of February, 1879.

Q. Did you see him again after that day? A. No, sir.

Q. Do you know whether he was in Lawrence after that date, or when he left Lawrence? A. I do not.

Q. You did not see him either at your office or on the street?

A. No sir, I have no recollection of seeing him any more after that.

Q. You say he was at your office many times consulting you in regard to being vaccinated; what was the subject matter of the conversation there at that time?

The plaintiff objects to the question as incompetent,
1065 irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. His business was to inquire of me what effect vaccination would have upon him, whether it would disable him, whether it would make him sick, whether there was any danger in it to his health, etc. That was the character of his inquiries; whether it would lay him up.

Q. Now, you finally did vaccinate him; what virus did you use at that time?

A. I used what we call the bovine virus; the cow pox.

Q. Did you have that at your office? A. No sir.

Q. Where did you get it?

A. Whilst the matter was under consideration, I wired to the vaccine farm at St. Louis and they sent me by mail fresh virus.

Q. Now, in what condition was this vaccine sore on the 25th day of February?

[—] It was making very satisfactory progress; there was already a vesicle or blister.

Q. So that you could certify to the company that he had been successfully vaccinated? A. Yes sir.

Q. You may state, doctor, if you remember of a dead body being brought to Lawrence on or about the first of April, 1879, which was said to be that of John W. Hillmon? A. I do.

Q. Did you see that body? A. I did.

Q. When did you see it as to the time of its arrival, if you know?

A. I saw it in the forenoon on or about the third of April, 1879; I understood that the body came in that morning or some time during the night, or early in the morning.

Q. Where did you see that body?

[—] At the business place of Bailey & Smith on Massachusetts street; they were undertakers.

Q. Were they the principal undertakers at the city of Lawrence at that time? A. I think they were.

Q. And it was in their undertaking establishment that you first saw this body?

A. Yes sir. They were furniture men and had a store but this was not in the store; it was in a small building in the rear of the store on the same block; the same lot.

1066 Q. Who was with you, if any one, at the time you first saw the body?

A. Dr. Miller was with me, Dr. V. G. Miller, who was then a resident of Lawrence.

Q. He was a physician and surgeon there at Lawrence, was he? A. He was.

Q. Was there any one with you at that time, if you remember?

A. Mr. Smith of Bailey & Smith was in the room.

Q. Did you look at and examine that dead body lying there? A. I did.

Q. And did you see it afterwards? A. I did.

Q. When did you next see it?

A. I saw it repeatedly in that building during that day and the following day.

Q. Well, now, the next time that you went there to see that body, Doctor, who was with you, if any one?

A. Doctor Miller was present, Mr. Smith, and I am not sure about on my next visit; I am not so sure about who was present the next call; I think I was there twice in the forenoon.

Q. Now, were you there again in the forenoon?

A. Yes sir.

Q. Who was with you on that occasion, if you remember?

A. There were other physicians, Dr. Fuller and Doctor Mottram.

Q. I understood you to say Dr. Fuller.

A. Yes, sir, Doctor Alonzo Fuller and Dr. Charles Motram.

Q. Now, you may state to the jury whether that was the body of John W. Hillmon whom you had vaccinated, and whom you had examined on his various applications for insurance? A. It was not.

Q. Do you remember a coroner's inquest being held over that body? A. I do.

Q. Were you one of the officials?

A. Nothing except I assisted in making the autopsy on the body, and examination of the body.

Q. At whose request did you assist?

A. At the request of Dr. Fuller.

Q. Did he have any official capacity there?

A. I think he was appointed by the coroner, by Dr. Morris, who was the coroner. I think Doctor Fuller was
1067 appointed by him to superintend the examination of the body.

Q. Doctor Morris was the coroner? A. Yes sir.

Q. And he appointed Dr. Fuller as the examining physician, and at his request, you helped to hold an autopsy on the body? A. That is correct.

Q. Now, did Doctor Morris, the coroner, have any connection with either the Connecticut Mutual, or the Mutual Life Insurance Company as examining physician or otherwise?

The plaintiff objects to the question as calling for the opinion of the witness.

By the Court: He may answer, if he knows.

A. I have no knowledge that he was, at all.

Q. Do you know who the examining physician for the Mutual Life was?

A. I don't know of any one except myself; I don't think they were doing very much business there.

Q. Do you know who the examining physician of the Mutual Life was?

A. Understood that Dr. V. G. Miller was.

Q. Only if you know, doctor. A. I beg your pardon.

Q. Only if you know; not what you understand.

A. I was satisfied in my own mind from what I understood that he was; I don't know; I have no positive knowledge.

Q. Now. you may state, on the first occasion that you visited that body that morning, what examination you made of the body.

A. The lid of the coffin was first removed by Mr. Smith and I viewed the body as it lay in the coffin first.

Q. That was all on that occasion, was it? A. No sir.

Q. What else did you do?

A. On that occasion, I opened the sleeve on the left arm and examined the arm to see if there were marks of vaccination.

Q. Now, did you find marks of vaccination there?

A. Yes sir.

Q. When you vaccinated Hillmon, how many points or applications, whatever you call it— A. Insertions.

1068 Q. Insertions of virus did you make upon the arm?

A. I made two.

Q. About where were they located on the arm?

A. They were located on the left arm on the upper and back portion; the anterior and back portion of the arm in this manner.

Q. And about how far distant were they from each other?

A. I should judge from an inch and a half to two inchess, without actual measurement.

Q. In your estimation it was an inch and a half or two inches? A. Yes sir.

Q. Now, did you find vaccine sores on the arm?

A. Yes sir.

Q. Of the dead body? A. I did.

Q. Where were they located, if you found more than one?

A. I found two.

Q. Where were they located?

A. They were located approximately in the portions, as near as I could estimate, of those that I made.

Q. What examination did you make of those vaccine sores?

A. I first made a careful inspection of their appearance as they presented themselves to my eyes, and I not only did that but I removed one of them; removed a portion of the skin containing one of them, and a portion containing a part of the other one.

Q. I understand now you removed one entirely?

A. Yes sir.

Q. One of those sores entirely?

A. Yes, sir, cut it out.

Q. And a portion of the second?

A. A portion of the second one.

Q. Now, you say they were vaccine sores? A. Yes sir.

Q. Were you able to determine whether they were vaccine sores or sores of some other kind or character?

A. Yes sir.

Q. Were you able to determine that from the sore itself?

A. Yes.

Q. From the character of a vaccine sore you are able to tell that sore from a sore from an injury? A. Yes sir.

Q. Now, you found that these were vaccine sores, did you?

A. Yes sir.

Q. Are you able to tell from the appearance of the
1069 sore about how long a time had elapsed from the time of the insertion of the virus? A. Very nearly.

Q. That is, of a vaccine sore? A. Yes, sir.

Q. Now, you may state, doctor, why you removed those sores? A. I understood it was said—

Objection.

A. I was told—

By Mr. Atwood: Let him tell what he did it for, if he knows.

Q. You may answer, doctor.
A. I was informed that the body was to be buried.
Q. When?
A. That afternoon, and I removed those sores, that evidence of the vacination, its character, and its stage, might be preserved for observation.
Q. Now, what, doctor, did you do with those sores?
A. I took them across the street to my office the pieces of skin which I removed.
Q. The pieces of skin which contained these sores?
A. Yes, sir.
Q. You took them across to your office? A. Yes, sir.
Q. You may state, doctor, if afterwards there was an autopsy held, a post mortem held upon this body?
A. There was.
Q. I think you have said that was under the direction of Dr. Fuller?

The plaintiff objects to the question as leading; objection overruled, the plaintiff duly excepts.

A. It was.
Q. Who else assisted at that time?
A. Dr. V. G. Miller, and Doctor Charles Mottram.
Q. And yourself? A. Yes, sir.
Q. Now, you may state whether or not those vaccine sores were exhibited to those gentlemen? A. They were.
Q. And examined by them? A. They were.
Q. Who else, if any one, saw those sores, if you know?
A. Dr. F. D. Morse saw them.
Q. Anybody else that you know?
A. I am not able to designate by name any one especially, I think Dr. John Moore, one of Mr. Woodward's clerks, saw them. Beyond that, I am unable to name the parties
1070 that saw them.
Q. What did you do towards concealing or preventing people from seeing those sores?

The plaintiff objects to the question as calling for the conclusion of the witness. Objection overruled, the plaintiff duly excepting.

A. Nothing whatever.
Q. Where did you keep them?
A. For a while, for a few days, they lay on my office table in the center of my office; then they were laid upon the shelves of a case with glass doors against the wall; then after a number of days, probably a fortnight more or less, they were put into a little jar into a preservative fluid.

Q. Where did you keep them?
A. Sitting on a shelf of the case just mentioned.
Q. What fluid did you use, do you remember?
A. Yes, sir, I used a solution of hydrate of chloral.
Q. What finally became of them, if you know, doctor?
A. Why, I know when I saw them last.
Q. When did you see them last?
A. It was in the early part of 1882; I think in the early part of February, 1882; I left that little jar, in connection with some other jars that contained some specimens, pathological specimens, in the rear of B. W. Woodward's drug store.
Q. Do you know what became of them then? A. No, sir.
Q. When was that?
A. That was in the early part of February, 1882.
Q. What was the occasion for leaving them there?
A. I was making preparations and was on the eve of removing from Lawrence to another city.
Q. To what city?
A. The city in which I now reside, Minneapolis, Minnesota.
Q. You say you left them in the rear of the store?
A. Yes, sir.
Q. What do you mean by the rear of the store; in the store itself or—
A. I think I remember placing them on the floor; I think it was just in the rear of the store building; it might
1071 have been, it might possibly have been a narrow alley just in the rear of the store. I could not say how that was; I remember calling the attention of one of the—

Objection.

Q. Well, what did you do with them to the best of your recollection? A. I sat them down on the floor.
Q. And left them there? A. I did.
Q. Was that for the purpose of destroying them as evidence in this case?

The plaintiff objects to the question as calling for the conclusion of the witness.

By the Court: Ask what the purpose was?

Q. What was your purpose in leaving them ther?
A. My purpose was not to encumber myself with them in moving to another state; I simply did not want them and I left them to get rid of them.
Q. You kept them all those years? A. I had.
Q. Had any one connected with the defense or with the prosecution of this case asked at any time, up to that time, to see those sores?

The plaintiff objects to the question as calling for hearsay testimony. Objection overruled, the plaintiff duly excepting.

A. I think not.

Q. Do you know Mr. Borgolthaus who used to live in Lawrence? A. I do.

Q. Do you know Mr. Samuel A. Riggs, an attorney of Lawrence? A. I do.

Q. And Mr. John Hutchings who formerly resided there, but [not] dead? A. I knew him.

Q. Did either of those gentlemen, or the plaintiff, ever ask you for an examination or an opportunity to look at those sores?

The plaintiff objects to the question as calling for hearsay testimony. "It would be silly for the plaintiff to ask for them after the witness had an opportunity to manipulate them as he pleased." The Court overruled the objection, to
1072 which ruling of the Court the plaintiff at the time duly excepted.

A. They did not.

Q. Now, at the time this autopsy was held upon that body, what examination was made of it by the attending physician?

A. I first made a very careful inspection of the body on its exterior and careful measurements were made, and then the body was opened and the internal organs of the body were examined.

[—] Now, doctor, did you notice the clothes upon that body? A. I did.

Q. How did they fit the body in appearance; the sleeves?

The plaintiff objects to the question as calling for a conclusion of the witness. The court overruled the objection, the plaintiff duly excepting.

A. The coat sleeves appeared to be too short for the arms and the coat appeared to be too full around the body, and the trousers appeared to be too short for the limbs.

Q. Did you make measurements of the body? A. I did.

Q. Did you examine it for scars or any other means of identifying the body? A. Yes, sir.

Q. Did you make a memorandum of that at the time?

A. Yes, sir.

Q. Look at the paper which is marked Exhibit C, and state if that is the memoranda of measurements of the examination you made of the body at that time? A. It is.

Q. Now, if you can state from memory, if not, refresh your memory from the paper, and go on and state, give a description of that body as you examined it there at that time?

A. The body was in a good state of preservation. The hair was a dark brown, almost black.

By the Court: You are only to refer to the paper in case it is necessary to refresh your memory.

Q. I wish you would proceed, as you made the examination, doctor, proceed and state what you found, and if necessary refresh your memory from that paper?

A. The body was free from any marks that might be called marks of identification. Judging from the appearance
1073 of the skin and the character of the hair, the fine hair and skin, I should judge the body to be about 25 years of age; the only evidence of decay or decomposition or change was the eyes, what is commonly called the pupil, or cornea; it had lost its color and the eyes were shrunken and shrivelled; the line marking between the white and dark of the eye was obliterated in a measure; the nose was dry and shrivelled, especially the cartilagenous portion, so that the nose was apparently shorter, and not natural in its appearance. There was no discoloration about the body whatever, not a mark of decay in the skin anywhere. The fingers were long and slender; the feet were long, and I think free from any special marks; I think there were some evidences of corns on the toes, but nothing marked; the body was muscular in appearance. As to measurements—

Q. Doctor, in regard to the cheek bones; do you remember in regard to them.

A. In regard to the face, yes. The face fas unusually broad across the cheek bones; the cheek bones were unusually prominent, so much so that you might say the face narrowed in both directions from a line drawn across the middle over the cheek bones to the forehead, and the cheek bones to the chin; it was symmetrical in that way, also, but the cheek bones were remarkably prominent and wide. The lower jaw was heavy and strong; the upper lip was full, coming up well; the lower lip, I should say, not the upper one. The upper lip was rather narrow, and seemed to expose the upper teeth. It had a rather light growth of mustache, irregularly, probably either not trimmed at all, or trimmed very irregularly and scanty in its growth. The face was smooth shaven otherwise. The lower jaw was slightly to one side, displaced; that was discovered to be on account of a fracture of the skull, and the lower jaw was easily brought around into place so that the teeth came together in a normal way. The teeth met each other very squarely, one against the other, when the jaw was brought into place, so the interior surface of the teeth
was nearly smooth, the upper jaw not closing around
1074 the lower teeth as is often the case. The teeth were perfect; singularly even and large. The upper incisors or middle teeth were broad, quite broad, broader than usual,

I may say. The length of the body, I think, was five feet, eleven and five-eighths inches measured by laying the body on a board and standing up squares at the foot and the head, marking their position on the board, and then measuring with some measuring instrument. The girth of the body around the chest, around the nipples, was taken by a tape line. The length and circumference of the wrists—I think the hands I measured—I can tell by referring to this; the width of the face across its middle part, and the length of the face, can give the exact figures.

Q. Will you refresh your memory by referring to the paper as to the width of the face?

A. These figures I will have to read from this: The circumference of the head was 23 1-2 inches; that is that measure the length of the profile with mouth closed 8½ inches from the top of the face, and the width of the face across the maler bones, the cheek bones, was 5¾ inches; the hands measured 9¼ inches as the measurement for gloves.

Q. Now, what was the measurement of the chest, the chest measurement of this body?

A. The chest measurement was thirty-five and one-half inches; the length of the foot was ten and a half inches. The nose, although it was, as I said, dried and shriveled—it had a high bridge; I should judge it to be an aqualine nose, and somewhat prominent in its middle portion. I see the weight of the body, and I am refreshed by that. The weight of the body was 147 pounds naked; nude; the clothing was put together and weighed and it weighed nine pounds. The length around the wrist was seven inches, and around the neck 13 1-8 inches.

Q. What, if any, identifying marks did you find on the body?

A. Well, there were no blemishes of any character or marks by which the body could be identified that we discovered; the only thing on it was two small moles on the body.

1075 Q. Where were they located?

A. One of them was located on the back.

Q. Whereabouts on the back?

A. It was on the back about the spine, along middle way between the lower borders of the shoulder blades. The other one was on the hip.

Q. What sized mole was that?

A. They are described here, if you will permit me: The size of a small pea, teat-like, exactly on the spine adjoining the lower point of the shoulder blades, and one the size of a mustard seed over the left hip; I found nothing else.

Q. Now, you spoke of his age. How do you judge of his age?

A. Well, I judged that by the feel of the skin; the velvety feel of the skin, the soft white hairs and the condition of the teeth.

Q. Now, as to the hair; what was the character of the hair on this body?

A. The hair was four inches long, and more or less curly; somewhat curly, and almost black.

Q. What beard, if any?

A. He had no beard except the mustache which I described.

Q. Did you describe the mustache? A. I did.

Q. How did you describe that?

A. I described the mustache as being rather thin on the upper lip, narrow, that is, not a wide mustache, short and rather rough and stubby, unevenly trimmed or not trimmed at all, and not meeting very well in the middle under the nose, the central portion.

Q. You say not meeting very well?

A. Not coming together well in the central portion of his upper lip. The eyebrows came together, while they were not very striking, very prominent, but they came so as to unite almost in the central part of the forehead; the hair, that is, grew until it met. There was—Shall I go on?

Q. If you please.

A. There was found to be a hole in his head, the entrance large enough to insert my fore finger, which I did. It was on one side, on the right side, going over the meatus or
1076 hole in the ear upward, and then forward; going upward an inch and a half and forward half an inch, on the right side of the head an inch and a half above the opening into the ear, and half an inch forward from that line would find the middle of the entrance; that hole had come out on the other side in a similar position about half an inch lower I think just a little bit lower down near the ear; the hole went almost squarely through the head, and on either side I could insert my finger. I judge that it went in on the right side because of the character of the hole on the left side which was broken more than on the right, indicating there it had evidently broken the skull and loosened the jaw; the skull was evidently broken because there was a grating felt as we took hold of the head in the manipulation of the bone.

Q. Will you tell of the lower jaw once more?

A. The lower jaw was square and heavy. The jaw came so far forward, as I said, as to bring the teeth in a line; that is, in a straight line together.

Q. Did the teeth strike together?

A. Yes, the teeth would strike in front or very nearly.

I have described it here; here is a note in regard to that, if I may be permitted.

Q. Refresh your recollection from the paper.

A. A full set of teeth all sound and of large size; the two upper incisors broad and cover two lower and right lateral in part; they spread not only over the lower incisors, but they covered more, and when the jaws were closed the anterior surface of the upper and lower teeth, that is, the front surfaces of the upper and lower incisor teeth were even when the jaws were closed or very nearly so. So the jury may understand what I mean by that, that the teeth came together, his lower teeth were not either in front of the line of the upper teeth nor backwards.

Q. Now, did you make an examination of the cavity of the body?

1077 A. Yes, sir, we opened the body and examined the chest, the organs of the chest, and the organs of the abdomen, that is, the lungs, the heart, the liver, the stomach, and the intestines.

Q. How did you find them?

A. Found them all in a normal condition except that one of the lungs was adherent to the wall of the chest; that is, grown to it.

Q. What would that indicate, if anything?

A. It indicated that at some time in the person's history he had had the pleurisy, or pneumonia, and that the pleurisy had caused the two surfaces, the pleural surfaces, to grow together; to adhere.

Q. I think you stated the length of the feet to be ten and a half inches? A. Yes, I think I did.

Q. Did you see the body again after it left the undertaker's establishment? A. I did.

Q. Where did you see it?

A. I saw it at the cemetery there at Lawrence.

Q. About how long after you had made this examination?

A. Well, this examination, I think, was made on the 4th of April, and was made within, pretty soon, within two or three days; I should think a day or two or three—I don't remember exactly the date on which that was made.

Q. What was the condition of the body at that time?

A. It was not materially changed.

Q. Had decomposition set in more.

[—] No special evidence; a little more shrivelling and drying of the body.

Q. How were the eyes? A. Well, they were more sunken.

Q. Now, what was done at that time, that you saw it out there?

A. The body was exhumed and taken out of the—at least, the lid of the coffin was removed, and I examined the hands and wrists more particularly, with a casual inspection I think of the lower part of the limbs or the legs.

Q. Now, what, if any scars, did you find upon this body?

A. Did not find any; there were none.

1078 Q. On the hands; did you find any there?

A. Not any.

Q. Or marks or cuts or any of that kind? A. Not any.

Q. You may state if at that time or at any time, you preserved any of the hair? A. I did.

Q. When was that?

A. I think I took that out at the cemetery.

Q. Can you remember which portion of the head you took it from?

A. I could not say certainly about that; I think it was probably from the back portion of the head.

Q. What did you do with that, if you remember?

A. I kept it in my possession for a good while, and I left it with the attorneys in this case; I think,—I am not certain about that; it went out of my possession, and I cannot testify just at what time, nor into whose hands it went; I think I surrendered it to the attorneys for the defense; I don't know.

Q. Do you remember whether you gave any of it to Mr. Riggs?

A. I don't think I ever did; I think I gave some to Doctor Miller, but I don't think I gave any to any attorneys at all, except I left a package, think, with the attorneys for the defense.

Q. Now, what was the purpose of taking that hair?

A. My purpose was to preserve a specimen to be referred to, in regard to its character and color.

Q. Was anything else done about the body while you were there? A. It was photographed.

Q. Do you remember who the photographer was?

A. I think his name was Lamon.

Q. Did you notice any ring marks on the hand at that time? A. I did not.

Q. Did you examine it with a glass, doctor? A. I did.

Q. What sort of a glass was it?

A. It was an ordinary hand mirror; small like mirror.

Q. What do you mean; a magnifying glass?

A. Yes, that is what I mean to say; a lens was what

1079 I mean; it was an ordinary lens that would magnify three or four times, I suppose.

Q. If there had been marks, ring marks on the hands, do you think you would have observed them?

A. I think so; I looked for them; that was the occasion of my looking for them.

Q. How did you come to make this more particular examination out there at the cemetery of these hands?

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and assuming a fact not proven in the case. Objection sustained, the defendants and each of them at the time duly excepting.

Q. You may state, doctor, if you had heard a rumor, after you examined the body at Bailey & Smith's, between that time and the time you went out to the grave, if you had heard a rumor that John W. Hillmon had scars on his hands, and if that was the object and purpose of more particularly examining that hand? A. That is the case.

Q. Now, referring once more to these vaccine sores, when did you say it was you vaccinated him, doctor?

A. I vaccinated him on the 20th of February, 1879.

Q. And when did you last see those sores?

A. I saw them on the 25th, five days later.

[—] What was the condition of them at that time?

A. They were progressing very favorably there was a vesicle or little blister in process of formation.

Q. You may state whether a vaccine sore has regular stages of progression? A. It has.

Q. Will you briefly describe to the jury how you vaccinate in the first instance, and then the progress of the sore?

A. We now use altogether the cow pox. The manner of vaccinating is just to scratch or break the skin where we wish to make the sore with some instrument so that it shall bleed slightly, a very little, then to reduce the virus to a semi-liquid state with water and rub it on this in
1080 such manner that it shall be absorbed by the little absorbents of the skin and taken into the skin or as much of it as may be; then the arm is allowed to dry as to be sure that nothing shall rub it off; it [—] made dry, and then the matter is let alone. That is the common custom. Now, if it takes, as we say, in a few days, about this place, this point of scarifying, it will begin to become red at first, and become a sore, as we say, and swell, and the swelling and redness extends until in the course of a few days, four, five or six days, there will be—well, of course, not so early, in the course of seven or eight days, or more, there will be quite a caked or swollen surface there, the swollen portion which is called the areola or reddened portion. In the center of that, where the abrasion was made, a blister begins to form, first filled with a clear lymph, that a little further along changes to pus-

like matter, yellow, and then in the course of a few days it dries.

Q. You speak of a few days, doctor. Can you tell about the number of days?

A. If you will permit me, sir, I will give you the days a little farther on.

Q. Go on in your own way.

A. The skin together with the dried pus, the material underneath, dries and forms a crust or scab which, in process of time, if not disturbed, loosens itself and drops off, and leaves a scar, a vaccine scar. This crust, of course, varies somewhat in size; if often will be from the size of a—probably you might consider that of a ten cent piece; it may be a little smaller and it may be a little larger. Now, the day history of that, the chronology would be something like this: That about the fourth or fifth or sixth day, the vescicle or blister makes its appearance, which continues two or three days or four; something like that; then it gradually changes into a pus-like form. That condition will last until the 12th, 14th or 15th days, and then that begins to dry and form a scab or crust which in the process of time is ready ordinarily to drop off about the 25th day.

Q. Now, in this description, what are you describing;
1081 what would be a normal—

A. What I would call a normal, ordinary history of vaccination.

Q. May the time when the scale or scab is ready to drop off vary? A. Somewhat, yes.

Q. Does it vary sometimes somewhat? A. Yes, it does.

Q. Now, you examined this sore, as you say, which you found upon the arm of this man? A. I did.

Q. At about what stage of development or what day of development, did you conclude from that examination that this vaccination had taken place on this body?

A. I concluded that it must be from about the 12th to the 15th or 16th day.

Q. How did you arrive at that?

A. From the appearance and character of the sore I found; the sores.

Q. Now, will you describe, doctor, the character and appearance of the sores you found upon this arm?

A. There was present to the feel the areola or the cake about the sores where there is a hardened, thickened condition of the skin, but they were not red; the skin was pale; in the center of the sore, was a dark spot about the size of a ten cent piece, I should say, which appeared to be dried skin closely adherent to the skin below, and not raised above the surrounding surface, but appeared to be as though it had been

full of liquid and instead of a crust being formed to cement the skin together, the skin had shrunken down and adhered to the surface below, and very nearly on the same plane with the other skin; then I cut through the sore—that was part of my purpose in dividing one of the sores was to note the appearance of the section, cut with a knife through the skin to note how thick this crust or scab might be, how thick the thickened condition of the skin or areola might be around it, and I found that this dark sore on the surface was so to speak only a superficial matter; I could not raise the crust of it at all; I took my knife and tried to lift it up, but I could not; it was simply a scale of black skin and immediately be-
1082 neath it I cut through tissues which had a reddened appearance showing the inflamed condition, and for that reason I judged that the vaccination process had not gone so far as to even form the crust that we ordinarily find in a vaccine sore at its maturity further on, but missing in its earlier history.

Q. Doctor, are you able to determine a true vaccine sore from a sore which was caused by a wound; if so, state how you do that.

A. Well, the character of a vaccine sore, the surrounding inflammatory process, causing thickening of the skin, and the unbroken character of the skin, is one thing, and the absence of other marks that might occur in a wound, because a wound that would produce a sore like that would penetrate and break the skin. As I said before, a vaccine sore has its characteristic appearance.

Q. What are those?

A. I have already described them pretty fully.

Q. I am speaking now particularly of the scale or scab.

A. That is to be found later in the stages; of course, that is characteristic; there is a difference between a vaccine scab or crust and an ordinary scab from a wound; probably more easily—not in every respect so easily described; the scab of a wound is probably more closely adherent and is not regular or circular in form and is not as hard and tough as a vaccine scab because a vaccine scab at maturity is very hard; it is very hard and of uniform thickness more like a button.

Q. Now, may the progress of a vaccine sore be retarded; if so, how may it be retarded?

A. By injury; a bruise to the arm or a scratch that will break the vesicle or blister and convert it into something of an open sore would prolong its history sometimes.

Q. Are you able to tell from the appearance of the sore or the scab on the sore, as to whether it has been injured or not?

A. Well, yes, pretty well; there might be exceptions, but if the skin were not broken, I should judge if the skin was not broken, or the sore had assumed more the appearance
1083 of a wound, I should judge that there had been nothing done in injury to it.

Q. Would you be able to tell from the character of the scab itself? A. I think so.

Q. Now, from your examination of these sores which you found on the arm, would you say that was a normal sore, or did it have the appearance, at any time, of having been injured? A. I should say it was a normal sore.

Q. Now, you say you found a wound in the head?

A. Yes sir.

Q. [And] you [described] the size of it.

A. It was a hole through the head; I can better describe it by saying that I easily inserted my fore finger; it very nearly filled it on the right side, at the entrance; on the other side, it was more irregular and larger.

Q. What would be the effect upon a person, in your judgment, who should be struck with a ball large enough to make that wound? A. Oh, I should say instant death.

Q. What would be the effect as to his falling?

A. It would paralyze him utterly at once; I should say he would drop into a heap, so to speak; fall directly.

Q. What nerves or nerve centers would be affected by a passing in that way through the head?

A. It would especially divide the motor nerves from the motor and sensory nerves of the lower extremities, cut them off from their center, because they are centered above the wound; the motor sensories of the lower extremities would certainly divide, and hence it would bring immediate paralysis of the lower extremities. All power of locomotion would be destroyed surely.

Q. Drop like a beef?

Objection as leading.

Q. How would he drap?

A. Well, he would, of course, go to the ground, at once; of course, he would be lying, I suppose, somehow; I don't know; it would depend on circumstances.

Q. Would that depend somewhat on the position in which he was standing as to which way he would fall?

1084 A. Well, it would depend on the circumstances; after the man dropped he might straighten out a little bit, or he might drop into more or less of a heap; I think that would be a matter I could not answer definitely, just what shape he would be in, but certainly there would be instant paralysis and instant death.

Q. There is another point I would like to ask in regard to vaccination. Is it a difficult process to vaccinate a person?

Q. Any person can do it? A. Yes.
A. Oh, no, not at all; anybody can do it.
Q. May a person be vaccinated from virus taken from the arm of another person?
A. That used to be the custom in my early practice-altogether; largely, at least.
Q. Can it be done successfully? A. Surely.
Q. Any one can do it?
A. Yes. Any one that can scratch a little sore place on the skin, and make the blood come.
Q. Now, doctor, I want to refer to the application once more which was made on the 24th day of February. How often have you testified in this case, doctor?
A. I have testified, I think, this is the sixth time.
Q. Now, were you asked in regard to the figures, "5, 11" which are found in the application, at the first trial of this case? A. I think I was; I am not sure.
Q. What did you say, if you remember, in regard to those at that time?

The plaintiff objects to the question as incompetent, irrelevant and immaterial.

By the Court: That is more properly a matter of cross-examination.

By Mr. Green: We now offer in evidence all the applications to which the attention of the witness has been called—A and B— the others are already in, for the purpose of showing the amount of insurance for which John W. Hillmon applied at those various dates.

By the Court: They are in for all they show.

1085 And in answer to cross-interrogatories propounded to him by L. B. Wheat, Esq., counsel for the plaintiff, the witness testified as follows, to-wit:

Q. Doctor, will you tell me who wrote this 5, 11, in this application dated the 31st of October; whose handwriting is that 5, 11? A. That is mine.
Q. That you say, was the first application you made?
A. Yes, the 31st of October.
Q. That is the first time you examined him?
A. That is the first I examined him.
Q. If there is anything in here that gives any identifying mark on him, please state what it is in this first application.
A. He is reported as being white; skin is white; figure erect; his eyes marked, hazel.
Q. Were his eyes dark or light or hazel according to your recollection of Mr. Hillmon?

A. Well, that I don't think now I would be able to testify to; certainly I should think rather on the order to be light rather than dark.

Q. If I remember right, you said he had dark hair?

A. Yes, dark.

Q. Almost black? A. No, I said dark hair.

Q. He had dark hair?

A. Yes, sir. Complexion fair; that is all I discover on this.

Q. Is there anything in that paper in relation to any scar on his hand or head; if there is, please point it out.

A. I don't see any; I am not aware of any.

Q. You don't see any reference to any such thing?

A. No, sir.

Q. How many times did you examine him; six or eight times?

A. No, I think it was five; yes, I think I filled out five certificates.

Q. You had four here, I believe of the Connecticut Mutual and two of the New York Life, have you; right here now, today.

A. No, I don't think so; there was two of them were filled out on the same day.

Q. The 4th of December, 1878? A. Yes, sir.

1086 Q. And one on the 24th?

A. I think on the 4th of December, two of them were filled out on one day, which constituted the real manner of the examination, and the next time, occurring within thirty days or a month, was largely a copy of these.

Q. I do not ask you now about a copy. You filled out two on the 14th of December, one on the 24th of December, and one on the 24th of February in the Connecticut Mutual?

A. Yes, sir, 1879.

Q. Then there was two in the New York Life you have referred to.

A. One of those was on the 31st of October, and the other on the 4th of December.

Q. Then, on each of these five different days he was before you?

A. No, there was only four of these days he was in my presence.

Q. Well, four days, then? A. Yes sir.

Q. Now, state whether on those occasions you did not feel of his pulse each time?

A. Yes, sir, I counted his pulse.

Q. Can you tell me which hand of his you took hold of to examine his pulse? A. I could not.

Q. Which hand do you generally?

A. That depends altogether on the relative position of myself and the applicant.

Q. You don't now remember which hand on either occasion, do you, or do you? If you do, I want it.

A. No, I could not tell which hand I took hold of.

Q. Can you recall the situation there so as to say which hand it must have been; from the way you stood can you state which one it was?

A. No, I could not, because I am apt to take hold of the hand which is most convenient; it might be the hand farthest from me and it might not.

Q. You did examine his pulse each time? A. Yes, I did.

Q. And each of these four different timee you measured his chest?

A. I don't think I measured his chest—Yes, I think I did on four different times.

Q. Was he standing up or sitting down when you examined his chest?

1087 A. Oh, he was standing up, I presume; that is my custom.

Q. And you standing up? A. I think so.

Q. Doctor, how high are you?

A. I am five feet ten and a half.

Q. You can tell very easy whether a man is higher or lower than you when you are standing up close to him measuring his chest?

A. If there is any great discrepancy I can, I should judge, but unless my attention was called to it, I would not notice it.

Q. When you measured him do you remember where you stood, when you were measuring him Doctor?

A. We stood face to face.

Q. You remember his appearance well enough to tell the color of his eyes, and even the shade of hazel.

A. Well, I think that was my impression, yes.

Q. If you were higher than he you would have had to look down at his eyes, wouldn't you?

A. Well, if I was very much higher, I would.

Q. If you were at all higher, the slant of your eyes would have to be down, wouldn't it? A. I would not know—

Q. I am not asking you what you would know. Where were you; let us get at that; where were you each day when you did the measuring of his chest; were you in a room on the floor or were you on raised ground? A. On a level floor.

Q. In a room? A. Level floor.

Q. In a room?

A. Yes, sir, when I looked into his eyes—

Q. Never mind now. I ask you that question we got away from. A. Yes, sir.

Q. And if he was the taller, you would look up towards him, of course wouldn't you?

A. If he had been very much taller, I would.

Q. If he was taller at all, the slant of the look would be upward, wouldn't it?

A. If he was a man very much taller.

Q. Well, we will pass from that. You looked at him close enough there to notice that his hair was what you call curly, wasn't it; slightly curly; you didn't mean by that that it hung in ringlets, did you?

A. I do not mean to say that his hair was curly.

1088 Q. Didn't you say his hair was curly? I understood you to say so.

A. No, I am not aware of having said so.

Q. Well, never mind; we will leave that to the jury as to what you have said. I will ask you now to tell me whether his hair was curly or not. A. Was it curly?

Q. Was it curly? A. I don't think it was curly.

Q. You know I am asking questions about John W. Hillmon, don't you?

A. Yes; I don't think his hair was curly.

Q. Was it wavy?

A. I don't think it was; I think it was straight hair.

Q. Now, with reference to the nose; you spoke something with reference to a bulge didn't you, in his nose?

A. Mr. Hillmon's?

Q. Yes. A. No, sir, I did not.

Q. That was with reference to the corpse? A. Yes, sir.

Q. You have some memoranda there, have you not; some memoranda that you read from?

A. I had some in my hand a while ago.

Q. Haven't you it there now? A. No.

By Mr. Green: I have it.

Q. I will ask you to point out to me the part of that memoranda if there is any, in which corns are mentioned, if it is in there. A. Yes, if it is here.

Q. You don't find them yet?

A. I don't seem to find the part, the measurement of his feet.

Q. I ask you if you have got any mention in there about corns? A. I do not seem to discover it.

Q. You don't discover it?

A. I haven't read it over entirely, but I don't see it.

Q. You were examined as a witness in this case about the 12th of February, 1895, were you not, at Topeka, before Judge Thomas?

A. I say I have been examined in all the trials; I don't remember—

Q. Every trial that has been had? A. Yes, sir.

Q. Whilst we are on that subject, let me ask you where you have resided at every trial, at the time of every
1089 trial?

A. I moved to Minneapolis in 1882, in the spring of 1882, and I have been in Minneapolis.

Q. So that at the trial in June, 1882, you were present?

A. Yes, sir.

Q. And at the trial in June, 1885, here before Judge Brewer you were present? A. Yes, sir.

Q. And at the trial before Judge Shiras in March, 1888, you were present? A. Yes, sir.

Q. And in the trial in January, February and March before Judge Thomas, you were present in February?

A. I have been at all the trials.

Q. Well, were you not present in February, 1895?

A. I don't remember the month, but I was before Judge Thomas.

Q. And again at the trial at Topeka before Judge Williams? A. Yes, sir.

Q. Now, I will ask you if you produced these same three pages—these notes that you referred to—These notes are on three pieces of paper, are they not? A. Yes, sir.

Q. Did you produce these same identical three pieces of paper at these two last trials? A. I think so.

Q. Now, I will ask you if Mr. Samuel A. Riggs—He was present at those trials, was he not? A. I think he was.

Q. One of the attorneys for the plaintiff. I will ask you if he did take a copy of these notes on one of those occasions?

A. I don't remember whether he did or not; I don't know.

Q. You handed it over to him whilst you were being examined, didn't you? A. I don't remember.

Q. Don't you remember of his asking and that you delivered it to him then, and then his going on and asking you questions with regard to the various things in it, he holding your paper in his hand, and asking you questions to see what answers you could make?

A. No, sir, I don't remember particularly about that.
1090 Now, did you not state on each of those trials that the word corns was not in those notes, alluding to the notes, to the three pieces of paper that you held in your hand?

A. I don't remember.

Q. Don't you remember of saying that there was no reference to corns in it? A. I don't remember that I did.

Q. Well, words to that effect; that there was no corns.

A. I don't remember.

Q. Now, as I understand it, there is no corns in there now.

A. I will read it over if you will permit me; I will take it and read it over very carefully.

Q. I would like to have you look and see if the word corns is in there, and I would like you to say in what part of the paper it is.

Q. Did you examine the paper last night? A. I did, sir.

Q. Did you find the word corns in it?

A. I did not find it mentioned, no sir. Not in those notes.

Q. You took that memoranda for what purpose, when you wrote that memoranda?

A. I took it as a description of the body.

Q. As a description of whatever you found? A. Yes, sir.

Q. You marked on it the matter of a mole about the size of a mustard seed, didn't you. A. Yes, sir.

1091 Q. Even that? A. Yes, sir.

Q. But you didn't put down anything about corns in it? A. No, sir.

Q. You have been present at each trial of this case, you said? A. Yes, sir.

Q. Do you remember hearing the Fort Madison depositions read?

A. I have heard of it; I never heard it read.

Q. Did you hear of some witnesses in those depositions saying there was corns on Frederick Adolph Walters' toes?

A. No, sir.

Q. You don't recollect that?

A. No, I never heard anything about those depositions.

Q. You heard of their being read here at every trial?

A. I heard there were depositions read.

Q. You made a very careful examination of the body there from the sole of his foot to the top of his head? A. I did.

Q. You did not make any memorandum of any scar amongst the hair? A. No, sir.

Q. And you didn't make any memorandum of any scar on the hand? A. No, I did not.

Q. Will you read word by word and figure by figure, that memorandum there, or will I ask you a question, and then if it is agreeable to all, you can hand the paper to the stenographers and let them copy it. Will you state the words, letters and figures just in the order as they appear here in those notes that you hold in your hand; begin at the beginning and end at the ending just as they come there.

A. The question is just to read the notes?

Q. Yes, sir.

A. (Reading.) "April 4, 1879. Examination of body at Bailey & Smith's shop, said to be John W. Hillmon's.

Drs. Fuller, Stuart & Mottram present. Body in good state of preservation—hair dark brown—almost black—curly. Three to four inches long; eyebrows meet over the nose—brown mustache, light brown, thin, trimmed unevenly or not

at all; very narrow, not extending high on upper lip;
1092 face smooth shaven. Upper lip short, would most likely show his upper teeth. Lower lip full and prominent. Full set of teeth, all sound and of large size, the two upper incisors broad and cover the two lower and right lateral incisors; the anterior surfaces of the upper and lower incisors even when the jaws are closed, or nearly so; nose not very long; somewhat prominent at bridge, or aquiline; cheek bones prominent and broad, lower jaw large and heavy. A bullet hole entering the right side of head one inch and a half above and half inch in front of the right auditory meatus, and a hole marking the exit of the ball on the left side one inch above the auditory meatus. Circumference of head, 23¼ inches; length of profile, mouth closed, 8½ inches; width of face across malar bones, 5¾ inches. Hands, long, measuring for glove, 9.14, without any scars or defects; fingers unusually long. Body stripped naked; skin white; body remarkably well developed, muscular; length of body, 5 ft, 11⅛ in. Body entirely free from any blemishes or marks whatever except a mole the size of a small pea rather teat-like exactly on the spine on a line joining the lower point of shoulder blades; also, one of the size of a mustard seed over the left hip. Measurement around thorax (chest) over nipple next the skin, 35½ inches; length of foot, 10½ inches. Age, apparently about 25 years. Body opened. Intestines, stomach, spleen, liver, lungs, heart and kidneys examined and found to be in a healthy and normal condition, except considerable pleural adhesions over upper portion of right lung. No food found in stomach. Weight of the body (bare), 147 pounds. Weight of clothes (pants and drawers, shirt, coat and vest), (9 pounds). Length around wrist, 7 inches. Length around the neck, 13½."

Q. Is that all of it? A. That is all.

Q. Doctor, won't you please read by itself, the interlineation on the second piece of this paper. After the word "condition" is a mark indicating an insertion above, what you call a caret, is it not?

A. Yes, a caret, then it is inserted, "except consider-
1093 able pleural adhesions over upper portion of right lung."

Q. That is interlined, is it not?

A. That is interlined.

Q. Who wrote all this? A. I did.

Q. What did you write it with? A. A pencil.

Q. You had made the examination very carefully. State whether you wrote this description as you went along, or did you write it out afterwards?

A. I wrote it as we went on, went along, step by step.

Q. And when you made the examination—this part here. "Age apparently 25 years: Body opened, intestines, stomach, spleen, lungs, heart and kidneys examined, and found to be in

a healthy and normal condition," you wrote that just as you examined those parts? A. Yes.

Q. Then you wrote along then, "No food was found in the stomach." You had written the words, "No food was found in the stomach," before you had written the words, "Except considerable pleural adhesions over the upper portion of right lung"; you had written those words, "No food was found in the stomach," before you interlined these words, did you not?

A. Yes, sir.

Q. Now, doctor, how could you skip so important a thing as that when you were writing that description, and have to interline it; will you please explain that incident?

A. Yes, I remember; when the body was opened, the manner of opening the body was to divide the soft tissues from the neck, the lower portion of the abdomen, the skin was laid aside except in the central portion, it was divided in this manner; the anterior portion of the ribs are cartilagenous; two to three inches of the portion are cartilage, and they were divided between the cartilage and the bony union on each side, opening up from the center of the space—over the center of the chest, the space, from top to bottom, containing the sternum, and the cartilagenous portion of the ribs, some four to six inches wide; that portion of the chest bone was laid away and the lungs were observed, as we looked at them; the ab-
1094 dominal cavity was opened up in the same way, the tissues laid aside. Now, later in the examination, these pleural adhesions were only discovered by slipping the hand in between the lung and the ribs, and feeling around the lungs on each side; so that that portion of the examination was a little later done and was entered in at that place.

Q. Now, you made this examination for the purpose of identification?

A. Well, my object was simply to get an accurate description of that body.

Q. Was it any more important to get an accurate description of that body, than it was to give an accurate description of him in the applications for policies of insurance?

A. Well, I can answer that by saying that I was there to make a distinct and correct description of the dead body; that was my purpose.

Q. Doctor, how long had you been medical examiner of either these insurance companies before you took his applications?

A. Well, I could not say; I think I became examiner for the New York Life, I could not tell you; it was some time in the 70s, previous to this but I don't know how long.

Q. Several years before?

A. It might have been a few years.

Q. It might have been fifteen years? A. Oh, no.
Q. Well, how long? I thought you said fifteen?
A. I said a few.
Q. It might have been a few years? A. Yes.
Q. Doctor, will you please tell me what the object of a medical examination of an applicant for life insurance is?
A. It is to ascertain the character of the risk; that means whether the condition of the health is—
Q. Is it not also to take a description of the person?
A. That is what I am saying; yes sir, sure.
Q. How—
A. I meant to give a fuller answer to that question.
Q. Let us get down to the description. Doesn't it include to give a full and accurate description of the person?
A. I can answer that by saying that medical blanks
1095 contain questions for only certain points, not a full description, in every particular, of the body.
Q. In these applications of the New York Life and Connecticut Mutual, is there not three points; don't you remember points in there that ask for personal injury, and some of them that call for marks, some of these applications?
A. I do not know now just which one; I don't remember; they differ from each other; some of them ask whether there is any evidence of previous disease or injury.
Q. That is not the point we are asking about now.
A. I do not understand you.
Q. By putting in the height: Can you tell me what is the object of putting that in the application?
A. Well, it is a matter of description of the body.
Q. I am talking about putting it in the application; it would be part of the description of the individual, wouldn't it?
A. Yes, that is right.
Q. In this connection, before we go further, right there I will ask you if a person lying down, either alive, or a corpse, after it is dead, is not generally longer than it is standing up?
A. Not much; a little I think; it is owing to—people who are stooped are a little bit longer.
Q. Don't it depend also upon the texture of the cartilages in the joints? A. No sir.
Q. Doctor, don't you know that people, living people, will vary from a quarter of an inch to two inches in length between standing up and lying down?
A. No sir, not ordinary straight people; I don't know that.
Q. You have measured people, have you not? A. Yes sir.
Q. How much difference do you remember of discovering?
A. I have no—
Q. I am speaking now of living subjects?

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A. I don't remember of measuring—I remember of measuring one man.

1096 Q. That would not be enough to make a rule.

Q. The height of a person is regarded as a very important matter, is it not? A. Yes sir, for these reaesons—

Q. I didn't ask you the reason, doctor; I want to know if the matter of the height of a person was not a very important matter? A. It is an important matter, yes sir.

Q. Doctor, will you look at this application here, dated, it is exhibit 7, M. L. J. the one you referred to as the application made on the 24th of December, 1878; that is your signature there, J. H. Stuart, M. D., I believe you said? A. Yes, sir.

Q. Whose signature is this here?

A. That is John W. Hillmon's.

Q. John W. Hillmon wrote that signature? A. Yes, sir.

Q. Now, Doctor, who put that under the description of height, under the word Height who put that 5 ft. 11 in. there?

A. I think that is my writing.

Q. I believe you said on yesterday you wrote it?

A. Yes sir.

Q. You have always said that you wrote it at every trial, didn't you? A. I think so.

Q. Now, he was there on the 24th day of December?

A. Yes sir if that is the date of the paper, it was on the 24th.

Q. This was the third time that you examined him?

A. Yes sir.

Q. You examined him on the 31st of October, the 4th of December, on the fourth of December was the making of three different applications, I believe? A. Yes sir.

Q. And on the 24th of December, that was the last time?

A. Yes.

Q. You measured his chest at the same time that you measured him for the 5 feet 11, didn't you? A. I think so.

Q. How long a time were you engaged in measuring him on the 24th of December?

A. Well, I should think half an hour to an hour.

Q. You made the examination full on this occasion?

A. I think so.

Q. Measured him around the chest. Whatever measurements you made on him you made when he was standing up, did you? A. I think so.

Q. You made it personally yourself? A. Yes sir.

1097 Q. Did you stand in front of him or were you behind him when you made it?

A. Standing in front of him when I measured around the chest.

Q. Whatever measurement you made? A. Yes, sir.

Q. I notice one word here, under sub-division 10, the word, "Has he experienced any injury, state, and its effect upon the state of health. Ans. No." Who wrote that "no."

A. I did.

Q. Who was present when you wrote that in the Connecticut Mutual application? A. John W. Hillmon.

Q. Who else; wasn't Selig there? A. I don't think so.

Q. You think he was not there on that occasion?

A. I don't think so.

Q. You stated that you examined this body for scars and marks carefully, so as to find that little mole? A. Yes, sir.

Q. Now, did you notice any scar on either of his legs, the calf of his leg, or below the calf of the leg or below the knee, or anywhere there on this cadaver? A. I did not.

Q. You examined him, didn't you? A. I did.

Q. You examined him carefully? A. I did.

Q. Had a magnifying glass?

A. Well, I am not so certain about the magnifying glass myself at the time I examined his legs.

Q. Didn't you state that you had a magnifying glass?

A. I had one when I examined him at the cemetery.

Q. There was a magnifying glass used there at the autopsy when you was examining the body, was there not?

A. Well, I am not so certain about that; I cannot answer whether any one was using one or not; I could not say.

Q. You examined him very carefully? A. I did.

Q. Did you find any scar of any kind on either leg, including the calf of the leg? A. I did not.

Q. You didn't find any bunion on the foot, did you?

A. No.

Q. Or one of his joints enlarged? A. I don't think so.

Q. You don't believe there was anything of that kind
1098 there? A. I don't think so.

Q. If there had been anything of that kind there, you would have noted it in your memoranda?

A. I would, I think.

Q. If you had found any little scar on the leg you would have noted that? A. I think so.

Q. I believe if I understood you right yesterday, you said he had a nice hand; I am speaking of the corpse?

A. I think I said he had a shapely hand, I think with long fingers.

Q. Good, nice fingers?

A. The fingers were long, yes, sir.

Q. Straight?

A. Yes, I think so; I don't remember any thing to the contrary.

Q. You don't remember anything to the contrary of their being straight? A. No, I don't.
Q. Straight and nice?
A. I don't remember anything about nice.
Q. If he had had a crooked little finger, you would have noticed it, wouldn't you? A. Well, I possibly might.
Q. Let us see about that possibility. You said you did not see any ring mark on either finger? A. I did not notice any.
Q. You did not notice any? If there had been one you would have noticed it? A. I think so.
Q. If there had been a ring mark on either little finger you would have noticed it?
A. Why, I think so if it had been well marked.
Q. If it was anything you could call a ring mark?
A. If anything noticeable, I think I would.
Q. You would have discoverd it, you said that yesterday?
A. Yes.
Q. If it had been on either little finger? A. I think so.
Q. And if either little finger had been crooked you would have discovered it? A. I rather think so.
Q. That is certain, ain't it. A. I think so.
Q. If your examination was close enough to show if there was a ring mark, it would have been close enough to show whether there was a crooked little finger?
A. I think, Mr. Wheat, if it had been noticeably
1099 crooked, I should have seen it.
Q. Dr. on this subject of scars, you said that you felt his pulse on each occasion? A. Mr. Hillmon's.
Q. You took the pulsation of Mr. Hillmon's pulse?
A. Yes, sir.
Q. Did this four different times, the 31st of October, the 4th of December, the 24th of December, and the 24th of February? A. Yes, sir.
Q. On each of those days you took his pulse beats?
A. Yes, sir.
Q. The pulsation of his heart? A. I did.
Q. Number of respirations, etc? A. I did.
Q. Did you notice any scar in this part of either hand?
A. I don't remember any.
Q. Well, if there had been one there, you would have been apt to have seen it, wouldn't you? A. I couldn't say I would.
Q. If it had been a noticeable scar you would, wouldn't you?
A. Well, if it had been a noticeable scar perhaps, on the hand that I was examining, I might and I might not. I hold my watch in one hand, and put my finger on the pulse with the

other; I generally arrange it in that way to take hold of the pulse.

Q. It is a matter of indifference to you, as I understand, which hand you examine? A. Yes, sir.

Q. Which pulse you take, either the right or the left wrist?

A. That is correct.

Q. It would be very singular, then, if on each occasion, you had taken the same hand, wouldn't it? You would not have taken the same hand each time if it was a matter of indifference to you? A. Yes, I might or I might not.

Q. It would be four chances to one of doing it?

A. I never figured them.

Q. This scar here on the hand, if there was anything that would have torn his skin apart here enough to have made a scar, both on the inside and outside of the thumb, between the thumb and forefinger, if there had been such a scar, 1100 wouldn't you have seen it? A. Not necessarily.

Q. How could you have avoided it if you had seen him and he had stood up in front of you. How long would he stand up before? A. It would only [—] a very few minutes.

Q. Then he was standing up before you? A. Yes.

Q. And you were talking to him? A. Yes.

Q. If it had been a noticeable scar, why wouldn't you have noticed it?

A. Simply because I did not examine him particularly for it.

Q. Do you mean that you did not or that you don't remember anything about it?

A. No, I did not examine him for any scars.

Q. Do you remember whether you did or did not or simply don't remember whether you did or not?

A. I did not examine him for scars.

Q. You talked with him on each occasion? A. I did.

Q. You examined him as medical examiner? A. I did.

Q. There was quite a number of times that you saw him other than when you were taking these examinations?

A. Yes, sir.

Q. Did you walk along the street and talk with him?

A. I don't think so.

Q. On which arm was he vaccinated? A. On the left.

Q. You had his sleeve stripped up as high as where you vaccinated him? A. Yes, sir.

Q. His coat was off? A. Yes, sir.

Q. Shirt sleeves rolled up? A. Yes, sir.

Q. With reference to his teeth: Did you notice anything about his teeth?

A. I have no definite knowledge of his teeth; I have an impression.

Q. You have sworn on several occasions in this case?
A. Yes.
Q. You have been asked every time whether you noticed anything about his teeth, have you not?
A. I don't know whether I have been asked every time or not; I don't remember.
Q. You have been asked several times?
A. I have been asked several times, yes.
1101 Q. The tooth question has been up for consideration every time? A. I can't remember about that.
Q. Now, I will ask you if you did not swear on each occasion that you did not remember any defects or any defective teeth or any defect to his teeth?
A. I can't remember; I don't remember what my testimony was.
Q. You can't remember what you swore to on every trial?
A. I don't remember what my testimony was; I remember testifying early in the case but I could not say that I testified every time, and I could not say what I did say.
Q. If there had been anything about his teeth, you would have been apt to put it down in his application, wouldn't you?
A. No, sir.
Q. Now, I want to know whether you did see any scar on his hand when you took his application? A. No, sir.
Q. You did not see any? A. No, sir.
Q. You never saw any scar on Hillmon? A. I did not.
Q. Nor you didn't see any defective teeth in his mouth, did you?
A. I don't remember definitely whether I did or not.
Q. You don't remember of seeing any decayed teeth or anything?
A. I don't remember definitely enough to testify; I have an—
Q. Never mind; this is the first time you have said you have, on this occasion? A. I should not think so.
Q. Isn't this the first time you have rung this point in?
A. No, I don't think it is; I don't remember my testimony on the subject.
Can you remember what you swore to on the different trials on these main points?
A. I think I can on the main points. I think so.
Q. Now, has not this matter of tooth been one of the main points in the case from beginning to end on every trial?
A. Well, it has been up but I don't remember my testimony upon it.
Q. You say you can remember your testimony on the main points; how about this tooth? You can remember
1102 about some other things, even to these talks with him?

A. I think I have testified as I testified to-day, in a way, but I don't remember definitely.

Q. Mr. Stuart, in this matter of teeth, you have never testified that you had any recollection of anything wrong or rotten or missing to his teeth, have you?

A. I don't remember that I have; I cannot remember.

Q. Don't you remember that you have not?

A. No, I can't remember that I have not; I can't remember my testimony.

Q. Was not this question asked you by Mr. Riggs at the trial in 1895: "Did you ever notice whether he had a missing tooth or not?

A. I can't testify in regard to his teeth."

The defendants object to the question for the reason that it does not tend to contradict the witness. Objection overruled, the defendants duly excepting.

A. I don't remember definitely the question, but I, of course, if it is recorded, I cannot remember definitely.

Q. Wasn't your answer correct at that time?

A. I should think substantially; I should think so.

Q. Wasn't it exactly correct? A. If it is so recorded.

Q. Never mind how it is recorded. Wasn't that the correct answer to make to the question according to the fact?

A. Yes, that is what I think it is.

Q. And it is correct answer to make now to that question?

A. That is what I mean to make.

Q. With reference to these measurements on the 24th of December, what is the object of putting in the 5 feet, 11; what is the object of putting in the height?

A. It is to record his height.

Q. That would be for a description of the person, wouldn't it? A. A part of the description of the person, yes.

Q. Partly; wouldn't it be for a description of the person so far as the height is concerned?

A. Yes, sir, that is right.

1103 Q. To show the height of the man that was making the application? A. Yes.

Q. That is, for descriptive purposes? A. That is right.

Q. How much do ordinary men vary in height; how much do you find them varying in height; from what height to what height? There is only a few inches variation in the height of men, the ordinary men?

A. Well, yes, that is correct.

Q. The average man—I have no definite figures on that, but— A. The range?

Q. The range? A. Yes, I think that is correct.

Q. It is an important matter of description?

A. Yes; if I understand the question.
Q. It is an important matter of description, the height?
A. Yes.
Q. Right down to half an inch?
A. Well, we usually want to make it acurate; it is the purpose to make it accurate.
Q. The object is to make it accurate? A. Yes.
Q. That is the object of the examination?
A. Yes, that is correct.
Q. Now, where did this examination of the 24th day of December, 1878, take place? A. That was in my office.
Q. That same scale on the paper that you spoke of was there? A. Yes, sir.
Q. What part of an inch was that scale marked?
A. I think it was marked in inches and the fractions in it were always indicated afterwards.
Q. What was that scale there for?
A. For the measurement of applicants for life insurance.
Q. And the object of putting in the height was to give an accurate description? A. Yes, sir.
Q. The application was made and written in the same room the scale was or in some other room? A. In the same room.
Q. There was no reason why the scale was not comeatable then at any rate, out of the way or anything?
A. Not anything.
1104 Q. Nothing standing in the way of going to it?
A. Nothing that I know of.
Q. Why didn't you measure him instead of writing it 5 feet, 11?
A. Because I carried it along, the figures that I had written down in the first application something over a month before.
Q. You had him right there, before you? A. Yes, sir.
Q. You had stood up and measured him; that was the third time? A. Yes.
Q. Doctor, couldn't you have told a difference of an inch in a man's height in those days when you were examining him just by looking at him?
A. I could if I had directed my attention to it probably.
Q. Couldn't you have told it to the half inch?
A. No, I should not say so.
Q. You said you were 5 feet, 10, 1-2? A. Yes.
Q. I understood you to say that you measured this body that was brought back to Lawrence, whilst it was laying in Bailey & Smith's place? A. I did.
Q. What was the object of measuring it there?
A. It was to get the length of the body.
Q. You wanted to have that accurate, didn't you?
A. I did.

Q. How did you measure him?

A. The body was laid on a plank or board and upright pieces were placed at the head and the foot in an upright position, a square, I think; the points were noted on the board with a pencil, the length of the body, and then we did the measuring afterwards.

Q. You say it measured 5 feet, 11 inches and what?

A. 5 feet, 11, $\frac{5}{8}$ I think.

Q. Now, that was to assist in determining whether it was Hillmon or not?

A. Yes, sir, it was made to get an accurate description of the body.

Q. I want to know whether it wasn't made with di-
1105 rect reference in assisting in determining whether that body was Hillmon's body or not? A. I think it was.

Q. Made with direct reference to that? A. I think so.

Q. Was it any more important, in your judgment, to get an accurate measurement of the length of the corpse, than it was to put an accurate measurement of Hillmon in his application?

The defendants object to the question as calling for the conclusion of the witness.

By the Court: That is a matter of argument.

Q. It was done for the purpose of assisting in determining whether it was Hillmon or not? A. Yes sir.

Q. Am right on that, am I? A. Yes sir.

Q. On this matter of height, I will ask you also, in that connection if it ain't taken with reference to the weight; must not a person have a height in proportion to his weight, that is, if a man has not what is called a proportion, within certain limits, is it not an objectionable feature that might prevent the acceptance of the application? A. That is correct.

Q. That is another object? A. Yes, sir.

Q. Now, in this taking of the height, I will ask you— You said something on yesterday with reference to when you took the measurements of Mr. Hillmon. I will ask you whether, in the examination in chief in the trial of 1896, this question was not asked you, and if you did not make this answer:

[—] You were speaking with reference to his height by measurement.

"Q. When did you ascertain that fact, Doctor?"

The question before: "Q. You may state how tall Hillmon was. A. Five feet, nine inches.

Q. When did you ascertain that fact, doctor?

A. I can't give the date but it was during the early part of 1879, either in January or early in February."

Q. Did you make that answer?

A. I don't remember definitely the words I used.

Q. I will ask you if that wasn't the fact?

1106 A. That is what I mean to say; of course, the facts were, it was the early part of—

Q. It was either in January or the early part of February. You say that now?

A. Some time in February; The date, I don't remember.

Q. I ain't asking about some time in February; you said that on your examination in chief; I want to know if you didn't use the words "Or early in February."

[—] I don't remember.

Q. And then on cross-examination; didn't you say in substance the same thing on cross-examination?

A. I can't remember definitely; it might have been in substance; I can't remember.

Q. You heard Mr. Wiseman's testimony in 1882 about this measurement didn't you? A. No sir.

Q. Didn't you hear Doctor Miller's testimony?

A. I think I did.

Q. Didn't you hear him testify in 1882 to the effect that Hillmon talked to him about his height and that he actually measured him on the 17th of December, 1878?

A. No, I could not remember the particulars that he stated.

Q. Wasn't the 17th of December, 1878, the date that Dr. Miller fixed in his testimony in this case, as the date on which he actually measured John W. Hillmon?

The defendants object to the question as not proper cross-examination. Objection overruled, the defendants and each of them at the time duly excepting.

A. No, I don't remember that that was the date.

By the Court: Not whether Dr. Miller testified, but whether this witness heard him.

By Mr. Wheat: Yes, I ain't trying to prove what Dr. Miller testified to but only trying to prove the date.

Q. Don't you know that Dr. Miller claimed every time that he testified in the case, that he actually measured Hillmon on the 17th of December, 1878?

A. I don't remember that date.

Q. Didn't you see a record in a book in relation to

1107 the matter of the measurement by Dr. Miller; didn't you see it with your own eyes?

A. I don't remember of seeing that.

Q. Now, let me ask you if on the first trial of this case in 1882 and at the second trial in 1885, and at the third trial in 1888, if you did not on each of those trials, or at least in one of them, testify to the effect that you measured him actually

during the same day or a day or two after Miller testified he measured him? A. I don't remember that I did.

Q. Didn't you place the time of the actual measurement of John W. Hillmon by you as occurring—speaking now within a day or two, or a short time, anyhow—as being the same day that Miller did? A. I did not.

Q. Now, Doctor, I will ask you if you did not testify at the trial in 1895, and also at the trial in 1896, or at one of them, "Now, doctor, you said at one time that you measured John W. Hillmon. How did you do that and when was it as near as you can state," to which you answered, "I measured him some time in the early part of 1879, there—"

I will withdraw the question. Now, then, I will ask you whether on those trials in the 80s, you did not testify that it was about the same time that Miller did; didn't you about agree on the time?

A. I don't remember that we did.

Q. There ain't any mistake about this measurement here in this application of the 24th of December, 1878, having been made on that day, is there? A. I don't think so.

Q. There is no doubt about that as the correct time at which that business was done?

A. I should think not.

Q. I want you to be as sure as you possibly can in your memory that it was on the 24th day of December when you concede you still wrote 5 feet, 11. Did you ever report this measurement to the company, this actual measurement?

A. Not except on the application.

Q. Whatever was written in the applications at the
1108 time you made them of course, that you sent to the company? A. Yes sir.

Q. Sent it immediately? A. Yes sir.

Q. But when you actually made the measurement of John W. Hillmon that you testified to, you didn't send any note to the company about it did you?

A. I don't remember about it.

Q. Didn't send any note?

A. I don't think so; I don't remember.

Q. Didn't call their attention to any mistake in the previous applications? A. I don't remember that I did.

Q. Nothing about it? A. I don't think I did.

Q. Haven't you testified at each of the previous trials of this case that you did not?

A. I don't remember my testimony but I don't think I did.

Q. You don't think that you made any note or memorandum of that? A. I don't think so.

Q. Didn't write and inform them of the discrepancy?

A. I did not.

Q. Didn't say a word to them on the subject?

A. I did not to the company.

Q. Wasn't this question asked you at the trial in 1895 and 1896, each, respectively: I want the question to be separate as to each of those trials: "Why didn't you measure him on those occasions when you took his application," to which you answered, "I followed his statement." Is that correct?

The defendants object to the question because the same is double.

Q. At Topeka, in 1895, before Judge Thomas and a jury, wasn't this question asked you: "Why didn't you measure him on those occasions? when you took his applications?

A. I followed his statement."

Wasn't that question asked you and didn't you make that answer?

A. I don't recollect definitely about the circumstance of the question but I think it is correct.

Q. Wasn't that question asked you at the trial in 1896 when Judge Williams presided?

A. I don't recollect about the question being asked me.

1109 Q. Then, wasn't this question asked you—Didn't you so testify on that occasion?

A. I don't remember definitely about it.

Q. Now, the next: These questions are partly preliminary to get up to the main questions: Wasn't this question asked you and didn't you make the following answer on the trial in 1895: "Why didn't you measure him on those occasions when you took his applications? I followed his statement."

A. I don't remember the answer, but the substance, I think it is correct.

Q. Wasn't this question asked you at the trial in 1895: "You had the measurement right on the door? A. I didn't measure all applicants."

A. I don't remember the definite answer, but I—

Q. Never mind; I want to know if that question wasn't asked you at that trial, and if you didn't make that answer to it? A. I don't remember definitely about it.

Q. Well, in 1896, wasn't that same question asked you, and didn't you make the same answer?

A. I don't remember particularly.

Q. Did you think you did make such an answer or not?

A. I might have done so if the question had been asked me.

Q. Now, wasn't this question asked you at the trial in 1895. "You had the measure right there on the door when Mr. Hillmon was measured? A. Yes, sir." Wasn't that question and that answer made at that trial in 1895?

A. I don't recollect definitely.

Q. Well, do you remember indefinitely that that question was asked you at that trial?

A. What I mean by not remembering—Can I explain at all?

Q. No, you may answer my questions.

A. I can't remember definitely the questions and answers in the other trials.

Q. Wasn't that question asked you at the trial in 1896, I have mentioned? A. It might have been.

Q. And wasn't the same answer made?

A. It might have been.

Q. Didn't you so testify in substance?

A. I think I did, but I don't know definitely.

1110 Q. Wasn't this question asked you in the trial in 1895? "You have a clear recollection that he was measured at this time when he came in to correct the statement as to his height, haven't you," to which you answered, "Very clear recollection of that." Was that question and answer given?

A. I don't recollect definitely about the question, No, sir.

Q. Don't you remember the substance of the question and your answer on cross-examination?

A. I think it is correct, but I don't remember definitely.

Q. Wasn't the same question asked you and the same answer made in 1896? A. I don't remember.

Q. Next question: "On the first trial of this case, didn't you state that you had no absolute recollection upon that subject at all?" And didn't you to that question answer: "I might possibly have had some difficulty about my recollection." A. I don't know about that.

Q. Wasn't that question asked you at the trial in 1895 and didn't you make that answer to it?

A. I don't recollect.

Q. And at the trial in 1896, wasn't that question asked you, and you made that answer that I read? A. I don't recollect.

Q. Is it not a fact that you have difficulty about recollecting about that measurement? A. I don't recollect.

By the Court: He is asking you now.

A. I thought he was reading that paper.

Q. Did you say very clearly, asking about your status on that subject?

A. The other gentleman—I understood him that way. I thought you were reading.

Q. You didn't say anything about thinking that I was reading until Mr. Green made that suggestion to you. You just heard a suggestion by Mr. Green.

A. No, I said I did not understand you before Mr. Green spoke.

Q. You heard the last suggestion of Mr. Green?

A. I heard him make a suggestion, yes, sir.

1111 Q. That is all I want to know. Now, the next question.

By Mr. Green: I think the witness has answered that question under a misapprehension, and that he should be allowed to answer it now. The question being asked him is a question read from his former examination.

By the Court: I think so.

Q. The present question was as to your—
A. I wish the question read, please.
(It is read.) A. I had difficulty about it.
Q. You did have? A. Yes, I did have.
Q. You did have in 1882? A. Yes, sir.
Q. At the trial in 1882, you had difficulty in remembering it? A. I did.
Q. That is about the measurement? A. Yes, sir.
Q. I am talking of the actual measurement. A. Yes, sir.
Q. That trial was in 1882? A. Yes, sir.
Q. Before Judge Foster here in Leavenworth?
A. Yes, sir.
Q. You say you testified to some indefinite recollection?
A. Yes, I did; that is in substance correct.
Q. In your testimony in 1882, is it not?
A. I think it is; I don't know.
Q. You think that is correct? A. I think so
Q. You stated, Doctor, if I remember right, in your examination in chief on this occasion, that you first noticed this matter of the 11 in this application, where your examination is dated on the 25th of February, 1879; if I understood you right, in your examination in chief you testified with reference to the time and place when and where you first discovered the figures 11 in there, the alteration of them? A. Yesterday?
Q. Yes. A. I did.
Q. You testified to the time and place? A. Yes, sir.
Q. Who had the application at that time?
A. Mr. Green had it in his possession.
1112 Q. He had it in his hands and drew your attention to it? A. Yes, sir.
Q. That was in a room in the Hotel Throop in Topeka, was it not? A. Yes, sir.
Q. Several others were present besides Mr. Green?
A. There were others present, yes, sir.
Q. That was the first time you had ever noticed the 11?
A. Yes, sir, the first time I had noticed the erasure.
Q. Now, I will ask you if, in 1882, in the trial before Judge Foster, you did not testify that you wrote in there the 5 feet 11?

A. I think probably I did; I don't recollect that I did.

Q. Didn't you in 1885 at the trial before Judge Brewer and a jury testify that you wrote the 5 feet 11 in that same application? A. I don't recollect definitely that I did.

Q. Is it not your recollection that it was 5 feet, 11, your best recollection? A. Well, I might have done so.

Q. Well, didn't you? It was always read, all the applications read alike, 5 feet, 11? A. Yes, sir.

Q. At the first three trials, ain't that right?

A. I don't remember that they were.

Q. Didn't you testify at the trial in 1895 before Judge Thomas, that at the previous trials you had testified that you wrote the 5 feet, 11?

A. I might have done so; I don't recollect definitely the testimony.

Q. It is your best recollection that you did?

A. I think I did.

Q. You think you so testified? A. I think so.

Q. At all three of those trials? A. Yes, sir.

Q. That includes the trial before Judge Shiras at Topeka in 1888? A. I think so.

Q. And Brewer in 1885 here in this city? And Foster in 1888? A. I think so.

Q. You think you testified that you wrote the 5 feet 11 every time at those three trials? A. I think I did.

Q. Now, doctor, when they drew your attention to
1113 5 feet 11, you noticed it very quick; you could see it very plainly; you could see the 11 just as plainly or a little plainer than you can now, couldn't you?

A. I could if I had looked at it, as closely.

Q. As you do now? A. Yes sir.

Q. Now, let me ask you if this same application was not handed to you, all these three applications, at each of these trials, 1882, 1885 and 1888, that the same application was given to you to look at wasn't it?

A. I don't remember definitely that it was.

Q. It would have to be for you to read it? A. Yes, sir.

Q. You couldn't tell unless you looked at it; ain't that your recollection that the application was handed to you at each of these three trials?

A. I think they were; I don't recollect the definite act of looking at them.

Q. You could not testify with reference to it being in your writing unless you had it before you?

A. That is correct.

Q. Now, you can see that that matter of the 11 has been—There is a scratch, an erasing, and extra writing?

A. I can see two lines there, but I can't say that there has been—

Q. Can't you see even a third line there; the left hand one must have been the same as a double line; can't you see that far right now? A. Yes.

Q. There never was a word said about an erasure on that by anybody until that Sunday evening over in the Hotel Throop whilst the trial was progressing before Judge Thomas in 1895? A. I think not.

Q. The very first time you sent that application to the company? A. I did.

Q. In February 1879?

A. Immediately on its being taken; I didn't send it direct to the company; I gave it to the agent; I did not communicate directly with the company.

Q. You gave it to the agent in Lawrence?

A. I did not send any application directly to the company.

Q. The custom was to send them right on?

A. The custom was to give them to the agent and

1114 the agent communicated with the company.

Q. Sends them on and the policy issues afterwards?

A. He sends them on and the policy issues afterwards.

Q. That is the custom of the business, is it not?

A. I think so.

Q. When did you next see this application that we have got here of the 25th of February, where you signed on the 25th and Mr. Hillmon signed on the 24th. When did you next see that application after you turned it over to the agent there in February, 1879? A. I don't recollect when I next saw it.

Q. It was present at all the trials that you have been at?

A. For anything I know, I don't know that it was.

Q. The applications have been handed up to you in your writing; they have all been handed up to you at the time of each trial?

A. I don't remember that they have on every occasion.

Q. What is your best recollection?

A. My recollection is that the applications have been passed to me, a number of applications, but I don't remember definitely whether every one was in each case.

Q. When this actual measurement was taken of Hillmon that you spoke of in your examination in chief, was Mr. Selig present? A. Mr. Selig was present.

Q. That is A. L. Selig, ain't it? A. A. L. Yes.

Q. The man whose signature is on these papers?

A. Yes sir.

Q. He was agent of the company?

The defendants object to the question as incompetent, irrelevant and immaterial and not proper cross-examination. Objection overruled, the defendants and each of them duly excepting.

Q. Haven't you sworn at each trial that he was agent of the company? (No answer.)

Q. This A. L. Selig was along with Hillmon when he came in there at the time you spoke of actually measuring him?

A. He was.

Q. He was present when the measurement was made?

A. He was.

Q. Is that right? A. Yes sir.

Q. Was there more than one measurement made by
1115 you of John W. Hillmon or in your presence?

A. There was a measurement—

Q. I am speaking of the actual measurement of his height.

A. Yes, when Mr. Selig was present; then it was verified when I filled out the last examination on the 25th of February.

Q. Was that the time Selig was present or was it previous to that time? A. Previous to that, yes sir.

Q. Can you tell me, as near as you can, when this measurement was made when Selig was present?

A. I can't give you the date of that.

Q. As near as you can?

A. I cannot; I think it was some time in February, but I cannot remember the date.

Q. As a matter of fact, didn't you testify in 1882 that it was in December? A. I don't remember that I did.

Q. Previous to the time when this application of the 24th of December was made? A. I don't remember that I did.

Q. At the trial in 1882, wasn't the question put to you on the stand how he could have directed his measure to be made, how he could have come back, after the measurements made in the Mutual Life by Miller on the 17th of December, and still let you have written 5 feet 11 in this application on the 24th of December 1878? Wasn't that question asked you in 1882 and in 1885 both? A. I don't recollect that it was.

Q. What is your best recollection on that?

A. I don't recollect at all about it.

Q. Then, let me ask you if at the second trial, in 1885, you did not testify that your recollection was that he came in to be measured, the actual measurement that you speak of—if you did not testify that he came and told you his height was wrong, and that you measured him with Selig, sometime after the 24th of December, immediately after, within a few days?

A. I don't recollect.

Q. Wasn't that question asked you in connection with the idea how, after he had been to Miller on the 17th day of
1116 December, 1878, according to his testimony, to correct the measurement, how you could have written in here, how he would have let you write in 5 feet 11, or state any-

thing about 5 feet, 11 on that occasion. Wasn't the substance of such a question asked you in 1885? A. I don't remember.

Q. You have been asked many questions at each of these trials to explain how this discrepancy in the height occurred, haven't you? A. Yes sir.

Q. That has been a big part of the examination each time?

A. I think it has.

Q. At all of these five previous trials? A. Yes sir.

Q. You say that Selig was along when he came there first to you to correct about his height? A. Yes sir.

Q. Was Selig present when you measured him more than once?

A. I don't remember; I don't think he was but I don't remember.

Q. You don't remember of his being present more than once? A. Not when he was measured.

Q. Did you testify at the trial in 1895 or 1896 to his being actually measured a second time when he came to make the application which is dated the 24th of February, the one that is being passed around to the jury? A. I don't remember.

Q. You don't remember as to whether he came back a second time or not? A. What was your question?

Q. I will put it this way to make it shorter: Did you testify at the trials in 1895 or 1896 to his coming back a second time to actually, or of his being measured a second time?

A. I don't remember my testimony.

Q. You don't remember that you testified? A. No.

Q. Is not this the first trial and wasn't it in answer to this question of mine the first time you have ever testified that you actually measured him on the 24th day of February, 1879, when you took that application on that day?

A. I don't remember, that it is the first time.

1117 Q. If you remember of testifying to that at any previous trial mention at which trial.

A. I don't remember.

Q. At every trial you have testified that Selig came with him at the time he spoke about his height and you actually measured him, [you] haven't you; you testified at each trial that Selig was with him?

A. I don't remember, particularly.

Q. He was with him the first time he came to be actually measured? A. Yes, sir.

Q. Selig? A. He was.

Q. Selig was with Hillmon the first time he came to you to be actually measured? A. He was.

By the Court: I don't know that I understand you. Do you claim now that you actually measured John W. Hillmon twice? That is, as to his height?

A. I verified his measurement when the last application was filled out on the 24th of February; that is my impression.

By the Court: That is not the question: I say, do you claim that you actually measured him twice?

A. No, I don't claim that I stood him against the door and made an accurate measurement of him.

By the Court: That is not it. Do you say you actually measured John W. Hillmon twice with reference to his height, whether you stood him up against the door, or in any other way.

A. I measured him on the occasion of Mr. Selig's coming in with him; and then when I filled out the application of the 25th, the last application, I think, I verified it by measuring him again, but on that question I am not as certain as I am on the other.

Q. How did you measure him at the time when this application, when your examination here, dated the 25th of February, 1879, was made; how did you measure him on that occasion?

A. I measured by the door; by my scale on my door.

Q. You were just saying in answer to questions by the Court that you didn't measure him on the door the second time.

A. My answer to that question is a little indefinite.

1118 Q. I didn't understand your answer as being indefinite. Do you mean your remembrance is indefinite as to the second measurement?

A. My best recollection is that I measured him on the—that I verified it when I filled in this certificate.

Q. I understood you as just saying that you did not; but never mind; I may have understood you wrong. Did you ever see him after he made that application?

A. I never saw him after the 25th of February, 1879.

Q. You never measured him after he made that application, did you? A. Not after this date, no.

Q. Did you measure him after taking that application?

A. I did not.

Q. On the 25th of February? A. I did not.

Q. You made out at that time and signed on the 25th of February, 1879, that medical examiner's certificate that you hold there? A. Yes, sir.

Q. And you never saw him after that occasion, did you.

A. No.

Q. You are sure of that? I am very anxious that you should be as certain as you can whether you ever saw him after you saw him on the occasion when that certificate was made?

A. I have no recollection of ever having seen him after the 25th.

Q. You don't remember that you did see him after the 25th?

A. I have no recollection of seeing him.

Q. Well, did you ever make any measurement of him after that time? A. I don't remember any.

Q. Well, if you did, you would know it, wouldn't you?

A. I think so.

Q. That would be the third measurement if you measured him after that, wouldn't it? A. I think so.

Q. You don't remember any third measurement?

A. I don't remember any.

Q. You don't remember any occasion of it?

A. No, I don't.

Q. About the hair, doctor. I will ask you if this question was not asked you at the trial in 1895, before Judge Thomas: "What was the texture of the hair of this body, coarse or fine," and your answer, "Hair of the head?" Do you remember that question being asked at the trial in 1895 on cross-examination?

1119

A. I remember being questioned about the hair.

Q. Do you remember that question?

A. No, sir; I don't remember the form of it.

Q. Do you remember that question and answer in 1896?

Q. What is the answer?

Q. You inquired there, "Hair of the head?" This is only preliminary to show what we are talking about.

By the Court: That is probably a return question of the witness, whether you meant the hair of the head or the mustache.

Q. I will read two or three questions together: "What was the texture of the hair of this body, coarse or fine? A. The hair of the head? Q. Yes, the hair of the head. A. Well, I should think medium, if I remember right; maybe on the whole on the line of coarse, but not the coarsest hair." Were those questions asked and answers made at the trial in 1895? A. They were, I think.

Q. And also in 1896? A. I think so.

[—] "Did you make any memorandum of that in your notes made at Bailey & Smith's? I would like to refer to them and see." (Does so.)

Q. Then the answer, "The hair of the head, I made it, Hair dark brown, almost black; curly, three to four inches long. Is that right? with reference to your testimony at those two trials? A. I think it was.

"Q. I am asking you about the texture. A. Well, there is no note here on the texture."

"Q. That, of course, means coarse or fine, the texture?"
"A. Yes, sir.
Didn't you make that answer to that question?
A. I did, I think.
Q. You answered to the question, "I am asking about the texture. A. Well, there is no note here on texture."

By the Court: That would not be contradictory to any testimony he has given now, that I recollect of; you have not
1120 asked at this trial as to the texture of the hair, and what he may have testified at some other trial could only be used by way of impeachment or contradiction. Do you say it is contradictory to anything he has testified to at this trial?

By Mr. Wheat: Yes.

Q. The next question: "You said there was no note on the texture; there is no memorandum in these notes about the texture of the hair is there? A. I think not."
Q. You said there was not then; that was your answer.
A. Well, there is no note here on the texture; that was a correct answer.
"Q. Have you any recollection then aside from your notes as to the texture of the hair upon the corpse," to which you answered, "A. No, sir; I have not, besides the notes." Is that not so? Didn't you make that answer to that question? A. I think I did.
Q. It was true, was it not? A. I think it was.
Q. Next question: "The hair was curly. A. It says so, yes, sir." Did you make that answer then? A. I think I did.
"Q. You made the statement here on yesterday about the hair being curly; do I understand you to say you have no recollection aside from the notes? A. I have no notes besides these." Is that right? Did you testify that way? A. I think so.
Q. Now, have you an yrecollection—

The defendants object to the asking of the witness questions asked him at former trials which have no relevancy to the case, and ask that an objection may be considered as made to all questions for which a proper foundation has not been laid.
By the Court. I cannot separate the objection made to a series of questions unless made to the questions, as asked. What the counsel says is correct: I do not think that the last several questions that have been asked respecting his testimony at a previous trial are correct impeaching questions.

1121 Q. When you said you had testified to these questions at the other trials you meant the trial of 1895, did you not? A. I did.

Q. Those questions and answers were asked you at that time?

The defendants object to the question on the ground that it is not an impeaching question. Objection sustained, the plaintiff duly excepting.

Q. With reference to 1896; didn't you at that trial testify in the same way?

The defendants object to the question on the ground last stated.

Q. At the trial in 1895, that we have been mentioning, were you not asked, "Coarse and curly?" and was not part of your answer to that, "Not very curly?"

The defendants object to the question for the reason that it does not tend to contradict the witness.

By the Court: Ask him now what he says?

Q. With reference to the extent of the curliness: To what extent do you say that hair was curly?

A. Moderately curly.

Q. Do you mean curly enough to be in ringlets?

A. No, I don't think so.

Q. Was it anything more than what would be called wavy?

A. Yes, it lay on the head more than wavy; it had curls; what I would call curly hair; not a kinky hair, but a curly hair.

Q. At that trial in 1895, with reference to the ring mark on the finger, was not this question asked you: "I want to ask you one more question in relation to the examination you made at the cemetery; you say you don't think you saw a ring mark on the finger." "A. I don't remember about that."

A. If the Court please, may I make an explanation?

By the Court: Yes.

A. I don't remember my answer in reference to that question, and the particular answer I may have given to it at the time.

Q. You are through with your explanation? "I want to ask you one more question in relation to the examina-
1122 tion you made at the cemetery; you say you don't think you saw any ring mark on the finger?

A. I don't remember about that."

By the Court: The question is whether that question was asked you at the trial in 1895 and you made that answer?

A. That is what I thought I was answering. I don't recollect the particular instance of the question being asked me and the answer being made; I am not positive as to the purport of the answer in every instance.

Q. Do you remember such a question being asked you?

By the Court: He has answered that he did not remember.

Q. Didn't you in substance state on that trial that you did not remember examining close enough to see whether there was a ring mark or not? A. Would I say that?

Q. At the trial before Judge Thomas in 1895?

A. Now, this is six trials that I have testified to in this case; the five preceding ones, I cannot testify to what question was asked me in 1895, or 1892 or 1887 or any year; that is what I am testifying to. I cannot distinguish between these several trials so as to say that a certain question was put to me one year and a certain answer given and another one in another year; in my answers as to the time when these questions were made, the character of the questions, I cannot remember; I can testify as to the material of the answer but I could not as to any particular answer. If you ask me whether there was a ring mark there, I will answer the question.

Q. But you have been a witness five times and I want to know what you said before. Wasn't this question asked you at the trial of 1895, the question last asked you?

Question objected to and not answered.

Q. At this trial in 1895, while you were testifying at that trial, I think it was the first part of February, in the U. S. Court House in Topeka, when Judge Thomas was presiding, and this case was being tried, did you not testify in 1123 answer to this question: "Have your attention called to anything of that kind there?" And you answered thereto: "I cannot remember anything definitely about a ring or a ring mark?

A. If that question was asked me that was most likely my answer to it.

Q. That answer would have been true, would it not, your answer in these words: "I cannot remember anything definitely about a ring or a ring mark? A. That is correct.

Q. Doctor, with reference to this corpse: You saw the corpse? A. I did.

Q. At Bailey & Smith's and in the grave yard?

A. I did.

Q. Did you see it when Lamon took the pictures?

A. I was on the ground.

Q. Did you see Lamon take them, or some photographer or somebody?

A. I saw the photographer that took the pictures?.

Q. You said yesterday, I think, it was Lamon?

A. I think it was.

Q. I will ask you to look at Exhibits 12 and 13 at this trial and state whether those are good pictures of that corpse as it

lay there in the coffin at the time you mentioned in the grave yard when it was being photographed?

The defendants object to the question as not proper cross-examination. Objection overruled, the defendants and each of them at the time duly excepted.

A. They are.
Q. Each of them is a good picture of the point of view from which it was taken? A. I think so.
Q. Doctor, you testified on yesterday, if I remember right, to the effect that the eyebrows of the corpse met?
A. I did.
Q. How heavy were they where they met?
A. Not very; they were light.
Q. They were heavy enough to call them meeting eyebrows?

The defendants object to the question as calling for the conclusion of the witness.

1124 The Court overruled the objection, to which ruling the defendants and each of them at the time duly excepted.

Q. Look at that picture, Doctor, these two pictures, each one of them, and look carefully at the front view, and tell me —you have already said it was a good picture, and tell me if those are good pictures of his eyes and nose and eyebrows, as he lay there at that time? A. In this picture—
Q. Never mind about in this picture?
A. The eyebrows do not appear prominent to me in the front.

The plaintiff moves to strike out the answer as not responsive to the question.

By the Court: The answer should stand because it is in effect saying the picture is not a good picture, probably.

Q. Very well; go on.

By Mr. Isham: His answer is incomplete; he has not finished it.

Q. Go and finish the answer, doctor.
A. The portion of the eyebrow above the nose which ought to form the meeting of the two does not appear in the picture.
Q. Does not appear there?
A. Does not appear in the picture.

(Mr. Wheat here receives from Mr. Green exhibits 29G and 30G.)

Q. Now, Doctor, these pictures which I just obtained from Mr. Green, marked Exhibit G29 and the other marked Exhibit

G30, I will ask you to look at each one of these pictures, and tell me if these are what you call good pictures of this corpse as it lay there at the time the pictures were taken at the time you have mentioned at the grave yard at Lawrence?

A. They are good pictures except they were faded and somewhat indistinct.

Q. They are not faded quite so much as the pictures marked Nos. 12 and 13, are they, but in other respects just like them so far as you can see?

The defendants object to the question for the reason that the pictures speak for themselves.

By the Court: Let the pictures show for themselves.

1125 Q. The two sets of pictures of this corpse are duplicates of each other, are they not?

A. I think so; they look like it.

Q. The last ones not exposed to the air so much. Now doctor, look at the eye brows in these pictures that Mr. Green produced, the eye brows, the nose, the upper lip, the hair, well, the whole thing; look at it all carefully and tell me whether these pictures marked 29 and 30 are good pictures of the eye brows or not?

A. They are good pictures except somewhat indistinct and faded.

Q. I am just asking about the eye brows; they show the eye brows? A. I don't think they show the eye brows.

Q. Which part of the eye brows don't they show that was on that body? Which part of the eye brows do they fail to show?

A. The delicate portion that united the two prominent and distinct portions here across the center of the face.

Q. Well, had the eye been pulled out before these pictures were taken? A. No, sir.

Q. One of these pictures is a front view, is it not?

A. Yes, sir.

Q. They show quite a width between the eye brows, do they not.

By Mr. Barker: As to what the pictures show, we object on the ground that the pictures themselves are the best evidence.

The question not pressed for answer.

Q. Wasn't the nose bent around to the left, the end of it; the point? A. It was twisted a little bit; was dried.

Q. Didn't Doctor Miller take hold of the nose and try to straighten it up just before the photograph was taken so that it would present a straighter appearance than it would if it hadn't been done? A. I don't know.

Q. Can you say whether he did or not?
A. I cannot say whether he did or not.
Q. I will ask you with reference to the hair in these two photographs, these four pictures, these pictures of which you have the duplicates, you have seen them all, I will ask
1126 you as to the hair, whether these pictures correctly represent the hair as it appeared there on that occasion when the pictures were being taken? A. They do.
Q. That is as far as you can remember, they represent the hair correctly? A. I do.

By Mr. Wheat: We offer in evidence the pictures G29 and G30.
Admitted without objection.

Q. Now, doctor, you spoke about vaccinating Mr. Hillmon, and if I remember right on the 20th of February, 1879; was that the right date? A. Yes, sir.

The hour of 12 m. having arrived a recess was taken until 1 o'clock p. m.

Afternoon session. 1 o'clock p. m. Cross-examination of Dr. Stuart concluded by Mr. Wheat.

Q. You were one of those who made the autopsy?
A. Yes, sir.
Q. When did you commence to make that with reference to the time the corpse arived? A. On the following day.
Q. Were you not there with the corpse on the same morning? A. I was.
Q. Examining of it? A. Yes, sir.
Q. Had you taken it out of the coffin; did you take it out of the coffin that morning, that day?
A. I don't think we did.
Q. Did you undress it? A. No.
Q. It was not undresed that day?
A. No, it was undressed the next day.
Q. But it was not undressed the first day it was there?
A. I think not.
Q. Are you sure it was not?
A. I feel very sure it was not. I am not sure but I feel very sure.
Q. Did you cut it up on that first day? A. No.
1127 Q. You didn't cut it to pieces on the first day?

The defendants object to the question as assuming a fact not proven.

A. I never cut it to pieces; I removed a piece of skin referred to in describing the vaccination.
Q. A piece on the arm? A. A piece on the arm.

Q. You took that off on the first day?
A. On the first day.
Q. Very soon after it arrived?
A. During the forenoon some time.
Q. That was on the first day. Now, on the same day, you didn't cut the body to pieces at all, if I understand you rightly, in your answer?
A. Well, do you mean by the autopsy, the examination—
Q. Yes. A. The autopsy was made on the next day.
Q. If I understood you right, you just answered me, you meant to say it was not undressed on the first day any further than to pull up the sleeve to get at the vaccination?
A. I don't think it was.
Q. State whether it was left in the coffin all that day so far as you know, or not?
A. I think it was laid out of the coffin that day.
Q. What was done with it? A. Excuse me—
Q. What was done with the corpse that first day?
A. It was laid out and inspected.
Q. Well, in or out of its clothes?
A. I think it was in its clothes on that day.
Q. The careful, scrutinizing examination that was made then was made the next day?
A. Was made on the next day.
Q. Now, on the next day it was that it was cut to pieces?

The defendants object to the question as assuming a fact not proven.

Q. In the manner you have described?
A. We merely made an autopsy.

By the Court: He has described the extent of the cutting.

Q. I mean to the extent mentioned in your previous answers; I mean as you have already shown as the autopsy.
1128 A. Yes, we made the autopsy on the 4th, the next day.

A. Yes, we made the autopsy on the 4th, the next day.

Q. The body was cut to pieces to a considerable extent, wasn't it? I understood you to say that you took out some of the ribs from the body. I may have misunderstood you; how was it as to that?
A. The chest was opened; the ribs were opened.
Q. Were they not taken apart? Taken and laid aside? I understood you to say the ribs were laid aside?
A. No, a portion of the breast bone and a portion of the ribs were divided and turned up.
Q. Divided and turned up? A. Yes, sir.

Q. Who did the principal part of the cutting, if any one did? A. I think Dr. Mottram did the principal part.

Q. How came he to be there? A. He was there by invitation.

Q. Invitation of whom? A. I think Doctor Fuller.

Q. State whether, so far as you know, or did know, any application was made to the plaintiff, Mrs. Sallie E. Hillmon for leave to hold the autopsy on the body or in any manner to cut it up?

The defendants object to the question as immaterial. Objection overuled, the defendants and each of them at the time duly excepting.

A. No.

Q. Do you know of her giving her consent to any such thing? A. I do not.

Q. Do you know as to whether she knew it was going on or not? A. I do not.

Q. This cutting out of the little piece from the arm in which the vaccination sores were, did you have her consent, so far as you knew, either consent to do it, or knowledge on her part that it was being done,—taking that out of the arm?

A. I had no knowledge.

Q. Of her consent? A. Of her consent or knowledge.

Q. Or that she knew it was being done; you did it without leave from her so far as you know? A. Yes, sir.

1129 Q. Who requested you to do it, to take the piece out of the arm?

A. I think that was my own proposition. I did it on my own motion.

Q. Now, when the corpse was taken up there in the grave yard, state whether anything was said to Mrs. Hillmon about doing it before it was done, or any consent of hers obtained, or whether she knew of it so far as you know, before it was done or when it was done.

A. I have no personal knowledge whether she knew it or not.

Q. You have no personal knowledge of any consent or anything of that kind on her part? A. I do not.

Q. I understood you to say yesterday—I may have understood you wrong—that the purpose of cutting out the vaccine sore was to preserve evidence of it? A. It was.

Q. Now, was that the only purpose?

A. No, there was another suggestion about it.

Q. Something that resulted in the use of a piece of red hot iron, wasn't there? A. Yes sir.

Q. That was one of the purposes of taking it out and taking it away was to apply a red hot iron to it, wasn't it?

A. One of the purposes was to apply a hot iron, yes sir.

Q. Doctor, you said that this was a vaccine sore, if I understood you right? A. Yes sir.

Q. There ain't a doubt about that in your mind? A. No.

Q. Didn't you testify on the trial in the court room of this county over on the hill in June, 1882, before Judge Foster when you were giving evidence that you had doubts at that time when you took that piece out and carried it off and put a hot iron to it, whether it was a vaccine sore or not?

A. Did you read the question and answer? If I could hear the question—I had the question in my mind; it was a question that was raised, not by myself; I did not raise that question, but Doctor Miller raised the question whether that might not have been done by a hot iron.

Q. Let me ask you if this question was not asked
1130 you in the federal court house at Topeka in the court room where this court is usually held, in February, 1895, when you were testifying at the trial before Judge Thomas, whether this question was not asked you: "You questioned whether at first it was a vaccination sore at all or not." The answer to that: "I didn't believe it was at first."

A. Well, I cannot acknowledge that as my testimony, but if it is written, why, it must be. I can remember the state of mind that I was in; I never remember of answering it in that way.

Q. Who did you say it was that questioned its being a vaccination sore?

A. Dr. V. G. Miller suggested at once that it was done with a piece of hot iron, and he says, "We will test it." That is the way the application came to be made with the hot iron.

Q. When you took out the piece and took it away, you took it to what office? A. Took it to my office.

Q. And you put a piece of hot iron to it?

A. It was applied.

Q. Who applied it?

A. I don't remember whether I did or Dr. Miller I think I did it.

Q. Wasn't the iron red hot? A. No sir.

Q. Haven't you testified heretofore on each of these trials that it was red hot? A. I don't think I did; it was hot.

Q. What kind of a piece of iron was it that you applied to it? A. It was a poker to the stove.

Q. Poker to the stove?

A. Yes, a rod with a flat end to poke the fire.

Q. Now, what part of this piece of flesh or skin that had this vaccine sore on it did you apply it to?

A. The strip of skin was two to two and a half inches long, two inches more or less and the sore was near one end, and the hot iron was applied near the other end.

Q. You can't remember which did apply it?

A. I can't remember definitely but my impression is that I did it myself.

Q. You didn't produce a similar sore, did you?

A. No, in no sense.

1131 Q. Now, this sore: Will you describe the way the one looked that you cut into. I will ask you first if the whole of it was on the piece that you took out?

A. No, I divided the other one.

Q. You divided the one of which you took out a half?

A. I took out a whole one, and then I divided through the other and took out a piece of skin including half the sore.

Q. Was that half next to the other sore, or farthest away from the sore that you cut out entirely?

A. It was the half nearer the other sore.

Q. So that when that piece was taken off, it made one continuous taking off?

A. One continuous wound, yes sir.

Q. Doctor, describe that vaccine sore as well as you can when you cut out the two pieces with reference to what it showed there.

Q. You mean the one that I divided?

Q. Yes; did that on the surface, when you first looked at it, present any different appearance from the other? A. No.

Q. Looked the same? A. Looked the same as the other.

Q. Was it the same with reference to the texture of the outside covering or skin as you referred to yesterday?

A. Yes sir.

Q. Now, what was on the outside, then, of those sores as you first looked at them?

A. What was on the outside of them?

Q. What was on the outside surface of them?

A. The surface was dark over the sore.

Q. What was it; skin, cuticle?

A. It was cuticle, wrinkled and dried.

Q. Was it the original cuticle?

A. Yes, the original cuticle.

Q. It was the original skin of the body?

A. Of the body, yes.

Q. Was it the entire skin or just the outside skin, surface skin?

A. It was the skin; such portion of the skin that was raised by the blister.

Q. Yes, I understand that, but I am now asking another question. I will drop that for a few minutes and ask

1132 you still another question. You have sworn that you vaccinated him by cutting on the outside and putting some of the vaccine matter under some portion of the skin.

A. No, I simply scraped a little bit.

Q. At the top? A. Yes, scraped the surface.

Q. And was the entire skin of the body on the outside of this sore that you spoke of, that you found there in April?

A. No, this epidermis or outside skin that was raised by the blister; that was the first I saw—

Q. That was on the outside of these sores?

A. Yes, that was the covering of the sore.

Q. That was true of both sores, was it? A. Yes sir.

Q. Then, what was next below that?

A. That was adherent—the next was the under skin, the true skin underneath.

Q. That came next to the outside skin in these sores, did it?

A. Yes, except that there was underneath some dried material, in between the epidermis and the true skin that was dried.

Q. Did you mention that in giving your evidence in 1895 and 1896?

A. I supposed I included it in my description; I don't remember exactly the form of it; I intended to.

Q. How much was there of that dried matter in there?

A. Oh, there wasn't much.

Q. What thickness? A. Very thin.

Q. Well, how thin?

A. Well, I should think like a piece of paper.

Q. Paper is of various thicknesses. A. It would be.

Q. Here is a piece of paper.

A. Hardly as thick as that, I should think.

Q. Hardly as thick as the common paper that is laying around the table here? Well, then, what was next below that?

A. The next was the layer of the true skin, the cutis vera.

Q. Was this true skin any harder than it ought to be in health?

A. Yes, it was somewhat inflamed and thickened.

Q. Did it show any inflammation then?

1133 A. Yes, it showed, the cut surface was red, showing the increased quantity of blood, of blood elements.

Q. Was the blood still there?

A. Well, it was reddish; bloody; pinkish.

Q. Now, this outside skin—epidermis, I think you call it, don't you? A. Yes sir.

Q. Was that continuous over both of those sores?

A. From one sore to the other, do you mean?

Q. No, I mean the crust of the sore?

A. With the healthy skin?

Q. No, I am not talking about the healthy skin; was this epidermis entire over each of these sores? A. Yes, sir.

Q. It extended clear across? A. Clear across.

Q. Did it connect with the epidermis, the outside skin, on adjoining parts of the arm? A. Yes, sir.
Q. And was continuous clear across?
A. Continuous clear across.
Q. From the healthy part of the arm that had not been vaccinated clear across the sore? A. Yes, sir.
Q. Was that the case all around each of those sores, all around on every part of those two sores?
A. All around; that is my recollection.
Q. You took a knife, you said, and tried to raise the sore?
A. I did take a knife and try to slide it under the crust.
Q. Couldn't do it? A. No.
Q. Because of this epidermis being across there?
A. Because it was adhered to the surface below.
Q. Yes, well, wasn't the epidermis continuous and solid so that it did not present a point of cleavage? A. Yes, sir.
Q. Doctor, was this dried matter that you spoke of the first thing you encountered after taking off the outside skin; was this hardened matter, this crust matter, or whatever it was, that stuff that was thin like paper, that you spoke of, was that the first thing on the surface next to the cuticle?
A. That was beneath the cuticle.
1134 Q. The outside cuticle or epidermis? A. Yes, sir.
Q. And next below that was what you called the true skin, the endermis? A. Yes, sir.
Q. Is endermis the right name. What is the right name?
A. That is the true skin; the cutus vera.
Q. Is it not also sometimes called the endermis as contra-distinguished from the epidermis or outside skin?
A. It might be; I don't remember to have seen that term applied to it.
Q. This sore: We will take the outside surface of it, the upper surface of each of these two sores; how were they with reference to height as compared with the adjoining healthy parts of the arm; which was the highest?
A. There was a wrinkled surface, somewhat wrinkled, and was a little higher than the healthy skin around the border.
Q. Was it any higher than the adjoining skin around than what the little wrinkling would make on top of the wrinkles?
A. Well, I think it was a little.
Q. How much, doctor?
A. Why, I should think, I should not think very much; the thickness of paper, I should think.
Q. The thickness of a piece of common writing paper?
A. Fully that I should think.
Q. Any more than that?

A. Well, that would be perhaps—I don't [—] that there was any special difference; there might be a little bit more; I don't know about that.

Q. But it was a very little? A. It was not a great deal.

Q. The true skin that you spoke of: I will ask you if that was not thicker where the sore was than it was in the parts that the sore was not, that you cut out?

A. The inflammation extended around quite a border.

Q. I am talking now about the thickness right beneath the sore whether the true skin, as you call it, was not thicker at that point on account of the inflammation that had been there?

1135 A. Why, I don't think a very great deal thicker than it was around the border.

Q. Well, wasn't it thicker: This piece that you cut out, I suppose extended farther away than any of the inflamed part that had been there, did it not; than the inflammation had extended?

A. It was a narrow strip that reached out immediately in one direction.

Q. Didn't you cut out some of it that was still healthy?

A. Yes, sir.

Q. That is, a part where the inflammation had not extended?

A. Yes, sir.

Q. Now, wasn't this true skin immediately under these two sores thicker than it was anywhere else?

A. I don't think it was much thicker than the inflamed skin just around the border of the sore.

Q. Didn't the inflammation have a tendency to thicken it all?

A. It had thickened the whole skin in the neighborhood; that is, the whole surface.

Q. That is the very question I was just trying to show; the true skin was thickened then as far as the sore extended?

A. Yes, to the extreme border of the areola or sore. I thought you inquired simply for the center of the sore.

Q. You are answering what I was trying to get at; you understand me, now. The areola, what do you call that?

A. The reddened, inflamed surface or portion surrounding the sore.

Q. The true skin was thickened, then, as far as that extended? A. Yes, sir.

Q. Also let me ask you if that thickening did not extend clear cross under where the sore was? A. Oh, yes.

Q. That is what I was trying to get at. I was asking you about that before; of course, it would extend that far out, so

that underneath this sore, the true skin, for some little distance around where the sore was, was thickened?

A. Yes, sir.

Q. How much was that thickened, doctor?

A. Well, it was—I don't know as I can give it accurately.

1136 Q. At its thickest part, as near as you can.

A. I should think a quarter of an inch or more.

Q. You would think it was thickened a quarter of an inch?

A. I should think so.

Q. More than it would be farther apart?

A. No, the whole thickness of the inflamed portion of skin.

Q. Well, how much was that thicker than that part of the true skin that had not been affected by these sores, adjoining the sores?

A. The true skin was not more than 1-16 of an inch; probably a little more than 1-16 of an inch.

Q. And it was how thick?

A. I should think a quarter of an inch or a little more.

By the Court: You mean laterally or perpendicularly?

A. Perpendicularly, as I cut through.

Q. Can you tell me how thick this true skin was at the point, not immediately underneath the sore, but still underneath the areola, as you call it, the reddened parts, close up to where the sore was; how much was the true skin thickened at that point as near as you can tell me?

A. Well, my estimate applies to both. I think the skin around just the thickest portion would be as I have indicated, shading off—

Q. A quarter of an inch?

A. In the neighborhood of a quarter of an inch.

Q. At the thickest part?

A. And shading off to get back to the normal skin.

Q. And at the point where it was the normal skin it was 1/16 of an inch? A. Yes, I should think so.

Q. How far from the center of the sore was it to the place where it was 1/16 of an inch?

A. Well, in the neighborhood of an inch, I should think.

Q. That would be in every direction from each sore?

A. Yes, sir.

Q. Was the thickest part immediately in the center of the sore?

A. Well, I would think that including the covering of the sore it was.

1137 Q. To illustrate, doctor: If I understand you right, these two sores as they were there on the arm—For instance, one of the sores was there, (illustrating.) If I under-

stood you right, the top of that sore was more than about the thickness of paper, somewhere about that, above the surrounding parts of the arm; was not raised up more than that.

A. It gradually rose with increasing thickness until it reached the border of the vaccine sore in the center; that would be somewhat elevated above the skin.

Q. The healthy parts?

A. Above the surface of the inflammation, the skin immediately near it.

Q. That was about the thickness of paper, or a little more, just where the sore lay above the balance of it? A. Yes sir.

Q. And the outside cuticle that was there when he was vaccinated, the same true cuticle that was there when he was cinated, I mean the corpse when that corpse was vaccinated, the same true cuticle that was there when he was your judgment? A. Yes, in my judgment.

Q. That is your judgment? A. Yes sir.

Q. At any rate, there was outside skin over the outside of each of the sores. A. Yes, sir.

Q. What is called the outside skin? A. Yes sir.

Q. The epidermis as distinguished from the true skin?

A. Yes sir.

Q. That covered all over the place where this sore was?

A. That is my judgment.

By Mr. Barker: I want to know if the witness understood that the question was that the corpse had been vaccinated.

Q. The man whose corpse that was must have been vaccinated in life as I understand you? A. Yes sir.

Q. Now, the true skin that was in his arm at the place where he was vaccinated, the part which covered over this scab, the original true skin, that was there at the time of the vaccination of that arm and the same outside skin that was there at the time of the vaccination, was still there, was it not?

A. That was my judgment.

1138 By the Court: He has testified three times that it covered both vaccine sores all over.

By Mr. Wheat: Yes, I know he did; I am only asking him again in view of what Mr. Barker said in order that there might be no misunderstanding.

Q. So that there shall be no chance for a misunderstanding, I will now ask you another question: Doctor Stuart, I wish you would describe as accurately as you can, and minutely, the appearance and character of the vaccine marks which you found upon the body of the cadaver, which you saw in the Bailey & Smith's undertaking establishment in Lawrence, giv-

ing the extent and character of the surface appearance, color and all the other features of the marks as fully as you are able. Now, I do not desire to interrupt you with questions so I wish you would make your answer complete upon all those points? A. What is the question?

The defendants object to the question for the reason that thequestion has already been answered.

By the Court: He may answer the question.

The defendants duly excepted.

A. Do I understand I am to describe the whole of the sores again?

Q. If there is any trouble about your understanding it, doctor, I will present the question to you as printed in type here. I read that question. (Handing paper to witness.)

A. Well, I understand this question to imply that I am to—

Q. I didn't do anything but to ask that question just as it is there; I read it from this paper.

A. This first asks for the appearance of the vaccine marks; that, I take, to mean the sores, the vaccine sores of which we have been speaking, or which there were two in size and dimension, I don't know accurately, but I should think in the neighborhood of the size of a ten cent silver piece; they were dark in color; they had a wrinkled or rough surface; they were raised somewhat above the surrounding skin; they were
1139 hard and dry; the skin bordering these was somewhat raised above the skin immediately around; it was thickened and hardened to the extent of perhaps an inch and a half to two inches in diameter about each sore; then it shaded off to the normal skin; there was no special redness on the surface. I have no further special remarks.

Q. I want a full answer made to that question; read the balance of the question.

A. It says, "Give the extent and character of the surface appearance, color and all other features of the marks as fully as you are able." I think I included those; I included the color. It was not much different, if any, from the other skin, the normal skin; it was harder to the feel and raised somewhat from the normal condition, or thickened, meaning the same thing.

Q. Anything further to say in answer to that question? I am only asking you to make a full answer.

A. It seems to me to cover the points of the question, as I understand it.

Q. I will ask you if, at the trial of this case in 1896, in Topeka before Judge Williams, sometime in March, in the fed-

eral court room where this court was then being held, you were not asked this same question that I have just asked you, to wit: Dr. Stuart, I wish you would describe as accurately as you can and minutely, the appearance and character of the vaccine marks which you found upon the body of the cadaver which you saw in the Bailey & Smith's undertaking establishment in Lawrence, giving the extent and character of the surface appearance, color, and all the other features of the marks, as fully as you are able. No, I do not wish to interrupt you with questions, so I wish you would make your answer complete upon all those points. Wasn't that question asked you by Mr. Riggs and didn't you answer to that as follows: "There was what we call the sore, the central portion. That was surrounded by the areola or inflamed portion of tissue, making a surface probably two inches in diameter; something like that, an inch each way. That was elevated somewhat and swollen, hard, harder than the adjoining skin
1140 The sore itself was a dark spot, probably $\frac{5}{8}$ of an inch or 6-8 of an inch in diameter. It was about on a level, perhaps a little above the level of the other, or the surrounding tissue. The surface of that was not smooth, as was the skin around it; it was roughened and was dry and was harder. The appearance to my eye was as though it was a continuation of the skin from the surrounding surface, which had dried and hardened as though it had been distended a little by the accumulation of fluid beneath it, and the fluid had dried away and it had settled down on the base below it and in drying had adhered firmly to the underlying tissues; so much so, that making an effort with my finger to try to raise a portion of it around the edge, it seemed to be continuous with the skin, and I couldn't do it; I could not raise any portion of it with my finger nail. I took my knife and tried to loosen it up but I could not loosen it, but I shaved off a sliver of it, and found on cutting off a very thin sliver that I came to a red surface beneath colored pinkish, bloody color."

A. I think that is correct.

Q. That was next to the outside cuticle?

A. It was next to the part that I shaved off.

Q. Well, wasn't that next to the outside cuticle?

A. Yes sir. It was next to what I cut off, whatever it was.

Q. In this answer don't you answer as saying that that was next to the outside skin?

A. Well, it was what I shaved off; I shaved down to the—

Q. I am asking you if you didn't understand the answer as saying that you came to a red surface beneath, a pinkish, bloody color, and that you meant the cuticle or outside skin in this answer?

A. I said I cut off a sliver; I made a shaving and in cutting off the shaving, I cut down to the red surface.

Q. Did you or did you not make this answer that I read to you?

By the Court: He said he did; it was a correct answer.

Q. Now, let me ask you whether at the trial in 1895, at the court room in Topeka, where the court was being
1141 held in January, February and March, 1895, when you were being questioned by C. F. Hutchings, attorney for the plaintiff, you did not, on cross-examination, to the following question, make the following answer: "Now, I would like to have you describe as an expert to this jury, taking as much time as you require to state it accurately, or in any language that you can make it plainest in, the condition, character and description of this vaccination mark which you cut out of this arm and carried to your office?

A. There was a dark spot or sore, two of them, on the arm, in size half to three-quarters of an inch in diameter, perhaps, surrounded by a hardened thickened portion of the skin running together between the two more or less. The extent of this hardened thickened condition around the sore was perhaps an inch and a half or two inches in diameter with the sore in the center; as I said, the sore itself was dark and rough ened, not raised much, if any, above the general surface of the skin. That was the general appearance. Then, my object in cutting it as I cut through one of them, made a central incision right across through the center of the sore, passing through the hardened thickened skin about it for a distance of an inch and a half, removing a piece of skin half or three-quarters of an inch wide, to observe the depth or thickness of that hard ened or inflamed portion of skin surrounding the sore I found that the thickness varied, I didn't take any definite measurement, but I should say from half an inch, more or less, shading off to the margin of it, the cut surface presenting a reddish or pinkish hue, still maintaining the characteristics of the inflammation that existed from the vaccination, the central part, the sore. I made an effort to lift up and remove the crust, as it seemed to be, from the other; I found I couldn't do it; it was adherent, I found. Its thickness was very slight, and under the sore was also this reddened thickened condition resulting from the inflammation and the filling up with blood product.

1142 Q. I will ask you if you didn't make that answer? I will let you have the paper.

A. I take this to be my answer; I don't recollect what answer I gave but I take it to be my answer to the question.

Q. That would be a true answer to-day, wouldn't it?

A. I think so.

Q. About the color of the arm immediately around these sores; what color was it, Doctor, at that time?

A. It was not much different, if any, from the normal color of the skin.

By the Court:

Q. You mean the outside skin, the epidermis?

By Mr. Wheat:

Yes. A. Yes, up to the margin of the sore.

Q. The color that it presented there at the time you first looked at it, before any cutting was done. That is what I meant to inquire about. That is the way you understand me, don't you? A. That is correct.

Q. This ball hole through the head that you spoke of in your examination in chief; if I understood you right, you seemed to think that something had gone through the head on the right side? Is that right? A. Yes, sir.

Q. On the right side: The exact location, will you give it to me?

A. Beginning at the opening in the ear, going up an inch and a half, if I remember correctly, and then half an inch forward, would make the center of the opening.

Q. That would take you to the center of the opening?

A. Yes, sir.

Q. How about the point of exit on the other side of the head?

A. It corresponded very nearly exactly the same place, I think except a little bit lower.

Q. How much lower?

A. Oh, not to exceed half an inch.

Q. Now, will you tell me what part of the brain you think a straight line from the center of each of those holes would pass; what is [is] it called, that part of the brain that a straight line between the center of those two holes would pass?

A. It is called the cerebrum.

Q. Draw a straight line across through the head from the lower parts of those holes, one to the other, through

1143 what part of the brain would that straight line pass?

A. It would pass through the lower portion of the large brain, the cerebrum.

Q. It would still be within the cerebrum? A. It would.

Q. I understood you to say that a man shot in that way must drop right down?

A. That would be my judgment, that he would fall down.

Q. Let me ask you if it is not a well known scientific fact that anything injuring the cerebrum in that way that a man might stand up, or if he was sitting on a horse, that he might

sit there for some little time, and that he does not necessarily fall immediately because of the wound in the cerebrum?

A. I should say it was not.

Q. In your judgment, where do the motor nerves center in the head? Those governing the lower limbs, whether they center in the cerebrum or in some other part of the brain?

A. Well, they are gathered into bundles into the spinal cord, what we call the medulla oblongata.

Q. The medulla oblongata is another portion of the brain, is it not? A. Yes, that is the extreme base of the brain.

Q. That is the extreme base. Let me ask you what comes next below the cerebrum? A. Well as to the skull in front—

Q. Let me ask you if there is not a part of the brain called the cerebellum?

A. That is in the back portion of the head, way beyond where this wound was.

Q. Let me ask you whether between the medulla oblongata and either the cerebrum or the cerebellum, and above it, there is not a part of the brain known as the pons variolii?

A. Yes, sir.

Q. That is a part of the brain then above the medulla oblongata? A. Just above, yes.

Q. And still below the cerebrum?

A. It is rather below the cerebellum.

Q. And the cerebellum intervenes at that point between the upper part of the pons variolii and the cerebrum?

1144 A. It comes in, wedges in between the two. It does not separate the two, by any means.

Q. It separates them on the back side?

A. It goes into the medulla oblongata; it is not horizontal exactly, but it is inclined a little bit; it slides in between the medulla oblongata and is a prolongation of the fibres from the cerebrum.

Q. Now, these motor nerves in reference to the limbs and body. Where do they center; in which one of these four parts of the brain we have been talking about?

A. They are included in the medulla oblongata.

Q. And don't extend up into the cerebrum?

A. Oh, yes, a portion of them do.

Q. They are simply nerve fibres, as they are called?

A. That is what the brain is. A portion of it.

Q. But when these parts that go up into the cerebrum and cerebellum there, are they considered in medicine and science as governing the motive powers of the body?

A. The fibres are conducting elements like wires; the real center of power is in the gray tissue of the brain outside of the brain.

Q. Where is that gray tissue located?

A. It covers the brain all over.

Q. All around it? A. All around it.

Q. Is it not a recognized fact in medicine and science, so far as expert testimony goes that when a man is shot through the head in this way, that whether he will fall immediately or whether he will remain up for some little time, must depend upon the exact situation he was in when the injury was inflicted, and that it cannot be determined by such a wound, or how such a thing would be, but must be in every instance depend upon the fact as it actually was, and there is no means of determining scientifically how it would have been?

A. I don't know what the question means; I give it up; it is a conumdrum I could not settle. If a man was lying down flat on his side, I should say he would not fall; that is
1145 as near as I can tell.

Q. If he was standing, do you mean to say that it is certain sure thing he would fall immediately?

A. I should say in my judgement he would.

Q. You never saw an instance of this sort? A. No.

Q. Did you ever read anything on the subject in books, scientific books, I mean, such as you get your expert knowledge from?

A. I have read of men being shot and falling, etc.

Q. I mean with reference to the exact question I am asking?

A. I have read about a man that had a crow bar shot through his head and not dying.

Q. Have you read about a man by the name of Small shot in the Philippines, recently published in the medical journals, being shot through the brain right above the ears, clear through the head and who is living now and walking now?

A. No, I have not come across that.

Q. The question is whether you have read that case in the medical journals? A. No, I have not read that case.

Q. Were you present when this coffin was opened?

A. Referring to Bailey & Smith's undertaking establishment?

Q. Yes? A. On the morning of the 3rd of April?

Q. Yes, where the corpse was that you found there that day and on which the autopsy was held? A. I was.

Q. You were present when the corpse was opened the first morning? A. When the coffin was opened.

Q. He was clothed then was he not? It was dressed then, was it not? A. It had clothing on it.

Q. I will ask you if these were the same clothes that are in the picture there, the picture of the corpse that you have before mentioned, in exhibits 12 and 13 and 29 and 30? Whether those are the same clothes, so far as can be seen,

that were on the corpse when it was first opened there in Bailey & Smith's undertaking establishment at Lawrence?

1146 The defendants object to the question as incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of them at the time duly excepting.

A. Apparently they are.

Q. You saw the body when it was exhumed there in the grave yard, did you not? A. I did.

Q. Were the same clothes on it the[m] as were on it when the coffin was first opened at Bailey & Smith's?

A. I think they were the same.

Q. The same clothes. A. I think so.

Q. I will ask if that matter has not been asked of you and of other witnesses in your presence at all these different trials?

A. It has been asked me; I could not say at all of them.

Q. It has been your understanding all the time that he was buried in the same clothes that he came there in the coffin?

A. Yes, that has been my understanding.

Q. That he was brought to Lawrence in? A. Yes, sir.

By the Court: I want to shorten this case as much as I can consistently, with the rights and interests of the parties, and with that object in view, I want to ask this doctor a question. One of the expressions used by the witness, John H. Brown, in describing the killing of the man he called Hillmon, was that he reeled; I believe that was the expression Brown used in describing the falling, or sinking, or whatever it was, of this man that he called Hillmon. Do I understand you, by your evidence, to say that with that wound he could not have reeled?

A. I don't know just what that might mean, by reeling.

By the Court: Nor I, but using your definition of reeling?

A. A man standing that way, might turn to one side or the other a little bit and then go over by the force of the blow; or it might knock him around to one side a little bit or something like that.

1147 By the Court: If that was what was meant by reeling, you would not say that he could not reel or would not reel, if shot in the way indicated?

A. He might fall this way or he might fall that way, or some other way; I couldn't tell, but as to the idea of a man going or walking anywhere, I think that is impracticable; it was impossible.

By the Court: Can there be any difference between counsel on that? If there can be none, what is the use of taking up time in discussing whether a man could reel or could not reel?

By Mr. Wheat: It has always been claimed from the testimony of this witness and two or three other witnesses that they have produced that a man could not have reeled, and they have argued it to the jury; that is about as far as they have gone into it. That is the reason I have asked him.

By the Witness: If your Honor please, I do not think the word reel has ever been presented to me in this case; I don't remember the word; I don't think it has.

Q. By Mr. Wheat: As I understand you, you left this jar that had the parts of flesh containing the vaccine sores, in the back part of Woodward's drug store? A. I so stated.

Q. I understand you left it there to get rid of it?

A. Yes, sir.

Q. You wanted to get rid of them? A. Yes, sir.

Q. That was what you did to preserve them for the benfit of the parties. I understood you at first to say that you did it to preserve it? A. That is correct.

Q. At the time of the last trial of this case in Topeka, I will ask you after you had testified on the stand on that trial, before Judge Williams, in the court house at Topeka, in March, 1896, the trial that you have mentioned before, at that time, whether you did not that evening, after you were through testifying, or that day, after you testified, go back to the Hotel Throop? A. I did, I think.

Q. And whether you there did not meet S. F. Neeley,
1148 a gentleman—you have seen him during the trial, the man that was United States Marshal at that time—

A. —I know Dr. Neely.

Q. Did you meet him, the man you call Dr. Neeley, I mean, who was U. S. Marshal of this district?

A. Did I meet him where?

Q. At the Hotel Throop; do you remember of meeting him there and having a conversation with him about your testimony in the case? A. I don't remember.

Q. I will ask you if you did not that same afternoon, in the Hotel Throop, in the same room, in which the office is, whether you did not there say to him in substance, this, to Dr. Neeley: That when you viewed the corpse brought to Lawrence, supposed to be the body of Hillmon, that you were in doubt about the identity of the corpse, and when you stripped the arm and saw the sores at the two places corresponding to the points at which you introduced the virus into the arm of Hillmon, it greatly increased your doubt as to the identity of the corpse?

A. No, sir; I could not have made that statement; I don't remember the interview; I remember seeing Dr. Neeley in Topeka, but I don't remember the interview referred to there.

Q. Didn't you say that, in substance to him there?

A. No, I did not.
Q. Or anywhere else? A. No, never said that to any one.
Q. You understand the time I allude to well enough, do you not? A. Yes, sir.
Q. Did he not say to you that he could not quite reconcile your testimony in the case with the testimony of Dr. Morse, the testimony in relation to identity?

The defendants object to the question because it does not tend to impeach the witness.

By the Court: That will not do as an affirmative question.

Q. State whether he did not say that to you in substance, and then if you did not answer him to the effect or in words substantially those I will now quote: That you could not [my] yourself after having examined the body, including the examination of the vaccine sores, say for certain whether
1149 it was Hillmon or not?
A. Oh, no, sir.
Q. Did you not have a conversation with J. D. Patterson, a dentist of Lawrence, in which this was said: Did you not in Lawrence, Kansas, in the office occupied by you, or in that occupied by Dr. J. D. Patterson, a dentist, at or about the time of the inquest held by the coroner of Douglas county early in April, 1879, say to Dr. Patterson, or in his presence, in reply to a question as to whether the body in question was the body of Hillmon, or whether the whole thing was a fraud, say, "I am sure I don't know; I am sure I don't know," or words to that effect?
A. I shall have to give no to that; my answer is no; not in accordance with any recollection whatever that I have.
Q. Patterson had an office close by yours?
A. His office was next to mine.
Q. You know the man I refer to as Patterson?
A. I did then; I have not seen him for many years.
Q. Do you know the man who made the model of the teeth there? A. Yes, sir.
Q. I am alluding to the same man.
A. Yes, sir; Dr. J. D. Patterson.
Q. You understood him to be the man that I was asking the question about, did you not? A. Yes, I did sir.
Q. I will ask you if you didn't pull out some of his hair?
A. I did.
Q. At the coffin. How much did you pull out; the hair of the corpse, I mean when it was there out at the grave yard? A. Small wisp of it, not very much.
Q. Wasn't it when it was first brought here to court a bunch larger than your large finger?
A. Oh, no, by no means; not by any means.

Q. I will ask you where your present place of residence is?
A. Minneapolis, Minnesota.
Q. You have been residing there ever since when?
Ever since 1882.
1150 Q. You have come here at each of these six trials, five previous to this one, to testify in this case, have you not? A. I have.
Q. For that purpose only? A. Yes, sir.
Q. Each time? A. Yes, sir.
Q. State whether you have been paid for coming or not?
A. I have had compensation.
Q. How much have you been paid for coming each time?
A. Well, it has varied somewhat.
Q. My question covers each time?
A. I could not give it each time; but I can come in the neighborhood of it; I don't remember the exact sum.
Q. As near as you can?
A. I think in the first instance I was paid eight dollars a day for the absolute attendance on the trial.
Q. From the time you were absent from Minneapolis?
A. Yes, the time occupied in atending the trial.
Q. You mean just the time you were out, or from the time you left Minneapolis?
A. I mean the time I was serving at the trial in the city of Leavenworth, this place and my expenses.
Q. Your expenses for the whole trip?
A. For the whole trip.
Q. Eight dollars a day for just the time you were in Leavenworth or did that include from the time you left Minneapolis until you got back?
A. The time I was absent from my business, I had better say.
Q. That is what I mean; that is, the time you were absent from Minneapolis?
A. Absent from my business, yes, sir.
Q. Now, the second trial?
[—] Well, that is about the same.
Q. The third trial? A. About the same.
Q. The fourth trial?
A. I don't remember. I charged more later.
Q. You charged more the fourth trial?
A. I am not sure but I think I got fifteen dollars a day.
Q. For the whole time, from the time you left Minneapolis until you got back? A. I did.
1151 Q. That was in the trial before Thomas? A. Yes.
Q. The fourth trial? A. Yes.
Q. How much the fifth trial?
A. I think I got the same.
Q. Fifteen dollars? A. Yes, sir.

Q. This time how much? A. I haven't got anything.
Q. Haven't you any bargain about how much you are to ave? A. No, I have no bargain.
Q. They pay you what you ask?
A. No, they don't; they don't pay what I think my time s worth.
Q. You said that you gave all the hair you got to whom; Dr. V. G. Miller? A. No, I did not.
Q. What did you do with the rest of it?
A. It passed out of my hands at one of these trials.
Q. Into whose hands?
A. I think it went into the attorney's hands.
Q. Which ones? A. The attorneys for the defense.
Q. Which one of them? Mr. Green or Mr. Barker?
A. Well, I could not say.
Q. Was it one or the other of them? A. I think so.

And in answer to redirect-interrogatories propounded to im by James W. Green, Esq., counsel for the defendants, the vitness testified as follows, to wit:

[A.] Now, doctor, you have stated the various sums you ave got from time to time as you have come down. I will sk you if at any time the subject-matter of your compensation as been agreed upon before you came but was the matter ar-anged after some controversy after you had testified?
A. That is the case; it was arranged after I came with ome controversy as Mr. Green says:
Q. Now, you may state whether, in your judgment, you ave at any time, at any time of these trials, received com-ensation to compensate you for the loss of services, the loss of your services at home?

1152 Mr. Atwood, on behalf of the plaintiff, objects to the question as incompetent, irrelevant and immaterial. "We find that he is getting fifteen [days] a day in this case. He might get eighty dollars a day somewhere else where he night swear a little harder."
(No ruling.)

A. No.
Q. Or the value of your practice? Or as an equivalent for he loss you suffer in your practice? A. No.
Q. Now, you spoke of those scars. You say that you left those scars, in answer to a question they asked you, to get id of them. What did you mean by that?
A. Why, I simply mean that I relieved myself of the care of them any further; I did not want to take them with me; they were probably useless and worthless to anybody, and I did not wish to take them to another state and my only

thought was to set them aside and not have the care of them any further.

Q. Were there other specimens that you had at that time that you left there?

A. Yes, there was a number of others, what we call pathological specimens that I had collected from my practice.

Q. Did you have at that time that you left them, did you have any idea whatever of depriving any of the parties to this suit of matters of evidence?

The plaintiff objects to the question as calling for the opinion of the witness on the propriety of his own conduct.

By the Court: No, he has the right to say what his purpose was in disposing of them as he did.

A. No, sir.

Q. You say there were no value at that time; why did you say that?

A. Well, they were in a large measure disintegrated, going to pieces; it was nearly two years afterwards. No, I think it was nearly three years afterwards.

Q. Now, doctor, you spoke about applying a red hot iron to a portion of this skin that you removed from the arm at that time; was that applied to the sore at all? A. No, sir.

Q. The vaccine sore?

1153 A. No, sir, it was kept away from the sore and applied to the healthy portion of the skin which was included in the piece that I removed.

Q. What was the purpose of applying that red hot iron?

A. It was to observe the appearance that its application would have on the skin, whether it would blacken it and make a crust similar to the one that appeared on the arm.

Q. Now, you spoke about Dr. Miller straightening the nose at the grave; when was it he straightened it as to the time these two pictures were taken?

A. I have said nothing; the question was asked me if Dr. Fuller didn't do it, and I think I said that I didn't have any recollection of Dr, Fuller's doing it.

Q. Of Doctor Miller straightening the nose?

A. No, Dr. Fuller, I think when the question was put to me by the plaintiff, it was Dr. Fuller whose name was mentioned.

Q. Do you know whether or not his nose was straightened at the grave by any one?

A. No, I don't; I don't think I know anything about it.

Q. The nose, as I understand it, had the appearance as though it had been flattened? A. It had shrunken.

The plaintiff objects to the question as leading.

A. No, sir, it was pinched and dried in appearance, drawn out of shape, the cartilagenous portion.

Q. Now, speaking of the measurement of this body again, doctor, I wish you would state to the jury how many times you measured that body.

The plaintiff objects to the question as a repetition. Objection overruled, the plaintiff duly excepting.

A. I measured the body once.

Q. Who was present at the time, this once, we will say?

A. Mr. Selig.

Q. I mean Hillmon?

A. Mr. Hillmon was present and Mr. Selig.

Q. Now, at this time you speak of, Mr. Hillmon and Mr. Selig were present? A. Yes, sir.

1154 Q. Now, was that the first time you measured him? If you measured him more than once, was that the first time that you measured him, at the time you spoke of Selig being there? A. That was the first time.

Q. Now, can you give the date of that measurement?

A. I cannot.

Q. What is your best recollection as to that date?

A. It was in the early part of the year 1879. In the early months.

Q. Now, when, if at all, did you measure him again?

A. If I measured him at all again it was on the occasion of taking the application on the 25th of February, 1879.

Q. Now, did you measure him at that time?

The plaintiff objects to the question as an attempt to coach the witness. Objection overruled, the plaintiff excepts.

Q. You may answer, doctor.

A. I do not think I can change my answer that I gave this forenoon.

Q. I am not asking you to change your answer; I am asking whether you did or not.

A. My recollection is not definite enough to declare I did.

Q. You spoke about verifying; what do you mean by that?

[—] Well, when I examined him, the circumstances were these. When I examined him on the 25th of February, for the last policy, I had knowledge of his height by previous measurement and that knowledge was the basis of my entries in that medical examination.

Q. You may state if at that time you were in the habit measuring all applicants, or what your custom was in regard to that.

A. No, my custom was not to measure every applicant.

Q. In regard to the height of a person: Was it considered at that time, or at the time of taking this application, as being

necessary for any other purpose than the purpose of description?

The plaintiff objects to the question as calling for the conclusion of the witness. Objection overruled, the plaintiff duly excepting.

1155 A. Well, it was considered not only for the purpose of description but also to get the proportions of the applicant. There is a certain ratio between height and weight that is essential in considering an applicant for insurance.

Q. Was that point considered essential eighteen years ago?

A. Oh, I think it was.

Q. Now, a question was asked you as to whether you measured him a third time after this 25th of February, and as I recollect, you said you did not remember.

A. Why, I never measured him after the 25th. Never saw him.

Q. What did you refer to then that you spoke of that you did not remember?

A. I presume it was in the class of questions that this morning confused me when I answered in regard to the entries on the papers and the time at which they were made when I answered. I didn't recollect in regard to those, but I do recollect that I did not measure him a third time.

Q. What would you say as to seeing him after the 25th of February?

Counsel for the plaintiff objects to the question as a repetition "He already stated that after the 25th he never saw him."

By Mr. Green: That is satisfactory. Question withdrawn.

Q. Did you see any scar on the nose of Hillmon at any time when you were examining him?

The plaintiff objects to the question as leading. Objection overruled; the plaintiff duly excepts.

A. I did not.

And in answer to re-cross interrogatories propounded to him by Mr. Wheat, counsel for the plaintiff, the witness testified as follows, to wit:

Q. Doctor, you never measured him in the presence of Selig but once, did you?

A. I don't think I did.

1156 Q. When was it; before the 25th of February, anyhow?

A. It was before the 25th, that is my recollection.

Q. Now, then, at the time you left that jar where you say you did, I will ask you if these gentlemen, Mr. Green and Mr.

Barker, two of the attorneys for the defendants now here present, did not each of them at that time reside in Lawrence, Kansas, the same city where your office was and in which you left that jar? A. They did.

Q. They both resided there at that time? A. Yes sir.

Q. You were well acquainted with them?

A. Yes, well acquainted with them.

Q. You knew they were attorneys for the insurance companies, didn't you in this case at that time?

A. Well, I knew that they had served in that way.

Q. Now, at that same time they had lived there for years, hadn't they, each of them? A. Yes sir.

Q. And at the same time didn't John Hutchings and Samuel A. Riggs and each of them reside in Lawrence?

A. They did.

Q. Had they not each of them resided there for years?

A. They had.

Q. You knew each of them? A. Yes sir.

Q. Well acquainted with each of them? A. Yes sir.

Q. Did you not know that both of them were attorneys for the plaintiff in the then pending litigation?

A. Why, I don't think I did; I don't think I knew anything about it; I don't think so.

Q. What was Borgolthaus' name; attorney Borgolthaus?

A. Rufus Borgolthaus.

Q. You knew him? A. Yes sir.

Q. Didn't he reside there in Lawrence also? A. Yes sir.

Q. Didn't you know at that time, the time that you left that jar there, that he was attorney for the plaintiff in these now pending cases? A. Yes, I knew he was.

Q. Now, did you say anyhing to either of those
1157 three men that you knew were in the case, Borgolthaus, Green and Barker, about that jar or the vaccine sores in it, or as to what disposition you would make of them?

A. I did not.

Q. Where was the plaintiff living at that time?

A. Mrs. Hillmon.

Q. Yes. Didn't she live in Larence?

A. Well, I don't know whether she was living in Lawrence in 1882 or not.

Q. Did you say anything to her, or communicate or make any communication to her with reference to what should be done with those vaccine sores? A. Not at all.

Q. You never had any communication or conversation with her in relation to those vaccine sores? A. No.

Witness excused.

1158 Claude Holliday, a witness produced by the defendants, being duly sworn testified as follows, to wit:

Direct Examination

By Mr. Barker:

Q. State your name?
A. My name is Claude Holliday.
Q. Where do you live?
A. About eight miles northwest of Tonganoxie, now.
Q. In what county? A. Leavenworth county.
Q. Where were you living in 1870, 1 and 2?
A. I was living about four miles south [if] where I live now; six miles west of Tonganoxie.
Q. How long have you lived in Leavenworth county?
A. 32 years.
Q. I will ask you if you are acquainted with one Levi Baldwin? A. Yes.
Q. About when did you become acquainted with him?
A. It must have been in 1870 sometime.
Q. Where did you live with reference to Levi Baldwin at that time? A. I lived south about a mile.
Q. About a mile from Levi Baldwin? A. Yes, sir.
Q. Where did Mr. Baldwin live with reference to Tonganoxie, about how far from Tonganoxie and in what direction?
A. He was about the same distance only about a mile further north.
Q. Were you acquainted with one John W. Hillmon?
A. Yes, sir.
Q. When did you become acquainted with him?
A. I don't recollect exactly what time it was.
[—] Where was he and what was he doing when you became acquainted with him?
[Q.] He was herding cattle for Keeler.
Q. Whereabouts with reference to your place and Levi Baldwin's
A. It was about a mile from Levi Baldwin's, and joined up to where I lived.
Q. Do you recollect what year that was in?
A. I can't just remember now.
Q. Did you know him after that? A. Yes, sir.
Q. Where did you see him after that?
A. He was at my house I think.
Q. Do you know of his working or being at Levi
1159 Baldwin's?
A. Yes, he worked there and stayed there most of his time when he was in that part of the country.
Q. Did you see him frequently and become quite well acquainted with him? A. Yes, I saw him pretty frequently.
Q. Now, after you became acquainted with him there at Levi Baldwin's when he was there herding cattle, state if you saw him after that time? A. Yes, sir.

Q. Do you recollect of the fact of his being absent for awhile and then coming back? A. Yes, sir.

Q. Did you see him after he came back? A. Yes, sir.

Q. Can you tell the Court and jury about how often you saw him after he returned from the west?

A. I couldn't tell, no sir, how many times.

Q. Where was he apparently making his headquarters at that time, I mean after his return from his western trip?

A. He was at Lawrence part of the time and part of the time at Baldwin's.

Q. Baldwin was still living in the same place, was he?

A. Yes, sir.

Q. Do you remember about the last time you saw Hillmon?

A. I think it was in the winter of 1878 or 9.

Q. Where did you see him then?

A. I met him in the road coming from Lawrence.

Q. That is, he was coming from Lawrence?

A. I think he was.

Q. In which direction was he going, so far as Baldwin's was concerned? A. He was going out in that direction.

Q. Do you know the general appearance of the man?

A. I do.

Q. What would you say in regard to the color of his hair?

A. Well it was light brown or sandy; something of that kind.

Q. What do you say in regard to Hillmon's height?

A. I think it was about 5 feet 8 or 9 inches.

Q. I will ask you if you remember the fact or circumstance of a dead body being brought to Lawrence, Kansas in early April, 1879? A. I do.

1160 Q. I will ask you if you remember the fact of an inquest being held over that body? A. I do.

Q. You may state if you were in the city of Lawrence at the time or during the time that that inquest was being held?

A. I was.

Q. I will ask you if you went out to the cemetery where this body was lying? A. I did.

Q. I will ask you if you saw the body exposed there at the cemetery? A. Yes sir.

Q. Do you remember the condition that it was in at that time? A. Well, it was in a tolerable—

Q. I mean so far as being in a coffin, sitting up or whatever you remember in regard to that?

A. He was sitting kind of sloping; the coffin was kind of sitting on the end like, in the coffin—

Q. Was that the same occasion of certain pictures being taken? A. Yes sir.

Q. Now, at the coroner's inquest, do you remember when you went in there, who was on the witness stand?

A. Sallie E. Hillmon.

Q. Did you hear this question asked her in substance: That she was asked to state the height of her husband, John W. Hillmon? A. I did.

Q. You may state if you heard the answer she made to that question?

A. She said she really didn't know what; never saw him measured.

Q. Now, you say you saw those remains out there. Were those the remains of John W. Hillmon whom you had known at Levi Baldwin's in your neighborhood? A. No sir.

Q. Did you observe any peculiarity or defect in John W. Hillmon's teeth? A. I did.

Q. You may state as near as you can what that defect or peculiarity was as well as you remember?

A. Well, it was a defective tooth broken off or out.

Q. When did you observe that, Mr. Holliday?

A. It was in, I think it must have been 1874, more than likely; I am not right sure about it; it was after the
1161 grasshoppers was at our place.

Q. You may tell the jury as well as you can in what portion, in which jaw this tooth was broken out?

A. It was on the upper jaw on the left hand side.

Q. That would be your best recollection?

A. That would be my best recollection.

Q. Did you observe the teeth of this dead body when you were out at the cemetery? A. I did.

Q. What kind of teeth the body had?

A. It had perfect teeth, large teeth and white.

Cross-examination

By Mr. Hutchings:

Q. How many times have you testified in this case before?

A. I was at the inquest, I was at all the other trials.

Q. I mean in the trial of this case?

A. I don't know exactly how many trials there has been.

Q. You have testified at every trial of the case haven't you? A. Yes sir.

Q. Did you ever testify before that you saw any defect in John W. Hillmon's teeth? A. Yes sir.

Q. Do you remember of testifying at the trial in 1895 when Judge Thomas presided? A. I think I do.

Q. Did you testify at that time anything with reference to any defect in the teeth?

A. I don't know as I did; I don't know whether the question was asked.

Q. Don't you know you did not?

A. I don't know whether the question was asked.

Q. When did you first become acquainted with John W. Hillmon, in what year?

A. I couldn't tell the exact year.

Q. How many times did you ever see John W. Hillmon?

A. I couldn't tell that either.

1162 Q. The Hillmon that you knew had light brown hair? A. I should say so, yes sir.

Q. You never knew any Hillmon that had dark hair?

A. No sir, that is the only one I knowed.

Q. When you went to see this body at Lawrence, you didn't recognize it as Hillmon because it had dark hair?

A. Because it had black hair.

Q. You never knew any man by the name of Hillmon that had dark hair? A. No sir.

Q. Now, then, I will get you to state whether in the trial before Judge Thomas in 1895, you didn't say that you never had seen John W. Hillmon but three times in your life?

A. I never said it.

Q. Did you not in the trial at Topeka in 1895, at which Judge Thomas presided, testify as follows: "Now, from 1872 up to the time you saw this corpse taken from the grave at Oak Hill cemetery you had only seen John W. Hillmon three times in seven years. A. Yes sir, all I recollect of." Didn't you so testify before Judge Thomas? A. I don't recollect.

Q. You remember where the court house is there in Topeka? A. Yes sir.

Q. You were there and testified in 1895 when Judge Thomas presided? A. I did.

Q. But you say you don't remember answering that question in that way? A. No sir, I don't.

Q. Did you not in substance testify at that trial of this case that you had never seen John W. Hillmon but three times from 1872 up to the time that you saw the body in the grave in the coffin? A. I don't recollect.

Q. How many times do you say you ever had seen him?

A. I couldn't say that either.

Q. What is your best judgment? A. Well, I couldn't say.

Q. Do you think you saw him more than three

1163 times? A. Yes, I did.

Q. You can't state in what years you saw him?

A. Not precisely only the last years, of course.

Q. When did you see him last before you saw that corpse?

A. I saw him in the winter of 1878 or 9.

Q. Which was it, 1878 or 1879? A. I couldn't say.

Q. How many times did you see him that winter?

A. I don't think I saw him but that one time.

Q. Where did you meet him? A. On the road.

Q. He was riding horseback? A. I think he was.
Q. He passed by you and said "Good morning, Mr. Holliday?" A. I think he did.
Q. That is the only time that you saw John W. Hillmon after 1872 wasn't it? A. No.
Q. Where did you see him next before that?
A. I couldn't say exactly.
Q. What is your best recollection?
A. I don't recollect that.
Q. Don't know whether it was a year or two years or three years? A. No, I don't.
Q. So that your testimony here as to the identiy of Mr. Hillmon is based upon seeing him in the fall or winter of 1878 or 1879, riding horseback on the road and saying good morning to him simply once? A. I think that would be about it.
Q. Now, then, you testified about being at the coroner's inquest and hearing Mrs. Hillmon's testimony? A. Yes sir.
Q. Did you testify before the coroner's inquest? A. I did.
Q. Do you know what attorneys were there at the inquest?
A. I think Mr. Barker was there.
Q. Didn't you testify upon the previous trial of this case that you didn't know, you didn't remember as to any attorney that was there? A. No sir.
Q. Who asked Mrs. Hillmon the questions?
A. Couldn't say that.
Q. Don't remember? A. No sir.
1164 Q. Did you see anybody there but Mr. Barker?
A. Mr. Green was there.
Q. Do you remember anything else Mrs. Hillmon said?
A. Yes sir.
Q. You do? A. Yes sir.
Q. Now, didn't you testify at the same time before Judge Thomas, at the time and place mentioned, that the only thing that you could remember that Mrs. Hillmon said was simply that she didn't know how tall her husband was?
A. I don't recollect about that.
Q. Didn't you testify before Judge Thomas in 1895 at the court house in 1895 in Topeka, Kansas, as follows: "You don't remember what attorneys were conducting the examination? A. No sir, I don't." Is that right?
A. I don't know whether it is or not.
Q. Did you testify upon that trial that she said she had never measured him?
A. I don't know as she [saw]—she said she had never seen him measured.
Q. Didn't you testify upon the previous trial of this case that you just came into the room as that question was put to

her and that you heard her say she didn't know how tall her husband was, and that that was all that you heard? A. No.

Q. I want to read to you and ask you whether you testified before Judge Thoms as follows: "You don't remember who examined her? A. No sir, I don't. Q. You don't remember who else was there? A. Ollie Walker was there. You don't remember what attorneys were conducting the examination? A. No sir, I don't. Q. You just remember that one thing, that she was asked what the height of her husband was? A. I just came in, you know. Q. How long did you stay in there? A. While they examined me. Q. That is the only thing you heard her say, was it? A. She said other things but I don't recollect what she did say."

Q. Didn't you so testify? A. It might be possible.

Q. If you so testified at that time, it was true, was it not?

The defendants and each of them object to the form of the question as improper. No ruling or answer.

1165 Q. State in your opinion as to whether your testimony at that trial was true?

A. Yes, sir, it was, I intended at that time to testify to the truth, yes sir.

Q. You say this tooth of Hillmon's that was missing was on the upper left hand side of his jaw? A. Yes, sir.

Q. The rest of his teeth were good?

A. Well, I don't think they were all good; they might have been.

Q. Did he have any other tooth out?

A. I don't recollect of seeing any other tooth out.

Q. The rest of his teeth might have been good so far as you know? A. Yes, so far as I could see.

Redirect Examination

By Mr. Barker:

Q. In these examinations, you have always been examined by questions and answer have you not? A. Yes, sir.

Q. They asked you in regard to the color of Mr. Hillmon's hair, what you testified to on a former trial; I will ask you to state if Hillmon didn't have light hair, I will ask you if you haven't stated on each of these trials that he had light brown hair? A. Yes, sir.

Q. You have stated one reason why you say you know that those remains were not the remains of John W. Hillmon was on account of the color of the hair? A. Yes, sir.

Q. What other reason have you for it?

The plaintiff objects to the question as not proper re-examination. Objection overruled, the plaintiff excepts.

Q. In what other respect did the remains differ from John W. Hillmon?

A. Well, in regard to his mustache, his beard and so on.

Q. What did you say in regard to his teeth?

A. Which, the body?

Q. Yes, the difference between the teeth of John W. Hillmon and the body.

A. The body's teeth was good teeth, sound teeth, and large teeth and white.

1166 The plaintiff objects to the evidence as not proper re-examination. Objection overruled, the plaintiff excepts.

Q. Did you notice the hands of the dead body out there?

A. I did.

Q. Did they differ from the hands of John W. Hillmon?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Overruled, the plaintiff excepts.

Q. The question was how, if in any manner, the hands of the dead body differed from those of John W. Hillmon; did you observe the difference? A. Yes, I did.

Q. In what respect?

A. The dead body's hands were long and slim and clear of scars or anything of that kind.

Q. What do you say in regard to Hillmon's hands?

A. He had a shorter hand, well, like my own, something like that; thick.

Recross-Examination by Mr. Hutchings.

Q. Did you see John W. Hillmon at any time in the year 1878? A. I couldn't say whether I did or not.

Q. Did you see him in the year 1877? A. I think I did.

Q. Where did you see him? A. I can't recollect.

Q. Did you see him at any time in the year 1876?

A. I couldn't say.

Q. Did you see him at any time in the year 1875?

A. I couldn't exactly tell.

Q. Can you remember any place that you ever saw John W. Hillmon except the one time that he rode along the road on horseback past you? A. Yes, sir.

Q. Where? A. At my house.

Q. When was that?

A. I think that was, must have been 1874.

Q. Can you remember any other place you ever saw him in your life?

A. I seen him at our school house on Nine Mile directly after he was married.

Q. Can you remember any other place that you ever saw him? A. Saw him many a time out on the prairie.

1167 Q. You say that you don't remember but what you testified in 1895 before Judge Thomas that the only times you ever saw him were the three times you have mentioned? A. No, sir, I can't.

Q. Remember whether you testified to that or not?

A. No sir i can't.

Q. What color were John W. Hillmon's eyes?

A. I could not say.

Q. Don't know what the color of his eyes was, whether they were blue or whether they were gray or whether they were black? A. I don't think they was black .

Q. Were they blue? A. Couldn't say.

Q. Don't know what the color of his eyes was, at all?

A. Don't think they were black.

Witness excused.

1168 Joseph Bebout, a witness produced by the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination,

By Mr. Barker:

Q. State your name and residence?

A. Joseph Bebout, I live in Lawrence now.

Q. Did you ever live in Jefferson county, Kansas?

A. Yes sir.

Q. About how long did you live in Jefferson county?

A. Well, I lived there in 1869 and was there off and on until 1872.

Q. How long have you lived in, say, Leavenworth Jefferson and Douglas counties? A. About 31 years.

Q. Were you acquainted with one Levi Baldwin?

A. I was.

Q. Were you acquainted with John W. Hillmon?

A. I was.

Q. Did you ever work for Levi Baldwin? A. I have.

Q. Did John W. Hillmon either live with or work for Levi Baldwin at any time that you did?

A. No sir, he worked for Keeler.

Q. About when did you become acquainted with John W. Hillmon? A. In the summer of 1871.

Q. What were you doing at that time?

A. I was herding cattle for Baldwin.

Q. What was John W. Hillmon doing at that time?

A. Herding cattle for Keeler.

Q. At what place or on what range were you herding cattle at that time?

A. In Jefferson county, Levi Baldwin's Jefferson county farm.

Q. Whereabouts was Hillmon herding cattle at that time?

A. He was right west and south.
Q. How close were you herding together?
A. The ranges adjoined.
Q. About how long did he herd cattle there at that time?
A. During the summer of 1871, about four months.
Q. Were you herding cattle during the same time?
A. I was.
Q. Did you see him seldom or frequently during that time?
A. I seen him every day; most every day.
1169 Q. In regard to eating and sleeping arrangements; how was it in regard to them?
A. Oh we ate a great many times together and slept a great many times together.
Q. Whereabouts, on the range?
A. No, sir; we corralled the cattle; we boarded at Brown's a good part of the time.
Q. Did you afterwards go to work in Douglas county?
A. I did.
Q. Do you remember for whom? A. Yes sir.
Q. Whom? A. Martin Sedgwick.
Q. Did John W. Hillmon work for any one in that neighborhood? A. That winter he worked for I. C. Baldwin.
Q. Who was I. C. Baldwin?
A. He was Levi Baldwin's father.
Q. Where did I. C. Baldwin live at that time?
A. Five miles west of Lawrence on the California road.
Q. In what township? A. Wakarusa township.
Q. In Wakarusa or Kanwaka? A. Kanwaka.
Q. Where did Martin Sedgwick live?
A. Lived in Kanwaka.
Q. Did you see him frequently during that time?
A. Well, I seen him off and on at the school house during the winter was about all the time I seen him.
Q. Did you see him after that? A. Yes sir.
Q. Several times?
A. Yes sir; I seen him several times during that next summer.
Q. Do you remember of missing him, of his being away at some time? A. Yes sir, I do.
Q. Do you remember his coming back? A. I do.
Q. When he returned from the west, if west he went, state whether you saw him or not?
A. I saw him once after he came back, in 1876.
Q. I will ask you if you saw him in 1878? A. I did.
Q. In the fall or winter of 1878?
A. Along in the fall.
Q. Where did you see him?
A. I met him at John Eldridge's livery stable.
Q. Where, in Lawrence? A. Yes sir.

Q. I will ask you if you were at that time pretty well acquainted with John W. Hillmon, that is, when you
1170 saw him in 1878?

A. Well, I wasn't any more acquainted with him than I was in 1872. Of course, I knew him.

Q. Now, will you state in a general way the appearance of John W. Hillmon; state about his height.

A. I never measured him but I should judge he was about 5 feet 9 inches.

Q. You may state what his build was and how he carried himself, whether he was square-shouldered or round-shouldered, and how did he carry himself, erect or stooping?

A. He carried himself square, up straight.

Q. Do you remember in regard to his feet, the size of his feet, whether he had a large foot or a small foot?

A. No, he had a medium foot; he didn't have an overly large foot; of course, I never measured his foot.

Q. Now, I will ask you if you saw the remains that were at Bailey & Smith's in 1879? A. I did.

Q. Do you know about how long they had been there when you saw them?

A. Well, I couldn't say how long [there] had been there; they had been there a day.

Q. Where were those remains when you saw them?

A. At the back end of Smith & Bailey's undertaker shop.

Q. In the city of Lawrence? A. Yes, sir.

Q. What was their condition so far as being dressed or in a coffin or out of the coffin?

A. Well, it was dressed and lying in a coffin when I seen it.

Q. That was the first time you saw the remains?

A. That is the only time I ever saw them.

Q. I will ask you to state whether those were the remains of John W. Hillmon whom you knew? A. They were not.

Q. I will ask you to state if you know anything or remember anything in regard to the condition of John W. Hillmon's teeth? A. I do.

Q. You may state as well as you remember what the
1171 condition of them was.

A. He had one out on the left side of the upper jaw right next to the eye tooth.

Q. You may state about when you discovered that he had this absent tooth? A. That was in 1871.

Q. The question was when you dicovered it; you discovered this when you were on the range herding cattle; it was at the time you were herding cattle? A. Yes, sir.

Q. You observed it after that, did you not? A. Yes, sir.

Q. I will call your attention to this exhibit No. 11, and ask you to state if that is a photograph of the John W. Hillmon concerning whom you have been speaking? A. Yes, sir.

Q. State whether or not you consider it a good representation of Mr. Hillmon? A. Yes, sir.

Cross-examination

By Mr. Hutchings:

Q. You say you noticed in 1871 that John W. Hillmon had a tooth out? A. I did.

Q. All the rest of his teeth were good?

A. Well, no, the one next to it was a little decayed or a little black.

Q. Do you remember of testifying in this case before Judge Thomas in 1895 at the federal court-house in Topeka?

A. I do.

Q. Do you remember of testifying in 1896 at the federal court-house in Topeka before Judge Williams in this case?

A. Yes, sir.

Q. Did you not in 1895, testify as follows: "Now, then, you are positive now, that his teeth were good but one, are you? A. I am. Q. That is, as good as the common run of men's teeth. Q. He had no tooth out except that one tooth on the upper jaw? A. Yes, sir."

Q. You so testified, did you, that all the rest of his teeth were good but the one? A. The next one was black.

Q. You never testified to that before, did you?

A. I did.

Q. Did you not testify both in 1895 and 1896 that all the rest of his teeth you noticed were good but one?

A. No, sir, I did not.

1172 Q. Did you not answer this specific question at both of those trials: "Now, then, you are positive now that his teeth were good but one, are you? A. I am. That is, as good as the common run of men's teeth." Did you so testify?

A. I did.

Q. Did you testify at either one of those trials that he had any other black tooth? A. Yes, sir, I did.

Q. You did at both of those trials? A. Yes, sir.

Q. You are as positive of that as you are of your recollection that he had one tooth out, are you? A. Yes, sir.

Q. So that you at those trials both testified that the rest of his teeth were as good as the common run of men's teeth, and you also testified that one of them was black?

A. A little black spot on one side.

Q. Do you say you noticed it in 1871? A. I did.

Q. That was eight years before you saw the body at Lawrence? A. Yes.

Q. And during that eight years you had never seen John W. Hillmon but twice? A. Seen him in 1876.

Q. You saw him just once? A. In 1872.

Q. I am talking between 1872 and the time you saw this body at Lawrence; you never had seen John W. Hillmon but twice? A. Seen him in 1876 and 1878.

Q. Well, is it right that you only saw him twice from 1872 up to the time you saw this body in the coffin?

A. Seen him twice, yes, that is right.

Q. During that seven years, you only saw him twice?

A. That is all.

Q. Only one time in 1876? A. Yes, sir.

Q. And on that occasion you did not stop to speak to him? A. No more than just to pass the time of day.

Q. Just passed the time of day and the other occasion in 1878 you simply passed him on the street?

A. No sir, not in 1878, I did not.

Q. Didn't you so testify on both the trials in 1895
1173 and 1896 that you simply passed him on the street?

A. Not in 1878, I did not.

Q. Did you not testify as follows at the trial in 1895 at Topeka before Judge Thomas in the federal court-house there: "From 1872 to 1878, you just saw him once. A. That is right."

Q. Was that your answer? A. From 1872 to 1878?

Q. Yes. A. I saw him in 1876.

Q. Was that your answer at that trial? A. It was.

"Q. During six years," and your answer, "Yes, sir."

Q. Is that right? A. Yes, sir.

"Q. And you never saw him any more? A. Not until I met him on the street there between Walker's and the bridge on Massachusetts street."

Q. You so answered, did you not?

A. I met him at John Eldrige's livery stable in 1876.

Q. Didn't you say that in 1878 you met him on the street there between Walker's and the bridge on Massachusetts street? A. I did [no] not.

Q. You didn't so testify? A. No, sir.

Q. Then, were you not asked this question: "Q. When was that?" Your answer: "In 1878, in the fall of 1878."

A. I didn't meet him on the street in 1878.

Q. Didn't you so testify both on the trial in 1895 and 1896?

A. No, sir.

Q. Then were you not asked this question: "Q. I say between 1872 and 1878, you never saw him but once. A. But once and that was in 1876."

A. Yes, sir, I met him in 1876 and then in 1878.

Q. Now, didn't you testify that you met him on the street, on Massachusetts street, between Walker's and the bridge in 1878? A. I did not.

The defendants and each of them object to the question for the reason that it does not tend to [contract] or impeach the witness.

Objection overruled, the defendants and each of them duly except.

1174 Q. Then were you not asked as follows: "Q. How long did you see him in 1878," and didn't you answer, "I didn't stop; just passed him on the street, and passed the time of day with him." A. Not in 1878.

Q. Now, then, you say in 1878 you did not meet him on the street? A. I met him at John Eldridge's livery stable.

Q. What do you say about meeting him on the street between Walker's and the bridge in 1878?

A. I didn't meet him on the street.

Q. You didn't meet him on the street; didn't you so testify in 1896? A. Not that I know of.

Q. You didn't testify in 1895 or 1896 that you simply passed him on the street and passed the time of day with him?

A. No, sir.

Q. And that that was the only time you saw him in 1878?

A. No, sir, I did not.

Redirect Examination by Mr. Barker.

Q. You have spoken in your cross-examination in regard to the location of this absent tooth, that is, where it was out. You may state how you are able to locate the missing tooth, the place from which it was absent?

The plaintiff objects to the question for the reason that it is cross-examination. Objection overruled, the plaintiff excepts.

Q. Go on and state how you know it?

A. I had one on the opposite side just the same as he had his on the other.

Q. I will ask you if there is any other circumstance by which you can remember in regard to that tooth, that is to say, if you had any conversation in regard to it.

The plaintiff objects to the question as calling for hearsay, and as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

A. Well, I used tobacco and he used it once in a while.

The plaintiff moves to strike out the answer as not responsive. Motion overruled. The plaintiff excepts.

1175 A. We would go to take a chew and he would bite off on one side and me on the other; he made the remark or I made the remark that—

Q. State what was said betweeen you and Mr. Hillmon in regard to his tooth and your tooth; what was said on that subject at that time?

The plaintiff objects to the question as hearsay, incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

Q. Go on and state what he said?

A. When he would take a chew of tobacco, we just made the remark that he bit off one side and me the other; he said he had a tooth out on the left side.

Q. Was the question of your having a lost tooth discussed?

The plaintiff objects to the question as leading. If it is competent to give the conversation the witness should state what was said and done.

Q. What, if anything was said in regard to your tooth on that occasion?

By the Court: State what was said.

Q. Just state briefly what was said there at that time, or at the time you were herding cattle and chewing tobacco?

A. Well, there was nothing more said only "You had one out on one side, and I had mine out on the sight side." We were showing each other our teeth. That was all that was said so far as the teeth were concerned.

Q. When was that with reference to the time you were herding cattle, you and he?

A. That was at the same summer.

Recross-Examination by Mr. Hutchings.

Q. You have never testified to that conversation? A. I did.

Q. In any trial of this case before, did you? A. I have.

Q. You are positive of that, are you? A. Yes, sir.

Q. Did you testify to a conversation in which Hillmon said he had a tooth out? A. Yes, sir.

1176 Q. That was 28 years ago that that occurred?

A. That was in 1871.

Q. And from the time that that conversation occurred up to the time that you saw this body in the graveyard there was eight years? A. I didn't see it in the graveyard.

Q. Or at Bailey & Smith's? A. Yes, sir.

Q. It was eight years? A. Yes, sir.

Q. And it has been 20 years since? A. Yes, sir.

Q. And you remember that conversation? A. I do sir.

Q. Do you know what color Hillmon's eyes were?

A. Yes sir.

Q. Didn't you testify upon the other trials of this case that you didn't know what the color of his eyes was?

A. No, I did not.

Q. Didn't you testify upon the trial of this case before Judge Thomas in 1895, at the Federal Court House at Topeka, that you did not know what the color of John W. Hillmon's eyes were? A. No, sir.

Q. Did you not testify upon the trial of this case before Judge Williams in the Federal Court House in Topeka in 1896 that you didn't know what the color of Hillmon's eyes were? A. I did not.

Q. Did you not in answer to this question, testify as follows: "Q. You don't know the color of his eyes? A. No, I don't, no, sir."

Q. Didn't you so testify positively in 1895 at the Federal Court House in Topeka before Judge Thomas when this case was being tried? A. No, sir.

Q. Didn't you so testify in 1896? A. No, sir.

Q. Didn't you testify as follows: "Q. Don't know whether he had black eyes or blue eyes? A. No, I don't."

Q. Didn't you so testify in 1895 before Judge Thomas and in 1896 before Judge Williams? A. No, sir.

Q. You deny testifying in that way on either occasion?

A. I said his eyes were light brown.

Q. Wait a minute: Did you so testify? A. No, sir.

1177 Redirect Examination by Mr. Barker.

Q. On each of these trials you have been interrogated upon questions, have you not; questions have been put to you and you have answered simply such questions as have been put to you? A. I have, sir.

Witness excused.

1178 William Brockelsby, a witness produced by the defendants, being first duly sworn, in answer to direct interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name and residence?

A. My name is William Broxkelsby, Lawrence, Kansas.

Q. How long have you lived in Lawrence?

A. Since 1859.

Q. Have you resided at Lawrence all of that time since 1859? A. Except what time I was in the army.

Q. How long was that?

A. Four years and seven months.

Q. Were you residing in Lawrence in 1877, 1878 and 1879?

A. Yes.

Q. Do you remember what official position, if any, you held in the city of Lawrence or in the city government at that time? Say in 1878? A. I was city marshal.

Q. Prior to that time what position had you held?

A. I had been a policeman since 1871.
Q. For how long? A. I went on in 1871.
Q. You had been a policeman then of the city for several years, had you? A. Yes, sir.
Q. And you were city marshal in 1878 and 1879?
A. Yes, sir.
Q. I will ask you if, during that time, 1878, you became acquainted with one John W. Hillmon? A. I did.
Q. Will you look at Exhibit No. 11 and state whether or not that is a photograph of the John W. Hillmon that you got acquainted with? A. Yes, I should say it was.
Q. Look at the picture marked Exhibit D and state whether that is also a picture of him? A. Yes, sir.
Q. Now, you may look at the two pictures and state to the jury which you regard as the better picture of John W. Hillmon? A. This one.
Q. That is Exhibit 11. You regard that as the best picture? A. Yes, sir.
1179 Q. Will you state about when you became acquainted with John W. Hillmon?
A. It was along in the fall or winter of 1878, sir.
Q. You may state whether there was any fact or any circumstance which led you to become acquainted with him?
A. Yes, sir.
Q. You may state what it was?

The plaintiff objects to the question as incompetent, irrelevant, and immaterial. Objection overruled, the plaintiff duly excepts.

A. He was drawn to my attention by a communication from Fort Griffin, Texas, from some parties, as to which I don't remember their names now.
Q. What did the letter contain?

The plaintiff objects to the question as secondary evidence and hearsay.

Q. I will put the question a little more intelligently. What did the letter enclose, if anything, to you?

The plaintiff objects to the question as incompetent, irrelevant, and immaterial. The Court sustained the objection to which ruling of the court the defendants and each of them at the time duly excepted.

By Mr. Barker: We offer to show the enclosure which the letter contained.

The plaintiff objects to the offer for the reason that the proof would be incompetent, irrelevant and immaterial, and hearsay. The Court sustained the objection, to which ruling the defendants and each of them at the time duly excepted.

Q. You may state what you did with that letter?

The plaintiff objects to the question for the reasons last above fully stated. The Court sustained the objection, to which ruling of the Court the defendants and each of them then and there duly excepted.

By Mr. Barker: This question is for the purpose of showing that he received a letter, and that he made a certain disposition of it. We are laying the foundation for sec-
1180 ondary evidence.

By the Court. He may answer to that.

A. What did you do with the letter?
A. I turned it over to Mr. Barker, I believe, at the inquest.
Q. At the time the coroner's inquest was being held in Lawrence, Kansas? A. Yes, sir.
Q. Have you seen that letter since that time?
A. I have not.
Q. Have you had it in your possession? A. I have not.
Q. Do you know further than that where that letter is?
A. No.
Q. I say further than that you turned it over to me?
A. No, sir, I do not.
Q. You said that you saw Mr. Hillmon, did you, in 1878 and 1879? A. Yes, sir.
Q. Did you see him after you received this communication from Fort Griffin? A. I did.
Q. Do you remember to whom this letter from Fort Griffin was directed?

The plaintiff objects to the question as calling for secondary evidence, and immaterial. Objection sustained, the defendants and each of them duly excepting.

Q. Where was he when you saw him?
A. He was on the streets of Lawrence.
Q. Did you see him in any other place except on the streets of Lawrence? A. Yes, sir.
Q. You may state where you met him?
A. I met him in the shooting gallery there.
Q. Whose shooting gallery?
A. I met him in the shooting gallery run by one Jakes; Jack Jakes, I believe was his name.
Q. What was he doing there?
A. He and I were shooting at a target.
Q. Do you remember in regard to the appearance of John W. Hillmon, in regard to his height?
A. Yes, sir, I kind of sized him up.
Q. What do you say in regard to his height?
A. About 5 feet, 9½ or 10 inches, I think.

1181 Q. Do you remember how he carried himself, whether erect or stooping? A. Erect.

Q. Do you remember in regard to his shoulders, whether he had square shoulders or sloping shoulders?

A. Square built; square shoulders.

Q. Do you remember in regard to the color of his hair?

A. He had dark brown hair.

Q. Do you remember in regard to his teeth, whether he had any defective teeth or not? A. He had.

Q. Were you in the city of Lawrence when certain remains were brought from Medicine Lodge and were in the undertaking establishment of Bailey & Smith in 1879? A. I was.

Q. Did you see those remains? A. I did.

Q. Where were they at the time you saw them?

A. At Bailey & Smith's.

Q. Do you remember when you went in there?

A. It was the next day, I believe, after they were brought in there.

Q. You didn't see the remains before they were taken to Bailey & Smith's? A. No, sir.

Q. You think it was the next day after they were taken there that you saw them? A. Yes. sir.

Q. What was the condition of the body, so far as being dressed and in a coffin, when you saw it state in regard to that? A. It was dressed.

Q. Where was it lying, on a slab or in a coffin when you saw it? A. In a coffin.

Q. Now, you may state whethsr or not those were the remains of John W. Hillmon? A. No, sir.

Q. What is your answer? A. No, sir.

1182 And in answer to cross-interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. You never saw John W. Hillmon in your life until December, 1878? A. No, sir.

Q. What time in December?

A. My best recollection it was the latter [—] of December.

Q. You saw him how many times?

A. I saw him quite a number of times.

Q Don't you know that in the latter part of December, or early in January, he left Lawrence and went to Medicine Lodge? A. No, sir; I don't recollect.

Q. Will you swear that you saw him there in January, 1879? A. No, sir; I don't think I did.

Q. Will you swear that you saw him there in February, 1879? A. Yes, sir.

Q. What time in February, 1879, did you see him there?
A. I think it was in the fore part of the month.
Q. In the fore part of the month?
A. Yes, sir; I can't give the day exactly.
Q. How many times did you see him there?
A. Quite a number of times.
Q In the fore part of February? A. Yes, sir.
Q. You are as sure as you are that you saw him there in December? A. Yes, sir.
Q. You saw him there repeatedly in the fore part of February? A. I did.
Q. Your recollection is as clear about that as that you saw him in December? A. Yes, sir.
Q. Did you see him there in March?
A. Well, I am not positive whether I saw him in March or not.
Q. What is your best recollection? A. That I did not.
Q. Now, then, this is the fact about it? You never
1183 saw John W. Hillmon in your life until the last part of December, 1878; that is true, is it not? A. Yes, sir.
Q. And you did not see him at all in January?
A. Well, I can't testify as to that.
Q. You have no recollection of seeing him in January?
A. No recollection.
Q. And you saw him in the first half of February?
A. Yes, sir.
Q. That is all the acquaintance you ever had with him?
A. Yes, sir.
Q. And if you did not see him at those times, you did not see him at all; that is right, is it not?
A. I might have seen him and not paid any attention to him.
Q. Now, this John W. Hillmon that you say you saw, what was the color of his eyes? A. I can't say.
Q. You don't know? A. No, sir.
Q. He had a hump on his nose, didn't he? A. Yes, sir.
Q. Looked as though he had received a blow there, or something? A. Yes, rather a high bridge there.

And in answer to redirect interrogatories propounded to him by Mr. Barker, counsel for the defendants, the witness testified as follows, to wit:

Q. Do you remember when it was that you saw Mr. Hillmon in the shooting gallery of Mr. Jack?
A. It was in the month of February.
Q. You think it was in the month of February?
A. Yes, sir.

Q. I will ask you if Mr. Hillmon seemed to be engaged or was engaged in any business at that time that you know of? A. Not that I know of.

Q. Did you ever know him to be engaged in any business there in Lawrence? A. I did not.

Q. What would you say in regard to seeing him in this shooting gallery more than once? A. I have.

1184 Q. Did you ever shoot with him in the gallery?

A. I have, sir.

By Mr. Hutchings:

Q. In the first half of the month of February, you saw Mr. Hillmon repeatedly at this shooting gallery and shot with him there? A. I have.

Q. You remember that? A. I do.

Witness excused.

1185 Jordan Neal, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Barker:

Q. What is your name? A. Jordan Neal.

Q. Where do you live, Mr. Neal?

A. I live in Lawrence.

Q. How long have you lived in Douglas County, Kansas?

A. About 45 years.

Q. What business have you been engaged in and what business are you engaged in now?

A. I have been farming, stock-shipping and stock-buying.

Q. What business are you engaged in now?

A. The same.

Q. How long have you been engaged in the business of farming and shipping stock? A. About 30 years.

Q. Did you have an office in the city of Lawrence in 1878 and '79?

A. Yes, sir. Indirectly. I had a place of headquarters no particular office.

Q. Where was your headquarters in 1878 and '79?

A. At the butcher shop of Fred Dykeman.

Q. On what street? A. Massachusetts street.

Q. I will ask you if you became acquainted with one John W. Hillmon? A. Yes, sir; I did.

Q. When did you become acquainted with him, as near as you can state?

A. Well, I could not name the precise time.

Q. Well, about when?

A. It was about a year before this corpse was brought in there.

Q. Where did you become acquainted with him?

A. In Kansas City, I think it was the winter before the corpse was brought in there.

Q. After forming his acquaintance in Kansas City, did you see him in Lawrence? A. Yes, sir; very often.

Q. Did you see him seldom or frequently?

A. Frequently, yes, sir.

Q. State whether or not you became well acquainted with him?

1186 A. Yes sir, very well acquainted for the time we were together, six or eight months.

Q. I will ask you if you saw him in the fall of '78 in Lawrence?

A. I think it was in the fall of '79.

Q. Do you think you saw him in the early winter of '79?

A. Yes sir.

Q. Do you remember in regard to the general appearance of Mr. Hillmon in regard to his height?

A. A man about my height; might have been a little taller; little bit heavier set.

Q. In regard to his shoulders, whether he had square shoulders or sloping shoulders?

A. Shoulders were square, reasonably so.

Q. Do you remember in regard to the color of his hair?

A. He had dark hair.

Q. Do you remember in regard to his hands?

A. He had a very long, slim hand, unusually long hand.

Q. I am asking now in regard to John W. Hillmon?

By Mr. Hutchings: That is what he is answering about.

Q. I ask you if you remember in regard to Hillmon's hands?

A. Hillmon had a rather thick, stubby hand.

Q. When you said he had a long slim hand, you didn't refer to John W. Hillmon?

A. No, I didn't; the other man. I made a mistake there.

Q. Now, I will ask you if you saw the remains that were in Lawrence in Bailey & Smith's undertaking establishment early in April, 1879?

A. I think that is about the time I seen the remains. I could not tell the date precisely.

Q. You did see the remains there, did you? A. Yes sir.

Q. Do you remember about when that was? I suppose there is no question in regard to the time. It was early in April, '79? A. I think so.

Q. Where were you when you saw them?

A. They were in the undertaking establishment there.
Q. The undertaking establishment of whom?
A. Smith & Bailey.
Q. How far from Bailey & Smith's undertaking
1187 establishment, from there was your place of business, that is, from your office in Dykeman's butcher shop?
A. A few doors, two or three doors south.
Q. Was it on the same street? A. Same street.
Q. Now, I will ask you whether the remains which you saw there in Bailey & Smith's undertaking establishment were the remains of John W. Hillmon?
A. I didn't think it was.
Q. What do you think now?
A. I think the same; never changed my opinion.
Q. What did you say in regard to that, whether they were or were not the remains of John W. Hillmon?
A. They didn't look like it.
Q. Where in the City of Lawrence did you see John W. Hillmon?
A. O, I seen him often at my headquarters there at Dykeman's place.
Q. I didn't understand your answer?
A. I seen, I said, him very often, mostly at my headquarters. He mostly came to my headquarters there and talked.
Q. State whether or not he was frequently in your place of business? A. Yes sir.
Q. You spoke about having met him in Kansas City?
A. Yes sir, that was how we formed acquaintance.
Q. Did you meet him in Kansas City more than once?
A. No.
Q. Can you tell the jury about how many times you saw John W. Hillmon?
A. O, I could approximate; quite a number of times, though.
Q. State whether or not you shook hands with him very often?
A. Always, after we met in Kansas City we shook hands, or, as a rule, we shook hands.
Q. Now, you may state what some of the differences were between the remains which you saw at Bailey & Smith's and John W. Hillmon?
A. Mr. Hillmon's hair was brown; rather shaded brown. The other man's were black, or very dark, and moustache.
Q. No other points of difference that you recollect now, striking?
A. The corpse had a very long slim hand, and slim, tapering fingers.
Q. In what respect, if any, did it differ from Hillmon's hands?

A. Hillmon's, as I said before, was thick, rather thick and stubby hand; showed a man that labored; the other
1188 showed a man that didn't labor.

Q. Did you observe the difference, if any, between the shape of the face of the remains and of Hillmon?

A. Well, my recollection is that the dead man's face was somewhat rounded; wasn't a flat face; wasn't a square face, as Hillmon's.

Q. Did you see the remains more than once?

A. Just seen them once; one time.

Q. Do you know where Levi Baldwin was when you went in to see the remains?

A. He was on the opposite corner from where the remains was.

Q. Did you see him when you went in?

A. I seed him before I went in. I left him on the corner just across the street.

Q. How far would that be from where the remains were?

A. Well, it was just across the street, about, I should say, two or three doors.

Q. Did you see Mr. Baldwin after you came out?

A. Yes, he was on the same corner as I came out.

Q. How long was it from the time you came out until you saw Mr. Baldwin, Mr. Levi Baldwin?

A. I just walked out. I was in there about fifteen or twenty minutes; just walked back on the corner and he was still standing on the corner.

Q. Do you know whether or not the coroner's inquest was going on at the time? At the same time you went in there, do you know whether or not the coroner's inquest was being held at the courthouse? A. No, I don't know it.

Q. You didn't know in regard to that?

A. No, I don't know anything about the inquest.

Q. Did you have a conversation with Levi Baldwin after you came out?

The plaintiff objects to the question as incompetent, irrelevant and immaterial.

By the Court: It is preliminary. He may answer.

A. After I came out he asked me if I—

1189 The plaintiff objects to the answer as incompetent.

Q. The question is simply whether or not you had a conversation with Levi Baldwin after you returned, soon after you returned from viewing the remains? If you had a conversation, not what the conversation was?

A. Yes sir, we did.

Q. Where was he standing then?

A. Standing on the corner right where I left him when I went down to see the remains.

Cross-examination

By Mr. Hutchings:

Q. Mr. Neal, you have testified at each trial of this case?

A. Yes sir, all but one, I guess. The first trial, I don't think I did. I am sure I wasn't on the first trial.

Q. You remember of testifying at the trial in 1895, before Judge Thomas, at Topeka, in the Federal Court House at Topeka? A. I testified up there.

Q. Do you remember the fact of my cross-examining you at that time? A. I do.

Q. Now, what attitude was this corpse in at the time you saw it at Bailey & Smith's undertaking establishment?

A. How is that?

Q. What was the attitude of the corpse?

A. Sitting up; rather, leaning against a post. It was in a sitting posture.

Q. In a sitting posture? A. Yes sir.

Q. Did you examine the hands carefully?

A. No, I just looked at them.

Q. They appeared to be long and slim? A. Yes sir.

Q. In fact, they were shrivelled, were they not, after the hands of any corpse, after the blood is out?

A. I didn't notice any shrivelling; smooth, nice-looking hands.

Q. They looked like the hands of a corpse, and you noticed the hands of the man like a dead man after death?

A. Yes sir.

Q. The fingers were spread apart somewhat, were they not?

A. A very little, yes sir. [A.] His fingers lay on his limb in that position.

1190 Q. The tissues were shrunken, and the hand looked like a dead hand, didn't it? The tissues were badly shrunken, were they not?

A. I didn't notice that, no. I didn't notice that close. I noticed the shape of the hand more than I did anything else.

Q. This hand, you say, of the corpse, was long and slim?

A. Yes sir, very long.

Q. Did you notice any crooked little finger?

A. No, I didn't.

Q. Hands pretty shapely, the fingers were located on his limb like that? A. They were straight.

Q. If one of his little fingers had been crooked you would have noticed it, wouldn't you? A. Likely would, yes sir.

Q. You also noticed that the corpse had a mustache, didn't you? A. Yes sir.

Q. Now, the reason that you think that wasn't Hillmon was based wholly upon the hair and the hands?

A. The hair and hands and general appearance. It looked unlike.

Q. Don't you remember answering me in the trial before Mr. Thomas that the only way you had to think that that wasn't the body of Hillmon was the hair and the hands? Now, to refresh your recollection, I would like to call your attention to the testimony given there in answer to my question. These questions: "Your recollection now is that the hair upon this corpse was nearly black? A. Yes." You answered Yes?

A. Yes sir.

Q. "Q. That is the particular thing upon which you based your opinion? "A. That is one of them, yes, sir." You answered in that way, didn't you?

A. I think I did, yes sir, should have.

Q. Didn't you answer as follows: "The dead man had unusually long slim hands, while Hillmon's hands were large, like your fingers, thick at the ends, while this man had tapering fingers; kind of long slim, tapering hands." That was your answer, wasn't it? A. That is correct.

Q. You remember me asking you this question "Now, what else was there" and didn't you answer "That was all:"
1191 That was your answer?

A. Yes sir; I suppose that was about all.

Q. Don't you remember that I wound up the cross-examination with this question: "It was two things, only two things, upon which you based your judgment, was it, that the hair upon this corpse was darker, and the fingers appeared to be longer and slimmer" and didn't you answer "yes sir."

A. Well, if I did, I didn't mean to answer just that way, for there is—for as I say now, there was other differences. That was one of the main things.

Q. Those were the principal criterions? A. Yes sir.

Q. The principal things? A. Yes sir.

Q. You saw Hillmon quite frequently in his lifetime?

A. Yes sir.

Q. And you met and talked with him and shook hands with him? A. Yes sir.

Q. Did you ever notice he had any missing teeth?

A. No sir, never did.

Q. Did he wear a mustache when you knew him?

A. I think he did.

Q. You don't remember the color of his eyes? A. No sir.

Q. You think his hair was light?

A. No sir, his hair was rather brown; rather shaded or faded brown.

Q. You think it was faded, what you call a faded brown?

A. Yes sir.

Q. And it was in that respect you thought this corpse differed from Hillmon, because the corpse had rather dark hair?

A. Dark hair.

1192 William Brown a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

By Mr. Barker:

Q. State your name? [—] William Brown.

Q. Where do you live now?

A. In the west part of Douglas Co., Kas.

Q. What business are you engaged in? A. Farming.

Q. Did you formerly live in Jefferson County, Kansas?

A. Yes sir.

Q. From about what time to about what time did you live in Jefferson County?

A. I think I moved into Jefferson Co. about 1883 or 4.

Q. Did you live there before that time? A. No sir.

Q. Did you work over there in Jefferson Co. before that time? A. Yes.

Q. Did you ever work for Mr. Levi Baldwin? A. Yes sir.

Q. Do you remember about when it was that you first worked for Levi Baldwin?

A. I think about 69 or near there was the first I ever worked for him.

Q. Did you work for him some time, off and on?

A. Yes sir.

Q. For how many years, would you say, from 69 to about what time did you work, more or less, for Levi Baldwin?

A. I worked for him considerable the latter part of 71 and in 72.

Q. Where was Levi Baldwin living at that time; that is, at the time you worked for him?

A. The first work I ever done for him was in Jefferson Co. He moved from there to Leavenworth Co. on a farm adjoining my folks.

Q. At that time your father lived in Leavenworth Co.?

A. Leavenworth County.

Q. How far did your father live from Levi Baldwin's?

A. Joining farms with him.

Q. How far did Levi Baldwin live from Tonganoxie?

[—] About five miles and a half.

Q. What were you doing for Baldwin in 71 & 2?

1193 A. I herded part of the time cattle in 71 for Mr. Nichols and Fred Kellar.

Q. What was Levi Baldwin's business?

A. Farming, buying cattle and shipping.

Q. Did you become acquainted with one John W. Hillmon?

A. Yes sir.

Q. What was you doing, and what was Hillmon doing when you first became acquainted with him?

A. Mr. Baldwin and he came there, I think, the first time ever I see him.

Q. Did he go to work there then?

A. No sir, he didn't go to work there then, that is, for a short time. He boarded there a few days and then he went to work for Mr. Kellar.

Q. What was he doing for Mr. Kellar?

A. Herding cattle and taking care of stock.

Q. Do you know how long he herded cattle there then?

A. No, I don't, but I think in the neighborhod of four or five months, something like that.

Q. On what range was he herding cattleat that time?

A. There was a part of the range in Leavenworth County and a part in Jefferson County. It was right on the county line.

Q. How far would that bring him from Levi Baldwin's?

A. Right at the edge, probably come up within about a mile of his place.

Q. Where were you herding cattle?

A. I herded with him there part of the time, and part of the time for Nichols.

Q. Were you working for the same person part of the time?

A. Yes sir, working for Mr. Kellar part of the time.

Q. How long did you and Hillmon herd cattle there upon this ranch near Levi Baldwin's? How long did you work there together, as near as you can remember?

A. Why, we worked together, and we were together every day or so for 4 months, I would think, probably longer.

Q. Did you become well acquainted with Mr. Hillmon then?

A. Yes sir.

1194 Q. I will ask you if you attended during that time or any other time any parties or places of amusement?

A. Yes, sir.

Q. Do you remember those circumstances?

A. Yes, sir, I do.

Q. Well, now, after that time, that is, the time of herding cattle, did you see Mr. Hillmon?

Q. I saw him in '72 and afterwards.

Q. About where did you see him in '72?

A. He came to Mr. Baldwin's, worked there some that spring, and was around there considerable in '72. That is, the spring, and early part of the summer.

Q. Were you working for Mr. Baldwin at that time?

A. I was working for Mr. Baldwin at that time, by the month on the farm.

Q. What character of work did Mr. Hillmon do during that time?

A. He helped Mr. Baldwin buy some cattle; was around trading some I think.

Q. Did you see him after that, after '72?
A. Yes, I saw him; he went away somewhere along about the fore part of the summer, or along about then, and I don't recollect of seeing him for three years or something like that.
Q. Did you see him along in '77 & '8; say the fall of '78?
A. I saw him either in '76 or '78.
Q. Do you remember of seeing him along in the fall of '78 in the City of Lawrence? A. Yes, sir.
Q. Do you know about the height of John W. Hillmon?
A. Why, he was about my height; a little taller, probably; ¾ of an inch; maybe an inch.
Q. About how tall are you, if you know?
A. I am about five feet, eight and a half.
Q. Now, in regard to the color of his hair, do you remember in regard to that? A. He had kind of light hair.
Q. So far as brown is concerned, could you give the shade of brown, whether it was light brown or dark brown? What would you say?

The plaintiff objects to the question for the reason that the witness has not said it was brown.

1195 Q. State the color of it, as near as you can?
A. I would think it was something near the color—it would not lack a great deal [—] being the shade of my hair.
Q. Now, in regard to the size of his feet, do you remember in regard to that, whether he had a large foot or a small foot?
A. He had a medium foot, about the same as mine. We wore about the same sized shoe or boot.
Q. Have you any means of knowing about what sized boot he wore? A. Yes, sir.
Q. What were the circumstances that led you to know about the size of the boot he wore, besides seeing his boot?
A. I traded boots with him in '72.
Q. Do you remember what that was, that is, what you were doing at that time?
A. Working for Mr. Baldwin on the farm.
Q. You may state how the boots which you got from him fit you? A. Fit me good.
Q. What sized boot did you wear then, do you remember?
A. Yes, sir.
Q. What size do you wear? A. I wear sevens now
Q. I will ask you if you remember the fact of their being certain remains there in the city of Lawrence at the undertaking establishment of Bailey & Smith in the spring of '79?
A. Yes, sir.
Q. Did you see those remains? A. Yes, sir.
Q. Were those the remains of John W. Hillmon, whom you had known at Baldwin's? A. No, sir.

Cross-Examination

By Mr. Hutchings:

Q. When did you first become acquainted with John W. Hillmon?

A. I think in '71, the spring of '71 I think.

Q. How old were you?

A. How old am I? The 5th day of coming December I will be 49 years old. I was born in '52.

Q. You first saw him in '71? A. Yes, sir.

Q. How long did you see him in '71?

A. O, probably 4 or 5 months, something like that.

1196 Q. See him 20 times?

A. Yes, possibly more than that. I could not tell. Saw him frequent.

Q. When did you next see him?

A. He was around there in '72; around Mr. Baldwin's, where I was working.

Q. Saw him several times in '72? A. Yes, sir.

Q. When did you next see him?

A. In '77, along there somewhere. Probably three years; maybe longer. He went away and was gone somewhere west, or went west.

Q. When did you next see him?

A. I saw him in the fall or early part of the winter in Lawrence.

Q. How often did you see him in '78?

A. I don't recollect seeing him but twice.

Q. Didn't you see him 20 times in '78?

A. No, I don't think I did. I don't believe I did in '78.

Q. You have seen Hillmon laugh?

A. Yes, sir, saw him laugh.

Q. Jovial man? A. Sir?

Q. He was a jovial man? A. Yes, sir.

Q. You stood close up to him and talked to him?

A. Yes, sir.

Q. What was the color of his eyes?

A. I could not tell you exactly the color of his eyes. I think, though, kind of brown.

Q. What did you say was the color of his hair?

A. O, it seems to me his eyes must have been lighter than his hair, but I would not be positive.

Q. You think that he had light hair; did he have light hair; light brown hair? A. I should think, brown hair.

Q. And his eyes were lighter than his hair?

A. I could not say positive, but I think they was, to the best of my recollection.

Q. He had a kind of Roman nose, didn't he?

A. Yes, sir, he had a kind of a raise; kind of a hump on his nose.

Q. What kind of teeth did he have?

A. Well, now, I could not say as to his teeth. I
1197 recollect of his saying something one time about having a tooth taken out.

Q. I am not asking you that. You didn't notice any teeth out? A. I do not know as I noticed any teeth out.

Q. And you have seen him a great many times?

A. Yes, sir.

Q. Talked with him; joked with him? A. Yes, sir.

Q. Seen him laugh? A. Yes, sir.

Q. Been to parties with him? A. Yes, sir.

Redirect Examination

By Mr. Barker:

Q. What is you best impression as to his having taken care of his teeth?

The plaintiff objects to the question as leading.

By the Court: I do not think any statement of Hillmon's along the line indicated would be competent. Perhaps, in order that the situation may be shown definitely, you had better ask your question, and I will pass on that. I don't want a general exception to a general theory of examination. I don't think that would be proper to go into the record.

By Mr. Barker: I withdraw the question, and ask the witness if he remembers having a talk with Mr. Hillmon in regard to his teeth?

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and hearsay.

By the Court: The objection is sustained, and the witness need not answer unless during that conversation his attention was directed to some condition or appearance in the teeth. To which action and ruling of the Court the defendants and each of them then and there duly excepted.

1198 The defendants and each of them next offered in evidence testimony of James Cameron, given upon the trial in 1896.

It is admitted by the parties that Mr. Cameron is dead.

Said testimony was thereupon read to the court and jury, and is as follows, to wit:

James Cameron.

Jas. F. Cameron, called on behalf of the defense, being duly sworn, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name, Mr. Cameron?

A. James F. Cameron.

Q. Where do you reside, Mr. Cameron?
A. I reside now about four miles southeast of Lecompton.
Q. How long have you resided there?
A. Something like ten or eleven years; I wouldn't state positively; but I don't remember—I think about eleven years.
Q. Where did you reside before you moved to that place?
A. Been knocking around all over Kansas—First lived in Leavenworth County, Osage County and in Jefferson County, Valley Falls,—mostly in Jefferson and Douglas Counties.
Q. When were you living in Jefferson county?
A. Well, I went up there prior to the land sales; I believe that was in 1857 or 8, but I went up there prior to the sales of the old Sacker lands—they was just trying to prove the claim when I got there.
Q. Did you continue to live in Jefferson county?
A. No, sir, I continued to occupy that claim occasionally and trying to get a hedge, but I didn't live there, alone.
Q. How long did you reside in Kansas, Mr. Cameron?
A. Been in Kansas since May 21, 1856.
Q. And when you lived in Valley Falls did you know a family by the name of Hillmon? A. I did, sir.
1199 Q. Did you know one John W. Hillmon?
A. Yes, sir.
Q. Did you know the father of John W. Hillmon?
A. Yes, sir. The first night he stayed in Kansas he stayed on my quarter section of land.
Q. How long did you know him?
A. From that time up to the time I last saw him.
Q. When did you first become acquainted with John W. Hillmon?
A. When his father stopped there. He built himself a claim there on his farm lying near. I boarded with them. Most of the time I would stay up there at Benjamin Hillmon's house on the joining quarter section.
Q. Did you meet John W. after that time? A. Yes, sir.
Q. Did you know him after he left your father's place?
A. Well, I seen [—] occasionally; not to say as often as I did when he was about home; but John and I was very good friends, and also when he come up he always stopped at my brother's place where I was living, four miles.
Q. When do you remember seeing him last?
A. I can't state the day, but he told me he was,—

Objected to.

Q. Can you state about the year that it was?
A. 1879—I think 1879.
Q. 1878 or 9?
A. 1878, or 9, I wouldn't swear positively.

Q. Do you know where he lived at that time?
A. I do not.
Q. Did you have any conversation with him at that time?
A. The last time I saw him I did a little—not much. And I did one or two times prior to that—I met him in the city of Lawrence.
Q. You met him in the city of Lawrence? A. Yes, sir.
Q. Now, Mr. Cameron, you may state if you know, the condition of John W. Hillmon's death—the last time you saw him?

A. Well, the last time I saw him he had one of his
1200 front teeth out.

Q. By what circumstances, do you recollect of them, if there were any circumstances, by which you do?
A. I think it went out from decay, but I can't say—
Q. No, I am asking you what circumstances, if there were any circumstances, by which you remember that you knew he had a tooth out?
A. O, I talked with him myself. We was always joking with one another about getting married, and I told him he had better get that tooth in.
Q. Were you married at that time? A. No, sir, I was not.
Q. Don't you remember any other circumstances that calls the fact to your mind?
A. Yes, sir; the very last time I saw him I pointed him out to my sister; she was well acquainted with him too; and there was Mr. Hillmon I believe and this other gentleman, I can't say who, standing right in front of the old grain store in Lawrence, and I pointed him out to my sister.
Q. Was anything said about his teeth at that time?
A. Yes, sir.

Objected to—sustained as to what witness said to sister.

Q. Did you notice his teeth at that time? A. Yes, sir.
Q. How did you come to notice his teeth at that time?
A. By simply pointing him out to her.
Q. What was the condition of his teeth at that time?
A. His teeth looked about fair and I would say all good, except that one out in front of his mouth—one of his front teeth.

1201 Q. Now were you present in Lawrence when that dead body was brought from the southwest, claimed to be the body of John W. Hillmon? A. No, sir, I was not.
Q. Did you see the dead body? A. No, sir.
Q. Were you at the coroner's inquest held over that body?
A. No, sir.
Q. Do you know where you were at that time?
A. I think I was about four miles north of Lawrence.

Q. Look at picture marked Exhibit "F," and see if you recognize that as a picture of any one you have known?
A. I think I do.
Q. Who is that a picture of?
A. I would call it a very good picture of John Wesley Hillmon.
Q. The party you have been speaking about?
A. Yes, sir.
Q. What did you say the middle name was?
A. John W.—John Wesley Hillmon.

Cross-examination.

Q. Where do you now reside?
A. About four miles southeast of Lecompton.
Q. Did you know the father of John W. Hillmon?
A. Yes, sir.
Q. What was his name? A. Benjamin Hillmon.
Q. Did he have any middle letter? A. I don't know.
Q. Do you know where he came from?
A. Yes, sir, I know what he told me.
Q. Where? A. Crawfordville, Indiana.
Q. Did he have any other sons except John W. Hillmon?
A. Yes, sir, he married a second wife—had a growing family.
Q. Did he have other sons except John Wesley?
A. He had a son named Henry, and one named William.
Q. When did you see them last? A. I can't say.
Q. How long did he and his three sons live in Jefferson County?
A. Lived there until he was killed, but I can't tell.
Q. Several years? A. More than that.
1202 Q. When did you say he came there?
A. I can't specify, only I told you the year prior to the land sales of the old Sacer's.
Q. You can't give the exact date, but about how many years did Benjamin and his three sons live there—just give your estimate?
A. I should think 12 or 14, maybe 15 years—I would not form any idea; it's a good while ago.
Q. That was in Jefferson county? A. Yes, sir.
Q. And he and his three sons lived there 12 or 15 years?
A. Yes, sir.
Q. Which was the oldest son? A. Henry.
Q. He was older than,— A. Than John Wesley.
Q. Of the other two sons which was the elder?
A. He didn't have any other unless it was by his last wife; Billy was the youngest of the two sons.

Q. John Wesley Hillmon was away from the county much of the time before 1876?

A. He was not away much while his father was alive; after his father's death he was not much at home.

Q. Do you remember seeing him in the year 1876?

A. Yes, sir, I did in 1876; I can tell you just where I saw him.

Q. Where? A. At Perryvale at the hotel.

Q. You saw him frequently before 1876?

A. A great many times.

Q. You spoke of his having a missing tooth—It was in the lower jaw?

A. I couldn't swear positively to that; when he spoke you could see he had a tooth out.

Q. It was in the lower jaw? A. I didn't say.

Q. Was it in the lower jaw? A. I wouldn't say.

Q. Do you say whether it was in the upper or lower jaw?

A. I couldn't say; I know he had a tooth out.

Q. In 1876 he didn't have a tooth out, was it?

A. The last time I saw him before 1876 his tooth was in; when I saw him in 1876 his teeth was out; he was gone a couple of years, maybe three; I couldn't state positively,

1203 because I was not a hand to keep track of him—

Q. You say you saw him in 1876 and he had a tooth out?

A. Yes, sir.

Q. Whether it was out in the upper or lower jaw, you don't know? A. No, I never said which was out.

Q. And you don't know now? A. I know it was out now.

Q. When you saw him next before that time then he had no tooth out?

A. Yes, sir, the time I saw him before I saw him in 1876.

Q. How long was that?

A. I think two or three years.

Q. Not more than that?

A. I don't think it was; I don't think it was quite that.

Q. Your best judgment now, you say you saw him in 1876; do you think you saw him in 1874 or 5?

A. I didn't see him for two years. I think it was two years before 1876, that I didn't see Mr. Hillmon at all, but I don't think it was hardly three years.

Q. And when you did see him he had no tooth out?

A. When I saw him formerly he had no tooth out.

Q. He never had any tooth out until you saw him in 1876?

A. I never saw him with a tooth out until I saw him in 1876.

Q. When you saw him before 1876 they was all perfect and regular? A. No sir, I didn't say so.

Q. Well about what then?

A. Well I noticed a dark colored black spot like that in my tooth there (indicating).

Q. In which; the upper or lower side?

A. I wouldn't tell you; I don't know.

Q. I am asking you about the black spot.

A. The tooth that was out was the black or dark one.

Q. How long had this tooth been dark or black?

A. I couldn't tell you how long the decay was working on the tooth.

Q. You are perfectly positive that in 1871 and 2 that Mr. Hillmon had not tooth out?

A. I think that is; I think that is.

1204 Q. And except that tooth that was black, and you say afterwards come out, his teeth were all in good solid condition?

A. Well all that I could notice, his front teeth in his mouth; he might have had all the rest out.

Q. Now this tooth that was out, was in the front; it was a front tooth?

A. Yes, sir, and just as plain to be seen as,—

By Mr. Hutchings: That's all.

Redirect Examination.

Q. You say he had some dark colored teeth; do you remember when you saw that?

A. I do not, but it was while his father was living his teeth was colored.

Q. While they were living there in Jefferson county?

A. Yes, sir. I never knew them to live anywhere else.

Q. That's while he was living there with his father?

A. Yes, sir.

Q. Now you say you saw him at Perry in 1876?

A. Yes, sir.

Q. What circumstance calls that to your mind, that it was at Perry that you saw him there?

A. Well I was living at Perry in 1876, and I was over at the hotel, and two gentlemen came up to me and I turned around and looked at him and I saw one was Mr. Baldwin, and stepped up and spoke to him, and he says, "I guess you don't know this man"—

Plaintiff objects to conversation—sustained.

Q. Did you know the man that was with him?

A. I told him it was John Wesley Hillmon.

Q. Did you know him?

A. Of course I knew him.

Q. Did you have any conversation at that time with them?

A. I had considerable.
Q. Was it at that time that you noticed his tooth was out?
A. Yes, sir, I talked to him about it right there.
Q. That was the first time you had noticed a tooth was out?

Objected as leading.

1205 Q. Well was that the first time that you noticed that a tooth was out? A. Yes, sir.
Q. Do you remember what time his father died?
A. I do not, positively.

Re-cross-examination.

Q. This picture you saw before you came upon the stand?
A. Yes, sir.
Q. You had a similar picture?
A. Yes, sir, I had two.
Q. You had one similar to this one?
A. I don't know whether it was similar to that or not.
Q. You were just shown picture on the stand; you have a picture just like that?
A. I have a picture; I wouldn't say whether it is just like it or not; it is Hillmon's picture.
Q. Will you produce it?
A. I can produce it if I ain't lost it.
(Hands picture to Mr. Hutchings.)
Q. Well that is precisely the picture that Mr. Barker showed you; didn't they show the picture here?
A. I got this of Bill Laymon, photographer, of Lawrence.
Q. When did you get it?
A. I guess it was prior to the first trial of this case.
Q. It was after the first trial or before?
A. Before I think it was, I wouldn't swear positively.
Q. It was after the suit was brought, wasn't it?
A. I don't know, I don't think it was.
Q. You have exhibit- this picture to several witnesses?
A. I have showed it to some three or four, and some that was not witnesses, but wanted to see it, yes, sir.

Redirect Examination.

Q. Can you fix about the year his father died, Mr. Cameron?
A. I couldn't tell unless I would consult with some of my papers that I have.
1206 By Mr. Green: That's all.
A. I can tell if I would look at my diary, but you don't want that.

Witness excused.

1207 James W. Adams, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name? A. James W. Adams.
Q. Where do you live, Mr. Adams?
A. Lawrence, Kansas.
Q. How long have you lived in Lawrence, Kansas?
A. About 24 years.
Q. How long have you lived in Douglas county, Kansas?
A. About twenty-six years.
Q. Where were you livng before you moved to Lawrence?
A. I lived in Kanwaka one year.
Q. Kanwaka township? A. Yes, sir.
Q. And after that where did you live?
A. Lived in Grant township, one year.
Q. What was your business when you were living in Kanwaka township? A. Farming.
Q. What was your business when you were living in Grant township? A. Farming.
Q. Where were you living in 1878 and 1879?
A. Living in Lawrence.
Q. In what business were you engaged? A. Grocery.
Q. Did you have an associate in business, a partner?
A. Yes, sir.
Q. What was the name of the firm?
A. It was Adams and Hosmer.
Q. Where was your place of business in 1878 and 1879?
A. On the corner of Henry and Vermont streets.
Q. In the city of Lawrence? A. City of Lawrence.
Q. Where was it with reference to what is known as the court house or city hall? A. It was across the street.
Q. What street? A. Henry street.
Q. Were you acquainted with one Arthur Judson?
A. I was.
Q. Were you acquainted with Mrs. Judson, his mother?
A. I was.
Q I will ask you if you were acquainted with Mrs. Sallie E. Hillmon? A. I was.

1208 Q. Did you become acquainted with one John W. Hillmon? A. I did.
Q. Do you know about the time that he was married?
A. I know about the time.
Q. Were you acquainted with Mr. Hillmon before that time? Before October, 1878? A. I was not.
Q. You became acquainted with him after that, did you?

A. After that.
Q. After October 3rd, 1878? A. Yes, sir.
Q. Then you became acquainted with him after his marriage? A. After his marriage, yes.
Q. Did the Judsons, Arthur and his mother trade with you? A. They did.
Q. I will ask you now if you saw John W. Hillmon seldom or frequently after October, 1878, at the time of his marriage?
A. I saw him frequently.
Q. Where did you see him? A. Saw him at the store.
Q. Did you see him there seldom or often in your store?
A. I saw him there quite often.
Q. What was he doing there; I mean by that, did he make purchases there? A. Yes, sir.
Q Did you see him in the early part, will say, of 1879?
A. Yes, I think I did.
Q. Along in February, do you think you saw him in 1879?
A. I think I saw him then.
Q. Where did you see him on those occasions?
A. Saw him at my store.
Q. There in Lawrence? A. In Lawrence.
Q. Did you become pretty well acquainted with him?
A. Fairly well.
Q. Do you remember the circumstance of the remains of some dead person being brought there to Lawrence in April, 1879? A. I do.
Q. And being at Bailey & Smith's A. Yes, sir.
1209 Q. Do you remember of a coroner's inquest being held at the court house about that time, that is, about the same time that the remains were there at Lawrence?
A. I do.
Q. Were you a member of that coroner's jury?
A. Yes, sir.
Q Do you remember the fact of Mrs. Hillmon, the plaintiff in this case, testifying at that inquest? A. I do.
Q. On that occasion was she not asked in regard to the height of her husband, and did she not state that she did not know the height of her husband, that she had never seen him measured?

The plaintiff objects to the question as leading. Objection overruled, the plaintiff duly excepting.

A. She was asked the question.
Q. What answer did she make?
A. She said she did not know.
Q. What, if anything, did she say in regard to having seen him measured or anything as to measurement?
A. She said she did not know; she was asked in regard to his height, and she said she didn't know his height.

Q. Now, do you remember of her being asked in regard to the character of his teeth, and what reply she made to that?

A. I remember that being asked.

Q. She was asked that question? A. Yes, sir.

Q. What did she say in regard to the character of his teeth?

The plaintiff objects to the question because it is not in proper form. Objection overruled; the plaintiff excepts.

A. What is the question?

Q. What did she say in regard to her knowledge in regard to the character of her husband's teeth?

A. As I remember, she wasn't acquainted with him enough to know.

Q. She said she wasn't acquainted with him enough to know? A. I think that was the answer.

Q Do you remember of her being asked on that occasion in regard to the color and quality of her husband's hair?

A. I do.

Q. You remember that question being asked?

A. Yes, sir.

1210 Q. What reply did she make to that?

A. I think Mr. Green asked the question and I think she said he had more hair than he had on his head.

Q. Did she say she had any further knowledge of his hair except that he had more than Mr. Green?

The plaintiff objects to the form of the question. Objection overruled, the plaintiff duly excepting.

A. I don't remember that she did.

Q. How long before you saw these remains at Bailey & Smith's should you say you had seen John W. Hillmon in Lawrence?

A. I saw him two or three months before, I think.

Q. Well, when was the last time you say that you saw him, before you saw the remains there at Bailey & Smith's, assuming that those remains were brought there on or about the the 3rd day of April, 1879; how long before that had you last seen John W. Hillmon?

A. I saw him just before he left.

Q. You saw him just before he left?

A. Yes, sir; Lawrence.

Q. When should you say that that was, as near as you recollect? February? March?

A. February, I could not fix the date, but it was a few days before he left.

Q. Now, do you remember Hillmon's personal appearance to some extent? A. Yes, sir.

Q. Do you remember in regard to his height?
A. Something about it?
Q. What should you say was the height of John W. Hillmon? A. He was a little taller than I am.
Q. How tall are you? A. Five feet, eight.
Q. What would be your best judgment?
A. About an inch taller than I am, I think.
Q. Is that a matter of judgment, or did you ever measure him or see him measured?
A. No, I never saw him measured.
Q. It is a mater of judgment? A. A matter of judgment.
Q. Now, do you remember in regard to the color of his hair? A. Yes.
1211 Q. What should you say was the color of John W. Hillmon's hair? A. Brown.
Q. Now, do you remember in regard to his bearing, whether he was erect or stooping?
A. I don't remember; I think he was erect.
Q. Do you remember in regard to his shoulders; was he a square-shouldered man, or sloping-shouldered?
A. I should call him sloping shouldered, if anything.
Q. How many times do you remember, did you see those remains there at Lawrence in April, 1879?
A. I saw them once.
Q. When was that; how long after they arrived there, if you know? A. The same day, I think.
Q. Where were they then?
A. They were at Bailey & Smith's.
Q. In the undertaking establishment? A. Yes, sir.
Q. Now, in regard to the condition of these remains, were they in a coffin or outside of the coffin; state where they were?
A. I think they were in the coffin.
Q. The body was clothed then, was it not? A. Bloody?
Q. Had clothing on? A. Yes, sir.
Q. Who was with you then? A. The coroner's jury.
Q. You only saw it with the coroner's jury?
A. That is all.
Q. Now, I will ask you if those remains which you saw there at that time with the coroner's jury were the remains of John W. Hillmon? A. They were not.

And in answer to cross interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. You have been a witness for the insurance companies at every trial of this case, haven't you? A. No, sir.
Q. When were you first a witness in the case?
A. I think they had two trials before I was witness.

1213 Q. You have been a witness, then, ever since 1887?
A. I could not state the date; they had two trials before I was a witness.
Q. This is the fourth trial in which you have been a witness? A. I think it is.
Q. You have told this same state of facts every time to the other juries? A. I think so.
Q. Is that your recollection? A. Yes, sir.
Q. Did you ever testify before to the identity of Hillmon?
A. Yes.
Q. Did you ever testify that you saw Hillmon in the fore part of February, 1879?
A. I don't know; I can't remember the date.
Q. Now, will you swear that you saw Hillmon any time between the first of February and the 4th day of February, 1879? A. I could not fix those dates.
Q. Was your recollection better before the adjournment than it is now? A. I don't understand the question.
Q. You testified on your direct examination, did you not—

By Mr. Barker: Let us have an anewer to the former question.

Q. Do you want to make any other anwer?
A. Let me understand that question.
The question is repeated.
A. I think it was.
Q. Didn't you testify on your direct examination that you saw Hillmon in Lawrence in the fore part, in the early part of February, 1879? A. I don't know but I did.
Q. Didn't you so testify on your direct examination, just now, before adjournment, just before noon?
By the Court: Before noon to-day?
A. I think I did.
Q. You say now that you saw Hillmon in Lawrence any time in the fore part of February, 1879?
A. I think I did.
Q. Your recollection is as good upon that as upon other subjects; is it distinct; is your recollection distinct about that?
A. Well, it bothers me fixing dates.
Q. How did you come to say in your direct examina-
1214 tion then that you remember of seeing Hillmon in Lawrence in the fore part of February, 1879?
A. Well, now, I could not fix the dates but when I saw him, I saw him in February.
Q. You don't remember now whether it was the fore part of February or the last part of February?
A. Well, I saw him, I think, the last part any way; I am not sure about the first; I can't remember dates.

Q. Your opinion is now it was in the last part of February that you saw him instead of the first part of February?

A. I do not say that; I think I saw him in February, and may be the first part.

Q. Now, then, Mr. Adams, the fact of the business is you haven't any recollection of any kind whatever as to what time you saw him in February, have you?

A. I couldn't fix the exact date.

Q. You haven't any recollection of any date in February when you saw him?

A. There is no particular date that I could testify to.

Q. Where did you see him, if you saw him at all, in Lawrence, Kansas? A. I saw him at my store.

Q. You say you were one of those coroner's jurors there in Lawrence? A. Yes, sir.

Q. Who was it that was examining Mrs. Hillmon when she was testifying? A. I think Mr. Green and Mr. Barker.

Q. Which one of them asked her the questions?

A. What question?

Q. The questions that you have been testifying about?

A. I think Mr. Green asked most of the questions.

Q. Don't you know it was Mr. Barker; that Mr. Green didn't ask any questions of her? A. Mrs. Hillmon?

Q. Yes; that all of the questions asked of Mrs. Hillmon were asked by Mr. Barker.

A. I think Mr. Green asked some questions.

Q. Did both of them examine her?

A. I don't remember, but I think Mr. Green asked some questions.

Q. Now, then, the fact of the business is you don't remember even who asked her the questions, do you?

A. Not all of them.

1215 Q. Do you remember, so you can state to this jury, whether both of them examined her or only one of them? A. I know Mr. Green asked her one question.

Q. Do you remember whether Mr. Barker asked her any questions? A. I am quite sure he did.

Q. Then you think that both of them examined her?

A. Yes, sir.

Q. Now, then, who did you understand that they represented there?

The defendants object to the question as not proper cross-examination, and as incompetent, irrelevant and immaterial. Objection sustained; the plaintiff duly excepting.

Q. Do you know who they represented or claimed to represent? A. Barker and Green?

Q. Yes.

The defendants object to the question as not proper cross-examination. Objection sustained, the plaintiff duly excepting.

Q. Was there anything said there at that time as to who they represented or claimed to represent? Were they appointed by the coroner's jury to ask those questions?

The defendants object to the question as incompetent, irrelevant and immaterial and not proper cross-examination. The Court overruled the objection to which ruling the defendants and each of them then and there duly excepted.

A. I could not say whether they were or not.

Q. Now, then, have you any recollection upon the subject of how Mr. Green and Mr. Barker came to be there asking questions?

A. I could not say.

Q. During the time that this examination was going on, there was a stenographer there, wasn't there? A. Yes, sir.

Q. Taking down every word that Mrs. Hillmon said?

A. I think so.

Q. You are testifying now to what occurred more than 20 years ago, as to what she said?

A. About 20 years ago.

1216 Q. There was a stenographer there taking down her words? A. Yes sir.

Q. Do you know who brought the stenographer there?

A. I think the coroner.

Q. The coroner? A. I think so.

Witness excused.

1217 Tinetta Corcadell a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination,

By Mr. Greene:

Q. State your name? A. Tinetta Corcadell.

Q. Where do you live?

A. Valley Falls; near Valley Falls.

Q. About how far from Valley Falls?

A. Four miles from Valley Falls.

Q. When did you go to Valley Falls, do you remember?

A. No, I don't remember.

Q. Do you know how long you have lived there?

A. Well, I have lived there 40 years.

Q. You came there as a little girl?

A. Yes sir, I was only eight or nine years old.

Q. What was your maiden name?

A. Hogan, was my maiden name.

Q. Did you know a family residing there near Valley Falls by the name of Hillmon? A. Yes sir.

Q. Did you know a young man by the name of John W. Hillmon? A. Yes sir.

Q. Do you remember how long you have known him?

A. Well Mr. Hillmon lived there when we came there, 40 years ago.

Q. How far did they live from your father's house?

[—] About two miles and a half.

Q. Did you live in the same school district? A. Yes sir.

Q. Did you go to school with any of the Hillmon children; if so, state each one?

A. I went to school with all of the Hillmon children.

Q. Do you remember how many children there were in that family? A. Yes sir.

Q. Who were they, if you remember?

A. State their names?

Q. Yes. Can you state their names?

A. Henry Hillmon; John W. Hillmon; William Hillmon; Lizzie Hillmon and Martha Hillmon.

1218 Q. Did you know John W? A. Yes sir.

Q. Did you go to school with him? A. Yes sir.

Q. When did you see John W. last, do you remember?

A. Well, about the year 1870. It has been 29 years ago since I last saw him.

Q. Where did you see him that time? A. At our place.

Q. Had you seen him prior to that time frequently?

A. Why, I don't know how often I did see him for the last six or seven years, but once every two or three years he would come back in the neighborhood, and I saw him, I guess, every time.

Q. Where did you see him the last time that you spoke of seeing him? A. At my place; at our place.

Q. Did he visit your father's house? I am not speaking of the last time, but when he was living in the neighborhood?

A. Yes sir.

Q. And when he would return after he had been away, and he came back, would he visit your father's house?

A. Yes sir, he would generally visit all the old neighbors.

Q. Whom, if any one, did he come in particular at your father's house?

A. Well, I don't know. He came to see us all, I guess.

Q. Were you at any time engaged to Mr. Hillmon?

The plaintiff objects to the question as immaterial. The objection is overruled. To which ruling of the Court the plaintiff then anad there duly excepted.

A. What did you ask me?

Q. Were you engaged at any time to this John W. Hillmon. You need not answer if it embarrasses you?

A. I do not know whether I will have to answer that or not.

By the Court: You may answer the question.

A. Well, I was at one time.

Q. Now, Mrs. Corcadell, do you remember Mr. Hillmon's teeth? A. Yes sir.

Q. You may state, if anything was noticeable in regard to his teeth?

A. Shall I tell how I think they were? Just state what kind of teeth I think he had?

Q. Yes.

1219 A. Well, I think his teeth was a little uneven, and when I first saw him he had a decayed tooth, here. I don't mean that the tooth was all gone. The outside of the tooth was there, but it was a dark colored tooth.

Q. Now, when do you remember of first noticeing that he had a dark colored tooth.

A. Well, I can remember that as far as I can remember anything about him.

Q. Was—what was the condition of his teeth, if you remember, at the time you were going to school together?

A. Well, that tooth was dark ever since I can remember, that one tooth was a dark colored tooth.

Q. How were the other teeth as to color?

A. Why, I don't remember as to the color, or any of them being colored only that one.

Q. Do you remember, Mrs. Corcadell, about what year it was that you were engaged to Mr. Hillmon?

A. I do not. I don't remember anything about it.

Q. Can you tell about how long it was before he went away from there in 70; when you saw him there in 70?

A. O, when I kept company with him was before the war—he went off to the war.

Q. Now, was any portion of this dark tooth gone, Mrs. Corcadell?

A. Well, I think that one corner, the lower part, was gone when I saw him last; it was broken off.

Cross-Examination.

By Mr. Hutchings:

Q. Now, you say you were engaged to Mr. Hillmon, engaged, I suppose, to be married to him?

A. I was a little while.

Q. That was away back before the war? A. Yes, sir.

Q. Away back in the sixties?

By Mr. Green: That is not the witnesses statement. She said before he went to the war.

1220 Q. Do you know when he went to the war?
[—] What war do you refer to, the war of the rebellion?
A. Yes, I do, but he only went just three months before the war was closed.
Q. You know what year he went? A. No, I don't.
Q. But it was before that you were engaged to him?
A. Yes, sir.
Q. Now, about when were you married?
A. I was married in '68.
Q. You had been married for three years, and had a family of children at the time you say he came back in '71?
A. Yes, sir, I had one child.
Q. The last time that you saw him was in '71?
A. No, I didn't. I say '70.
Q. Which was it, '70 or '71?
A. 29 years ago last August; you can count for yourself. I guess that is 1870.
Q. Do you remember in testifying in the trial of the case at Topeka in 1895 when Judge Thomas presided?
A. I guess I did.
Q. Do you remember of me cross-examining you then?
A. Yes, sir.
Q. Do you remember testifying at that time that you saw him in '71; that the last time was in '71?
A. I do not know. I do remember of my examination, and I think it was 29 years ago last August.
Q. In '71 you were a married woman and had a husband, and children, or a child, in '71?
A. Well, I was married. I don't know whether I had any children or not.
Q. You say that Hillmon was coming there to see you in '71?
A. No, I didn't say me. He came and saw me. I say he came to our place and saw all of us.
Q. Now, after he went to the war, when did you next see him? Did you see him at any time except in '71?
A. O, yes, many a time. He was back home for several years. I don't know, but he was back at his old home after the war a long time.
Q. Mr. Hillman, when you last saw him in '71, didn't have any tooth out, did he? A. Not that I could see.
1221 Q. If he had any tooth out in '71, you never noticed it? A. No, I didn't notice it if he did.
Q. But you noticed that his teeth were all in his head at that time?

A. No, I won't say that, because I don't know as I did—because I could not say, only his front teeth.

Q. Now, this was not one of his front teeth, was it?

A. Not right in front, but it was right here, just—I think it was right here.

Q. On which side of his mouth do you say the missing tooth was? A. I think it was on this side.

Q. On the right side? A. Yes, on the upper jaw.

Q. That is your recollection, that it was not on the left side, but on the right side?

A. I think it was on the right side.

Q. And it was a front tooth?

A. No, it was right—it wasn't one of the two front teeth.

Q. It was the third tooth from the front tooth, wasn't it?

A. It was pretty close there, I could not say just exactly.

Q. There are two front teeth? A. Yes.

Q. And this was one of the third teeth, was it not, beginning at the front tooth—one of the front teeth to the right, and then the next one, and then the third one?

A. Yes, sir, it was one of them two, next to the front tooth, but I don't know which one, to my knowledge.

Q. You say that the lower corner of the tooth seemed to be worn off? A. Yes, sir.

Q. Did you notice his other teeth?

A. No, I don't know as I did. I know what kind of teeth he had, but I don't know as any of them was out.

Q. How long was Mr. Hillmon about there in '71?

A. He wasn't there long.

Q. About? A. I don't know whether he was here or not.

Q. How is that?

A. I don't know whether he was here or not. He just stopped a little while, as he was going to the train.

1222 Q. Stopped where?

A. Stopped at our house, my husband's house.

Q. In '71, the last time that he was there?

A. It was 29 years ago.

Q. You never saw him afterwards?

A. No, sir, I never saw him afterwards.

Q. How many did you say of these Hillmon boys were there? A. Three.

Q. What were their names?

A. Henry, We—we always called him Wes. That is the John W. Hillmon you claim; and Henry Hillmon; Henry Hillmon was the oldest, and then John W. and then William.

Q. Isn't it a fact that it was Henry Hillmon that had some of his front teeth gone?

A. Oh, yes, when I saw him last he didn't have hardly any teeth.

Q. Henry Hillmon? A. Yes, sir.
Q. There were several of these Hillmons? A. Yes, sir.
Q. Do you know where Henry Hillmon went to?
A. No, down in the southern part of Kansas some place.
Q. He wasn't down around Wichita, was he?
A. He was down there some place. I don't know just where he was.
Q. He was a brother of John W. Hillmon? A. Yes, sir.
Q. Do you know where the other Hillmon went to?
A. Bill Hillmon?
Q. Yes? A. Yes, he is dead, I believe.
Q. Do you know where he was when he left that country?
A. No, he went off on the plains, too, but I could not tell you where.
Q. Now, besides these Hillmons, there were several other Hillmons, weren't there?
A. There wasn't any other family of Hillmons that lived in our neighborhood.
Q. Did you ever know any other persons by the name of Hillmon but these?
A. I have heard of some of their relations, but I wasn't acquainted with them.
Q. You don't know them personally? A. No, sir.

Redirect Examination

By Mr. Green:

Q. You were speaking about Henry Hillmon being
1223 about Wichita. Did you correspond with him at all?
A. Henry Hillmon?
Q. Yes? A. No, sir.
Q. You didn't know which portion of southern Kansas he was in, did you?
A. No, I could not tell you where he was. I heard from him —the people,—neighbors did.
Q. He had gone off onto the plains? A. Well, yes.
Q. Do you know when he left home as to the time you were married, for instance? A. Henry?
Q. Yes?
[Q.] Well, I think he left about the time we was married, but his family didn't. His family staid in our neighborhood for some three or four years, but he finally came back and took them away.
Q. I understood you to say that Henry Hillmon's teeth were nearly all gone? A. Yes, sir.
Witness excused.

1224 The defendants and each of them next offered in evidence the testimony of William Hogbin given upon the trial of 1885. It is admitted by the parties that Mr. Hogbin is dead.

Said testimony was thereupon read in evidence, and is in words and figures as follows, to wit:

William Hogbin called for the defense, and after being duly sworn, testified as follows:

Questions by Mr. Green:

Q. Where do you reside? A. In Jefferson County.
Q. What portion of Jefferson ounty?
A. Near the northern part.
Q. Near what town? A. Near Valley Falls.
Q. Did you know John W. Hillmon?
A. Yes, sir, I used to know one John W. Hillmon.
Q. When did you know him?
A. It has been about fifteen years since I seen him.
Q. Were you schoolboys together? A. Yes sir.
Q. Where was he living at that time?
[—] He was living up there in the same neighborhood I was.
Q. Now you may state if at any time you noticed anything peculiar about his teeth?
A. When I was going to school with him I noticed he had one dark tooth. That was all I remember about his tooth.
Q. Where was that dark tooth?
A. On the upper jaw near the center, as near as I can remember.
Q. What do you mean by 'dark'?
A. I mean it was dark color, or kind of blue.
Q. Discolored? A. Yes sir.

Cross-examination

Questions by Mr. Riggs:

Q. It was a kind of a blue tooth, was it?
1225 A. It was dark colored, or blue.
Q. Very noticeable, was it?
A. Well, not in particular. I had noticed it, though, often.
Q. How many years ago was that?
A. Fifteen years ago, I think.
Q. You haven't seen Hillmon, have you, for fifteen years?
A. No.
Q. There were several Hillmon's up there, were there not —he had brother or two ? A. Yes sir.
Q. What was your age at that time, fifteen years ago?
A. I was about eighteen.
Q. How old are you now?
A. I am thirty-four years old.
Q. You are thirty-four years old now? A. Yes sir.
Q. And you testified in this examination, didn't you, three years ago? A. Yes sir.

Q. What did you give your age at, at that time?
A. I don't remember giving my age.
Q. You responded to the name of Jackson Hogbin when ou were just called? [—] I came; my brother is not here.
Q. You say you were about how old when you knew Hill- on last?
A. I guess I must have been about eighteen.
Q. Don't you know how old you were?
A. I am thirty-four now and that was fifteen years ago. ou can count up and see.
Q. Hillmon at that time was a man grown, was not he, natured? A. Yes, I think he was, pretty near.
Q. About how old was he when you saw him last?
A. Well, I don't know as I can state exactly. I think he as twenty-six or twenty-seven years old.
Q. When did you first notice that he had this black tooth?
A. I can't remember it when I noticed it. I remember it hen I first seen him, I believe.
Q. You noticed it every time you saw him, didn't you?
A. I don't think I seen it every time I seen him, but I oticed it often.
Q. You say he had several brothers?
A. He had two brothers.
Q. Do you know their names? A. Yes sir.
Q. What were their names?
A. One was Henry and the other was William.
Q. Henry they called Hank, didn't they? A. Yes sir.
Q. Do you know what kind of teeth he had?
A. He had one or two teeth out.
Q. Do you remember that distinctly? A. Yes sir.
Q. Do you remember what kind of teeth he had?
A. I think his teeth were white, so far as I know.
Q. How old was William Hillmon?
A. He was about my age.
Q. Mr. Green asked you if you went to school with John W. Hillmon; did you? A. Yes sir.
Q. Now, don't you know it was one of John W. Hillmon's brothers that had the black tooth? A. No sir.
Q. Are you sure it was not?
A. Not to my knowledge.
Q. Are you sure it was not?
A. If it was, I never seen it.
Q. I am asking you if it was not his brother who had that black tooth?
A. John W. had one; I am sure of that.
Q. You are sure that his brother never had it?
A. I don't know whether he had it or not.

Q. What directed your attention to John W. Hillmon's black tooth?

A. [—] stranger came to ask me if I knew anything of Hillmon, or if I used to know him. I told him I did,—

1226 Q. I just asked you what drew your attention to John W. Hillmon's black tooth?

A. That is the first circumstance that I know of. After he spoke to me about it I remembered seeing it.

Q. What impressed it on your memory that John W. Hillmon had a black tooth?

A. That is all I can state.

Q. Then there is no fact to impress it on your memory, that he had a black tooth? Nothing you can associate with it to remember that he had a black tooth?

A. I remember seeing him have a black tooth; that is all I can remember.

Q. Is there any special reason why you remember that John W. Hillmon had a black tooth?

A. Nothing more than what I have told you.

Q. You remember no circumstance except what you have stated, then?

A. I remember seeing the black tooth, that is all I remember of it.

Q. Do you know of another man who has got a black tooth?

A. I believe I know of one man in my neighborhood who has.

Q. He is the only man?

A. There may be several others.

Q. Do you know of any who have blue teeth?

A. I don't know but what they have.

Q. How were the balance of [the] Hillmon's teeth?

A. I never examined them.

Q. How were the balance, so far as you saw them?

A. So far as I saw them they were all right.

Q. Do you know whether the balance of John W. Hillmon's teeth were good or not?

A. They were good so far as I saw them.

Q. Do you know whether they were good or not?

A. No sir.

1227 Q. Do you remember whether he had two teeth out at that time?

A. I don't remember. I remember seeing the black tooth.

Q. When were you first asked in relation to this black tooth—after this suit was begun, when did anybody first speak to you about Hillmon's tooth—after this suit was begun?

A. I don't remember when; I was spoke to by a stranger over three or four years ago.

Q. Don't you know the man?
A. He is setting right over there, if I am not mistaken—(pointing to a party in the court room—reporter.)
Q. Who do you refer to? A. To Mr. Green.
Q. Where? A. Up on the farm.
Q. That was the first time you had been spoken to for fifteen years? A. O, no.
Q. Well, then, I will ask you who first spoke to you about this black tooth after the institution of this suit?
A. I don't remember who was the first.
Q. Did Mr. Cox ever talk to you about the tooth of Mr. Hillmon? A. I don't know any one by that name.
Q. Did Colonel Walker? A. No, sir.
Q. Can you state who did first?
A. I think I have stated.
Q. The first one who spoke to you about the tooth was Mr. Green? A. Yes, sir, I think it was.
Q. That was up on your farm? A. Yes, sir.
Q. When was that?
A. That has been over three years ago.
Q. That was the first time your attention had been called to this in fifteen years, was it?
A. It was not fifteen years then; it is fifteen years now.
Q. How long do you say it was at the last trial?
1228 A. I believe it was twelve years then since I had seen him.
Q. When did you say at that examination that you had first noticed that missing tooth?
A. Ever since I can remember.
Q. You say then it was twelve years from the last trial that you sad seen Hillmon; the mention that Mr. Green made of it was the first [mentioned] that had been made of that black tooth for twelve years, was it?
A. I don't know exactly about that.
Q. Have you any recollection of a black tooth being mentioned since you last saw Hillmon up to that time?
A. I don't believe I have, except when it was spoken of in these cases.
Q. And you remember it without anything to attract your attention to it? A. I remember it, yes, sir.
Q. And you can state nothing to impress that upon your memory at all.

Witness dismissed.

1229 E. Summerfelt, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name to the jury, please?
A. E. Summerfelt.
Q. Where do you live, Mr. Summerfelt?
A. I live in Valley Falls.
Q. What county? A. Jefferson.
Q. In what business are you engaged?
A. Hardware and farming implements.
Q. How long have you lived in Valley Falls?
A. I have lived in Valley Falls off and on; it was ten years ago when I moved to Valley Falls.
Q. How long have you lived in Jefferson County?
A. Ever since the 12th day of July, 1858.
Q. Where did you live when you came to Jefferson county, Kansas; where did you first locate?
A. A place they call Nichols station now or right adjoining it.
Q. Were you living on a farm or claim at that time?
A. I was living on a farm until the spring of 1864.
Q. Did you become acquainted at or about that time with a family by the name of Hillmon? A. I was.
Q. Do you remember in what year you made the acquaintance of that family? A. In 1858.
Q. Where did that family reside?
A. They resided—Mr. Hillmon lived,—it was about two miles between us.
Q. Did you connect on adjoining quarter sections of land?
A. No.
Q. There was one quarter between?
A. There was one farmer living between us; his name was Smith.
Q. What was old gentleman Hillmon's name?
A. Benjamin Hillmon.
Q. Did he have sons? A. Yes, sir.
Q. How many, if you knew? A. I knowed three.
1230 Q. What were their names?
A. Henry, Wesley, we always called him Wes and William.
Q. You were acquainted with all three of them, were you?
A. I was.
Q. Now, from your farm, did you finally remove to Valley Falls?
A. I moved in 1864, in the spring of 1864, to Valley Falls.
Q. How long did you continue to live there at that time?
A. Until the spring of 1868 when I went on the farm again.
Q. Then where did you remove to?
A. It is a little west and north of Valley Falls.
Q. On a farm? A. Yes, sir.

Q. Then you removed back to Valley Falls, did you?
A. I moved back to Valley Falls about ten years ago.
Q. And you have been living there ever since?
A. Yes, sir.
Q. Did you make the acquaintance of John W. Hillmon whom you called Wes. or who was called Wes. at the same time you did his father?
A. I knowed him like I would my neighbor's boys.
Q. Do you remember the fact of John Wesley Hillmon going into the army?
A. Well, it was reported that he went into the army.
Q. Did you miss him from the neighborhood for a while?
A. I did.
Q. Now, did you see him after he returned from the army?
A. I did.
Q. You may state where you saw him?
A. I was living at that time in Valley Falls and I see him in Valley Falls.
Q. You may state if at that time, in 1864, there was a dentist residing at Valley Falls?
A. There was not; there was a dentist working there; came from Leavenworth; that is what he reported to me.
Q. But there was a dentist working there at Valley Falls in 1864? A. Yes, sir.
Q. How did you know that fact?
A. I had a tooth fixed myself by the dentist.
Q. Where? A. At Valley Falls; at the hotel.
Q. Do you remember what hotel?
A. That was the Cataract House.

1231 Q. Do you remember of seeing John W. Hillmon at or about the time that you had this dentistry work done upon your teeth in Valley Falls in 1864?
A. Yes, sir, I saw him there and I took—

Q. Where did you see him? A. In Valley Falls.
Q. Did you have a talk with him in regard to his own teeth at that time?

The plaintiff objects to the question as calling for hearsay evidence. Objection sustained; the defendants and each of them duly excepting.

Q. Did John W. Hillmon at that time show you, or was your attention called to any defects in his teeth? A. It was.

The plaintiff objects to the question as double. Objection overruled; the plaintiff duly excepting.

Q. Answer the question.
A. I would have to make a statement.

By Mr. Atwood: That question should be answered by yes or no; we insist on a categorical answer.

A. I say yes.

Q. Did you go with him at that time from any place to any place? A. I took him to the dentist.

Q. From where did you take him to the dentist?

A. From the street.

Q. From the street where; in what place?

A. In Valley Falls.

Q. Where was the dentist?

A. The dentist was at the Cataract House.

Q. What dentist was it? A. I didn't learn his name.

Q. State what dentist it was with reference to being the same dentist who had fixed your tooth?

A. It was the same dentist.

Q. How long was it prior to the time this dentist had worked on your teeth, until you took to him John W. Hillmon?

A. I don't think it was over fifteen or twenty minutes.

Q. Did you see the dentist doing anything to the tooth or teeth of John W. Hillmon?

A. He took the chair and went to work at his teeth.

Q. Could you tell which tooth it was?

A. It was the second tooth on this side. (Indicat-
1232 ing.)

Q. Did you observe what he was doing with reference to it?

A. He cleaned it out was what I should call it.

Q. By cleaning it out, what do you mean? Did he simply clean the outside, or remove something from the inside of the tooth?

The plaintiff objects to the question as leading.

By the Court: He may answer, if he knows.

The plaintiff duly excepted to the ruling of the Court.

A. The tooth was decayed; I noticed it; I looked in his mouth when the dentist was to work on it; it was on the inside, and on the outside was a little spot about half way up in his tooth the size of a pin, and the tooth was kind of dark; black.

Q. And do you say you saw him working upon that tooth?

A. I did.

Q. The dentist? A. Yes, sir.

Q. Now, you may state what was said by the dentist, and what was said by you, and what was said by John W. Hillmon at the time that the dentist was working upon his tooth?

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and hearsay. Objection sustained, to which ruling of the Court, the defendants and each of them and there duly excepted.

Q. What was the dentist doing, if anything, when you left there; I mean when you left the dentist and John W. Hillmon?

A. They was talking.

Q. State whether or not there was being anything done on the tooth?

A. I didn't see anything further done, only I suggested to Hillmon—

Objection.

Q. Did you come away from the Cataract Hotel at that time? A. I did.

Q. Whom did you leave there?

A. I left Hillmon and the dentist in the room.

Q. Where was Hillmon at that time?

A. Well, in the sitting room.

Q. Was he in the chair?

A. He was in the chair, yes, sir.

Q. They did not have any dentist there at that time?

A. No dentist there, no.

1233 Q. What, if anything, was the dentist doing when you left the two in that position?

A. Right at the time I left, he wasn't doing anything; they was talking.

Q. That was after whatever operation you have spoken of had been performed? A. Yes, sir.

Q. When did you next see Hillmon after that time?

A. Frequently, but I couldn't make any positive—

Objection.

Q. You saw him frequently. Do you remember any particular occasions when you saw him after that?

A. You mean the last time?

Q. Yes.

A. I think the last time I saw him his brother was cutting cord wood on a farm adjoining me and the boys was out hunting; I think that is the last time I saw Wesly Hillmon.

Q. Did any accident occur at that time to any one which fixed the date upon your mind?

The plaintiff objects to the question as hearsay and incompetent. Objection overruled, the plaintiff duly excepted.

Q. Did any accident occur to any person at that time that fixed that occasion upon your mind.

By the Court: It is leading; you should ask him if any accident occurred, or if there was any occurrence at that time.

A. One of the hunters shot his leg off, or shot the calf of his leg off, and he died very shortly, in the course of an hour after he shot his leg off.

Q. Who was that?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff excepts.

Q. You may state who that was that was injured in that way? A. It was Roderick.

Q. Are you able to state in what year that was?

A. I could not say exactly; it was some time in the 70s.

Q. That is the last time you remember of having
1234 seen John W. Hillmon?

A. Yes, sir; the last time I remember that I had any talk; I think I seen him after that, but I was living on a farm at this time and I didn't see him very often.

And in answer to cross-interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. When did you say you saw John W. Hillmon in the dentist's chair?

A. He just came from the army. I don't know what year it was in; I think it was in 1864.

Q. In 1864? A. In the fall.

Q. You never saw him but once after that?

A. I saw him many times.

Q. When did you say you saw him the last time?

A. When that accident occurred.

Q. That was in 1864? A. In 1864.

Q. That you saw him at the dentist's? A. Yes, sir.

Q. In Valley Falls? A. Yes, sir.

Q. You noticed his teeth? A. Yes, sir.

Q. You saw the dentist working on his teeth in the chair?

A. Well, he was sitting in the chair; he was—I wouldn't quite say he was working; he was examining the tooth.

Q. That tooth was on the left side of his upper jaw?

A. It was; it was the tooth right there on the side.

Q. Is that the left side of the upper jaw?

A. I call it the left side.

Q. Left side of the upper jaw? A. Yes, sir.

Q. Which tooth from the front?

A. It was the second tooth from the front.

Q. There was a hole in it?

A. Very small one on the outside.

Q. And the dentist was cleaning it out preparatory to filling it?

1235 A. That is what I supposed.

Q. You saw him put a filling in, didn't you?

A. No, sir.

Q. When did you next see Hillmon after that?

A. Well, I couldn't say. I saw him a good many times.

Q. He always showed a gold filling in his teeth whenever you saw him? A. I never noticed.

Q. You never noticed to look and see whether it was filled or not? A. No, I couldn't say.

Q. But you saw him a good many times? A. Yes, sir.

Q. Never noticed his teeth afterwards? A. No, sir.

Q. You didn't see any other teeth in his mouth at that time that were defective? A. No, I did not.

Q. There was one tooth in the left-hand upper jaw that had a hole in it? A. Yes, sir.

Q. And you saw the dentist working on the hole?

A. I saw the dentist with an instrument cleaning it out.

Q. That was in 1864? A. Yes, sir.

And in answer to redirect interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, the witness testified, as follows, to wit:

Q. Do you know whether it was decayed in the front or the rear?

A. The tooth was decayed most from the rear.

Q. It was on that place that you saw the dentist at work?

Objection as leading. No answer or ruling.

Q. What did you see the dentist doing to that portion of the tooth that was decayed the most?

A. I don't understand.

Q. What did you see the dentist doing to that portion of the tooth which was decayed the most?

A. The dentist had an instrument, a kind of a hook; he was working at it to examine it to see how bad it was decayed; that is all, I know about it; I was standing right before them and watching them.

1236 Q. Did he work from the outside of the tooth or the inside?

A. He opened his mouth and he worked this instrument on the inside.

And in answer to recross- interrogatories propounded to him by Mr. Hutchings, counsel for the plaintiff, the witness testified as follows, to wit:

Q. That hole came clear through from the other side?

A. It did a little in front.
Q. And he was boring that out?
A. No, he didn't bore it out.
Q. He didn't bore that out?
A. He was just cleaning it out with his instrument.
Q. The hole was big enough in front so that you could see it? A. It was about the size of a pin head.
Q. You saw it, didn't you?
A. Yes, but it was clear on the—
Q. Will you just answer my question. Did you see the hole in the front of his tooth? A. Yes, sir.
Q. You had seen that hole in there before, hadn't you?
A. I hadn't never seen it before until that time.
Q. And you never noticed his teeth afterwards.
A. Well, I didn't pay any particular attention to it.
Q. You first testified in this case at the first trial of it, didn't you? A. I think not.
Q. In 1882?
A. Well, the trial I was called here to Leavenworth in the court-house.
Q. Judge Foster presided, did he not?
A. I don't know who presided; I was not put on the witness stand.
Q. You were not put on the witness-stand that time?
A. No.
Q. When did you testify first? A. I think in Topeka.
Q. You testified in Topeka when?
A. Well, I testified the last term of court and I think the time before.
1237 Q. How many times have you testified?
A. This is the third time.
Q. Now, then, this occurred in 1864? A. Yes, sir.
Q. Right, is it? A. I think so.
Q. And you never testified in this case until 1895?
A. Well, I don't remember the date; the year.
Q. Thirty-one years afterwards?
A. Oh, no, it ain't 31 years ago.
Q. From 1864 to 1895 is thirty-one years, is it not?
A. Since I testified?
Q. It was thirty-one years between the time that you say you saw this thing in 1894 and the time that you first testified to it in 1895?
A. Well, if the court was in session in 1895, of course, I testified.
Q. You remember that I cross-examined you, don't you?
A. Yes, sir.
Q. I am the same person? A. Yes, sir.
Q. Cross examined you when you testified before Judge Thomas? A. I don't know the judge.

Q. At Topeka at the federal court-house?
A. I don't remember the judge's name.
Q. But you have testified on two trials at Topeka, the two last trials? A. Yes, sir.
Q. One was in 1895 and the other in 1896? A. Yes, sir.
Q. Right, is it not? A. I expect so.
Q. So that it was from 1864 until 1895, or thirty-one years before you ever testified to this fact; isn't that right?
A. I expect.
Q. And you never felt interest enough in this matter to look at John W. Hillmon's tooth after you saw it being filled to see whether it had been filled or not?
A. I didn't see it filled.
Q. Your attention was never called to this matter of Hillmon's tooth except that one time in 1864?
A. That is all.
Q. And thirty-one years afterwards you testified to it first?
A. Yes, sir.
Q. Right, is it not? A. I expect so.
1238 Q. Now, is it not a fact that you testified in answer to my questions to you in 1895 that you did notice after Hillmon came from the dentist that he had a gold filling in his tooth and that you frequently noticed that filling?
A. I don't think I ever did.
Q. Well, now, you say you don't think so; will you testify here before this jury, that you did not say, in answer to questions which I asked you in 1895, at Topeka, that you noticed, after Hillmon came away from there that he had a gold filling in his teeth?

The defendants object to the question as not proper cross-examination and not proper ground for impeachment. The Court overruled the objection, to which action and ruling of the Court the defendants and each of them then and there duly excepted and still except.

A. You wanted me to tell you whether it was filled with gold or some other metal and I told you I didn't know.

By the Court: He has asked you what you testified to at the trial in 1895 at Topeka.
Q. Didn't you testify in the federal court-house in Topeka at the trial in 1895 in answer to a question that I put to you that after Mr. Hillmon came away from the dentist's that you saw him and noticed that he he had a gold filling in the front of his tooth? A. I think not.
Q. You think not. A. No, sir.
Q. Do you remember what you did testify on that occasion?
A. Not exactly.
Q. You don't remember? A. No, sir.

Q. You might have testified to it?
A. And I might not.
Q. And you might not? A. Yes, sir.
Q. Didn't you swear to that; didn't you testify upon the trial in 1895, at the federal [house] house in Topeka, that you noticed that his tooth was filled with gold?
A. I never answered that question directly; you wanted me to answer it directly and I wouldn't do it.

1239. Q. You wouldn't testify whether you saw it filled with gold or not? A. That is correct.
Q. You wouldn't testify then whether you saw it at all or not? A. I never testified that I saw it filled.
Q. Then, I understood you to say to the jury that you never noticed Hillmon's tooth after you saw him in the dentist's chair?
A. I think I did notice his teeth, that tooth in front when he was at my house the last time.
Q. And it was filled with gold?
A. It was partly broken off.
Q. It was filled with gold, was it not?
A. I never saw gold in his teeth.
Q. When was he last at your house?
A. Some time in the 70's.
Q. About what time would you say in the 70's?
A. I could not say; it might have been 1871, 2 or 3.

By Mr. Barker, counsel for the defendants:

Q. You had heard of the disappearance of Mr. Hillmon long before 1895, had you not?

The plaintiff objects to the question as leading.

Q. State whether you had heard of it long prior to 1895?
A. I have heard it.
Q. You had heard it before that time? A. Yes sir.
Q. Do you know how early you heard of the disappearance or the alleged killing of John W. Hillmon?
A. It was reported—Well, I wouldn't say positive when the corpse was brought to Lawrence, or whether it was before; I couldn't say positive about that.
Q. What would you say in regard to hearing about it at or about the time the remains were brought to Lawrence?
A. I could not say the time when it was brought back.
Q. I know, but what do you say about hearing about
1240 this matter at about that time?
A. I heard it reported that Hillmon was shot; that is all.
Q. Do you remember when you heard that with reference to certain remains being brought to Lawrence?

A. I don't know anything about the particular time.

Q. State whether or not you had ever known of a dentist being in Valley Falls before that time?

The plaintiff objects to the question as not proper re-examination. Objection overruled, the plaintiff excepts.

A. That is the first time I had known of a dentist being there when he fixed my tooth.

Witness excused.

1241 John Alexander Low, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Barker:

Q. State your name, Mr. Low? A. John Alexander Low.

Q. Where do you live? A. Jefferson County.

Q. In this state? A. State of Kansas, yes sir.

Q. Near what place? A. Near Nortonville.

Q. How far from Valey Falls? A. About 8 miles.

Q. How long have you lived in Jefferson County?

A. Very near all my life, something over 40 years.

Q. In what business are you engaged? A. Farming.

Q. Have you been engaged in any other business?

A. No sir.

Q. I will ask you if you were acquainted with a family of Hillmon's in or about Valley Falls?

A Used to be, yes sir.

Q. Did you know the father, Benjamin Hillmon?

A. Yes sir.

Q. Were you acquainted with the sons?

A. Yes sir the whole family.

Q. Do you remember the sons' names now? A. Yes, sir.

Q. He had 3 sons, did he?

Q. You may state their names?

A. Henry, Wes and William.

Q. Was Wes the one who was known as John W?

A. Yes sir.

Q. Were you acquainted with John W. Hillmon?

A. Yes sir.

Q. Where did you live one time in reference to the Hillmon family, one time, in reference to the residence of the Hillmon family?

A. We lived about a mile; about three quarters of a mi' south and half mile east of where they lived.

Q. Were you in the same school district?

A. I was in the same school district, yes sir.

Q. State whether or not you ever attended school with John W. Hillmon? A. One summer.

1242 Q. Do you remember the number of the District? A. No. 2.

Q. How far was that from Valley Falls?

A. I should judge it is about 2 miles from the Falls; two miles north.

Q. After going to school with John W. Hillmon, did you have any further acquaintance with him? A. Yes sir.

Q. Do you remember of there being in that neighborhood a brick yard? A. Yes sir.

Q. Where was that brick yard with reference to your residence, and the residence of Benjamin Hilmon, father of John W. Hilmon?

A. It was about two miles west of where I lived then. It was something within a mile or a mile and a half of where I lived then.

Q. Do you know whether or not it was on what is known as the Hilmon claim?

A. No, it wasn't. It was on a claim—I don't know who owns it now. I think John Dougla, of Leavenworth, first claimed on it. It used to be called the Cupp place.

Q. Did you and Hilmon ever work there at this brickyard at the same time? A. Yes sir.

Q. For how long did you work together there?

A. I could not tell you the number of months. We worked there one summer.

Q. Where did you board at that time, and where did Hilmon? [Q.] At a board shanty.

Q. Where, at the brickyard? A. Right there.

Q. State whether or not you and John W. Hilmon occupied the same cabin at the same time?

A. Frequently. I stayed there all the time.

Q. How about John W. Hilmon staying there?

A. He stayed there frequently.

Q. Where did he sleep when he stayed at the brickyard?

A. He slept in the bunk with me when he stayed there.

Q. During the time that you were working—that you and Hilmon were working at the brickyard, did you ever treat his teeth in any way? do anything for them?

A. Yes, I put creosote in one of his teeth.

1243 Q. What tooth did you treat in that way?

A. It was one of his jaw teeth.

Q. What was the condition of the tooth at the time you administered this creosote to it?

A. It was a hollow tooth, decayed tooth.

Q. Do you remember on which side?

Q. I would not be positive as to that, however.

Q. Did you treat him in that way more than once during hat time?

A. Well, I should say two or three times during the ummer.

Q. Did you have an opportunity then to observe the con- ition of that tooth when you were treating it?

A. I seen it was decayed.

Q. Did you have an opportunity to observe the condition f his other teeth, of his front teeth? A. Yes, sir.

Q. You may state what their condition was?

A. There was one his front teeth was decayed.

Q. Notice it at that time? A. Yes, sir.

Q. During that time was Hillmon suffering from any dif- iculty? A. Nothing but tooth-ache.

Q. That is what I wanted to get at? How did it happen hat you treated his tooth in that way?

The plaintiff objects to the form of the question. The objec- tion is by the Court overruled, to which action and ruling of the Court the plaintiff then and there duly excepted.

A. He had tooth-ache and was in misery, and I got up—he could not put in [in] himself. I got up and lit a light and put a piece of cotton in his tooth.

Q. This creosote, where did you get it?

A. He had that himself.

Q. Now, how many times did you say you treated him in that way during that time?

A. I should say three times during that summer.

Q. Did you see him after that? A. Yes, sir.

Q. Where did you see him after that at any time, when he was suffering with tooth-ache?

A. He bought some cattle from my father, and wanted I should help him to drive them away.

Q. State about when that was?

A. Well, I could not name the year; I could not state the date.

1244 Q. You remember the circumstances, do you?

A. Yes, sir.

Q. Where was your father living then?

A. Over where I live now.

Q. Where do you live now from Valley Falls?

A. I live 8 miles northeast of Valley Falls. That was a mile closer, where we lived then, than it is now.

Q. I understand you to say you were to help drive cows?

A. Yes, sir.

Q. From what place to what place?

A. From father's place we went past John Wesley's father's place.

Q. On the way to Valley Falls? [—] Yes.

Q. Going from there to Valley Falls, did you cross any stream? A. Yes, sir, crossed Hickory Creek.

Q. Now, at that time, on that occasion, did you have an opportunity to observe anything in regard to the condition of Hillmon's teeth, John W. Hillmon? A. Yes, sir.

Q. You can state what it was? State the circumstances, or what there was in connection with it?

A. His tooth was hurting him, and he asked me to look at it. He didn't just ask me to look at it. He showed it to me.

Q. Where was that? A. That was at Hickory Creek.

Q. Now, what was the condition of his teeth at that time?

A. The gum was very red, inflamed and sore.

Q. Did you have an oportunity then to see in regard to his front teeth?

A. Not any more than what I had seen before.

Q. What was the condition of his front teeth at that time?

A. Why, one of them was decayed.

Q. Did he complain of any matter at that time.

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. The objection is by the Court overruled, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. He complained of his teeth hurting him, yes, sir.

Q. Did you treat the tooth in any way at that time; do anything for it? A. No, sir.

Q. Do you remember of having seen him after that?

1245 A. Yes, sir.

Q. Do you remember the last time you saw him?

A. No, I don't.

Q. Are you able to fix what year it was that you assisted in driving these cattle from your place to Valley Falls?

A. I could not be certain, but my recollection is that it was 68 or 69. I ain't sure. I would not be positive about that.

Q. When did you say you last saw John W. Hillmon?

A. Well, could not tell you that. I seen him every time he came to the neighborhood, but I could not tell you just what time it was.

Q. You are not able to fix the year? A. No, sir.

Q. Did you hear, at or about the time it occurred, of the alleged killing of Hillmon and the bringing of a body there to Lawrence? A. I don't understand that question.

Q. I asked you if you heard at or about the time of the occurrence of the alleged killing of Hillmon and the bringing of certain remains there to Lawrence—did you hear about that? A. Yes, sir.

Q. When did you hear of it?
A. I could not be positive about that; somewhere about—well, it would be shortly after it happened. I think it was about 70.
Q. You say you heard of it shortly after it happened?
A. Yes, sir, some time. I could not fix the date at all, for I don't recollect now. I heard it. I don't recollect now when I heard it, but I heard it. But I heard it.
Q. In your neighborhood at Valley Falls, had the matter of John W. Hillmon's death been a subject of discussion among the people there at Valley Falls?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. The objection is by the Court sustained, to which the defendants and each of them then and there duly excepted.

Cross-examination

By Mr. Hutchings:
Q. How old are you? A. I was born in 51.
Q. And you have lived ever since in Jefferson County?
A. Not exactly, no, sir.
1246 Q. Where have you lived?
A. I was born in Scotland, in the City of Dundee.
Q. When did you come to this country? A. In 57.
Q. You were then six years of age? A. Yes. sir.
Q. And you have been living in Jefferson County ever since?? A. Yes.
Q. You have been right there in Jefferson County during all the 5 trials, previous trials of this case?
A. Exactly.
Q. You have never been called as a witness in this case?
A. No, sir.
Q. You have? A. No. sir.
Q. You haven't? A. Haven't.
Q. You were never discovered until this trial?
A. How is that question?
Q. During all the five trials of this case that we had right here in this neighborhood, you never have been called as a witness? A. No, sir.
Q. This is the first time you have testified to these facts?
A. The first time I have ever been called on.
Q. You have heard this case talked about?
A. Certainly, every man in the case has.
Q. Every time it has been tried you have heard it talked about? A. No, not every time.
Q. I will get you to state if it is not a fact that persons representing these insurance companies have scoured that

country through there time and time again looking for witnesses? A. No, they have not scoured.

Q. They have never seen you? A. No, sir.

Q. When did they see you?

A. The first time was last week, when I answeerd the subpoena.

Q. Up to that time you never had told anybody that you knew anything about this case? A. Told my neighbors.

Q. Told your neighbors? A. Certainly, they all knew.

Q. Then, during all the time those trials were going on, you had told your neighbors this? A. Yes.

1247 Q. Which particular neighbor did you ever tell anything?

A. I don't know of any particular neighbor. It is the general talk of the country.

Q. What is the general talk of the country?

A. This Hillmon trial.

Q. Exactly, and so you talked about what you had told, and you said you had told your neighbors about this case?

A. I didn't state that. The neighbors did talk about it, but I didn't say I told them anything.

Q. Did you ever tell anybody that you knew anything about this case? A. No, sir.

Q. You never did? A. No, sir.

Q. When they came there and subpoenaed you and you came and testified here in this case, you were surprised, were you not? A. Yes, sir, I was.

Q. Because you had never told any one in the world that you knew anything about it? A. Let me explain.

Q. You can answer that question. I object to this witness explaining. The question calls for yes or no.

A. If you let me answer, and not answer for me, I will answer you straight.

Q. I was asking you whether you were surprised when you were subpoenaed because you had never told any one that you knew anything about the case?

A. Yes, sir, when I was subpoenaed I was surprised. That was, if I ain't mistaken, a year ago last spring, this last spring.

Q. You were subpoenaed? A. Yes, sir.

Q. Now, when was it that you say you and John W. Hillmon worked at the brickyard?

A. It was either in '66 or '67. I ain't positive. That is a long time ago.

Q. Well, what year did you say you were born in?

A. I was born in '51.

Q. In '66 then you would have been 15 years old?

A. Yes, sir.

Q. You were a boy then? A. I suppose so.

Q. You were 15 years old in '66? A. Yes, sir.

Q. And it was either in '66 or '67 that you worked
1248 with Hillmon there? A. Exactly.

Q. At that time you say he had a decayed front tooth?

A. His front tooth was decayed, but not as bad as his jaw tooth.

Q. Well, in '66 he did have a decayed front tooth?

A. Yes, sir.

Q. That you are positive of? A. Yes, sir.

Q. A portion of the tooth was gone, wasn't it? A. Sir?

Q. A portion of the tooth was gone, wasn't it?

A. Not of the front tooth, no, sir.

Q. What do you mean by being decayed?

A. It was dark colored; commenced to decay.

Q. Well, were there any holes in it?

A. Not on the outside, that I could see.

Q. Did you examine it? A. Not particularly, no, sir.

Q. And he had one hollow tooth? A. Yes, sir.

Q. You treated that there then by putting creosote in it?

A. Yes, sir.

Q. And he carried it?

A. Always carried a bottle of creosote around with him. I would not say that he had that all the time. He had it with him at that time.

Q. And produced it? A. Yes, sir.

Q. And he had to have somebody to put it into his tooth?

A. O, I don't know as he did. If he did, he had me do it.

Q. How did you do it? Took the bottle and poured it into the tooth? A. No, sir.

Q. How did you do it? A. I took a little bit of cotton.

Q. You did that three times? A. Yes, sir.

Q. During the time he was working there with you?

A. Yes, sir.

Q. At the same time you noticed that he had a decayed tooth? A. Certainly.

Q. Way back as early as '66? A. Yes, sir.

Q. That was just after he came out of the army?

A. '66 or '67. It might have been '67.

Q. Was there any filling in it at that time? A. No, sir.

Q. There was a hole clear through it? A. No, sir.

Q. He had been to a dentist in '61, and this was in '66 or '67? A. I never seen it filled.

1249 Q. If there was any filling in it, you didn't see it in '66 or '67? A. No, sir.

Q. There was a hole clear through it, in the front of his tooth? A. Not that you could tell.

Q. You looked right into his mouth in putting the cotton in his teeth three times? A. Certainly.
Q. In '66 and '67? A. Yes, sir.
Q. Had no hole through his tooth in front?
A. Not that I noticed.
Q. You would have noticed it if he had a hole right there through the tooth that the dentist could dig out?
A. Yes, if it had been on the outside. There was no hole through his tooth at that time. I didn't notice any.
Q. You are sure of that? A. I didn't see any.
Q. And you were looking at it, weren't you?
A. I was putting cotton in the tooth that ached, and I seen that tooth, that dark colored tooth, very frequently, lots of times.
Q. Saw it lots of times, but there was no hole clear through it? A. Not that I seen, no, sir.
Q. There could not have been a hole there at that time, in '66 or '67, that a dentist could dig an instrument into?
A. I didn't see it.
Q. Now, how long did Hillmon work with you in '66 or '67 in the brickyard?
A. One summer. I could not tell you,, I do not remember the months.
Q. Who was the owner of the brickward?
A. A man by the name of Nichols.
Q. What Nichols? A. Hiram Nichols.
Q. Where is he now? A. Sir?
Q. Where is Hiram Nichols now?
A. That is more than I can tell you.
Q. Have you seen him lately?
A. I haven't seen him for a good many years.
Q. Do you know where he went to?
A. He went from there to Farraday.
Q. Well, after that summer's work in the brickyard, what became of Hillmon? A. I could not tell you.
1250 Q. Where did you next see him?
A. I seen him several times off and on, in the neighborhood. He could attend lyceums and literaries at the school house, and the next time that I could give any definite recollection of it would be when he bought—
Q. When was that, in what year?
A. I think that was in '69. I would not be positive of that either.
Q. About how old were you at that time? I want to fix as near as I can, the date of it; you were about 15 years old when you worked with Hillmon in the brickyard?
A. About 15 or 16.
Q. You remember that; that you were a boy, a lad?

A. Yes, sir, 15 or 16 years old.
Q. Now, then, how old were you at the time you spoke of driving the cattle?
A. Well, somewhere 18, perhaps, or 19.
Q. You remember that, don't you; that is, to fix the date of it, if I can, by your age?
A. I remember he bought them cows.
Q. Could not have been ten years later than that?
A. I could not fix it. I don't know exactly what year it was.
Q. You can give within five years of it?
A. I can come closer than 5 years.
Q. How close can you come to it?
A. I think it would be '68 or '69.
Q. And you remember also that you were 18 or 19 years of age at the time? A. Yes, sir.
Q. You remember that occurrence was when you were a young man, before you had come to the age of majority?
A. Yes, sir.
Q. And he bought some cattle of your father?
A. Yes, sir.
Q. You were crossing a creek? A. Yes, sir.
Q. Or a river? A. A very small river.
Q. What was the name of it? A. Hickory Creek.
Q. And when you were crossing the creek he came to you and got you then to look at his tooth again?
A. Will you let me explain that?
Q. O, no, just answer the question?
A. Yes, sir.
Q. Right in the middle of the creek?
1251 A. O pshaw, no, not in the middle of the creek. The creek ain't big enough to get in the middle of it.
Q. What I want to get at is the fact?
A. It was on the edge of the creek.
Q. Was it before you had crossed?
A. As we were going into the creek—we had been across and back—we crossed it several times; we crossed it backwards and forwards; the cattle ran up the creek; it was hard work to get them out of the creek.
Q. At any rate on the banks of the creek, he asked you to examine his tooth?
A. No, he didn't ask me that way; he told me that his tooth ached. He told me his tooth ached, and I looked at it.
Q. You knew all the conditions of the tooth; knew that years ago? A. Yes, more than 2 years.
Q. And he knew that you knew all about the condition of his tooth? A. Certainly.
Q. He didn't have a bottle of creosote?

A. No, he didn't have.
Q. He just wanted you to look at his tooth? A. No sir.
Q. He did not want you to do anything?
A. I could not—he just wanted me to look at the tooth.
Q. He said it would be a comfort to him to have you look at the tooth?
A. No, he didn't say that.
Q. What tooth did you look at?
A. I looked at one of the jaw teeth.
Q. Was it the same old jaw tooth that you had packed with cotton before that?
A. Well, I could not answer that question.
Q. How many of his teeth were hollow then; that was two years later?
A. I could not answer that either.
Q. Didn't you notice that one side of his tooth had broke out, and that it had a hole in it?
A. No, I didn't notice that.
Q. You looked at his teeth; now what about his teeth?
A. I looked at that front tooth.
Q. The sore tooth?
A. Yes sir, that tooth that was hurting him.
Q. And the tooth looked red?
A. No sir, I never saw a red tooth.
1252 Q. What was it that looked red?
A. It was the gums that looked red.
Q. I am not talking about gums; did you look at the tooth?
A. I did.
Q. What about the tooth?
A. The tooth was hollow.
Q. Didn't you see two teeth that were hollow?
A. I don't remember examining to see how many teeth were hollow.
Q. You remember, though, that several of them were hollow? A. In '69? No sir, I don't.
Q. How about the front tooth? You noticed the front tooth again at that time in '69?
A. I never noticed, for I had no occasion to notice it.
Q. You had no particular occasion to notice it? Didn't you testify to the jury on your direct examination you did notice again that his front teeth were decayed every time that you met him?
A. Every time that I met him? Not every time. I remember frequently I would notice that tooth. It was discolored.
Q. In '69 did you see any hole through it? That came through outside?
A. No sir, I never did see any hole through it.

Q. If there had been a hole through it, you would have not noticed it, wouldn't you? A. I believe I would.

Witness excused.

1253 The defendants and each of them next offered in evidence the testimony of Samuel Walker, given upon the trial of 1885.

It is admitted by the parties that Mr. Walker is dead.

Said testimony was thereupon read in evidence and is in words and figures as follows, to wit:

Samuel Walker called for the defense, and after being duly sworn, testified as follows:

Questions by Mr. Barker:

Q. State your name and where you reside?
A. Samuel Walker, Lawrence, Kansas.
Q. State how long you have lived in Lawrence, Kansas?
A. Ever since the spring of 1835,—Lawrence and vicinity.
Q. You may state if you were acquainted with one John W. Hillmon? A. I was.
Q. You may state if you remember the circumstance of your going to Medicine Lodge in the spring of 1879?
A. I do.
Q. Who went down with you?
A. Mr. Wiseman and a gentleman by the name of Tillinghast.
Q. Do you remember when you left Lawrence?
A. Not the day exactly, but it was some time in the latter part of the month of February or early in March.
Q. 1879?
A. It was in March or the first of April.
Q. You never made but one trip down there with these gentlemen, did you? A. No.
Q. When you arrived at Medicine Lodge, who did you find there?
A. You don't want to know all, I suppose.
1254 Q. Who from Lawrence?
A. I found Mr. Levi Baldwin, Alva Baldwin, and Brown.
Q. John H. Brown? A. Yes sir.
Q. What did you do with reference to going to the cemetery at that place: Did you go out there? A. I did.
Q. Who accompanied you on that occasion?
A. Mr. Wiseman,—I can't exactly remember the names of two or three that were there,—but there was Wiseman, Tillinghast, and a doctor they called Davis, I believe; Brown, Baldwin, both of the Baldwins.

Q. About how far is it from Medicine Lodge to the burying ground of the place?

A. I should judge a mile or a mile and a half—a mile anyhow.

Q. Was there any grave opened while you were there?

A. They opened the grave while we were there. They were opening it when we got there.

Q. What was the condition of the grave so far as being fenced was concerned? A. It was not fenced.

Q. State what appearance there was that the grave was about to be fenced? A. There was some lumber there.

Q. On the lot? A. Close by.

Q. Was there anything else but lumber? A. No sir.

Q. You state that he grave was opened and the coffin taken out? A. Yes sir.

Q. State if that coffin was opened? A. It was.

Q. You may now state how you were standing and who was standing next to you at the time the coffin was opened?

A. If I can remember correctly, I was standing on one side, I think on the north side; Levi Baldwin was on my right, Alva on my left; Mr. Wiseman was right opposite, and Dr. Davis and Tillinghast was there, and Brown stood off over by the wagon—he didn't come up to the grave.

1255 Q. How far distant was Brown standing?

A. Possibly as far as from here to the door.

Q. Who opened the coffin?

A. Those men that were there. The coffin was taken out of the grave first and then opened.

Q. Now, what examination did you make or did you see made, of the body?

A. Well, I pulled the cloth off of the face. Mr. Wiseman spoke about having the sleeve opened. He had talked all the way of vaccination. I borrowed a knife either of Dr. Davis or Mr. Wiseman and cut the sleeve open. Dr. Davis held the hand while I cut the sleeve.

Q. Then you saw the arm? A. Yes, sir.

Q. What other examination, if any, did you make of the body?

A. I felt the teeth to see if they were sound, with my fingers.

Q. How long had you known John W. Hillmon?

A. Ever since about 1872,—that is, on and off, when he was in Lawrence. He was absent a good deal. The last day he was in Lawrence, that was in February, 1879, that was the last time I saw him,—the day he went away.

Q. February, 1879? A. Yes, sir.

Q. Where did you see him on that occasion?

A. In my office.

Q. You may state what was the condition of that body? whether it was well preserved?

A. It was just as well preserved as the day it went in, as it could possibly have been, except that there was a little coloration where the bullet went in, on each side.

Q. State whether or not that was the body of John W. Hillmon? A. It was not.

Q. What was the condition of the teeth?

1256 A. The day he was last in my office he came in there to hang up his overcoat. I was lying on my bed, was not well. He hung his overcoat right up over me, and I saw distinctly his tooth out. My son has a tooth out in the same place. He went up town and came back. He got a shave. Got his coat and told me he was going away.

Q. On which side was the tooth out?

A. The left hand side, first tooth from the front. He had got shaved and had his mustache cut off considerable, and it showed much more plainly. I remarked to him at the time that he had a tooth out just like Ollie.

Q. I will call your attention to Medicine Lodge again. You have stated now with reference to the body being taken up, etc. What was done with it then? I want to know what was done with it with reference to taking it to Lawrence.

A. It was taken down town, and the next day Levi Baldwin and Alva Baldwin and Brown started with it.

Q. How were they traveling?

A. In a spring wagon that belonged to Hillmon and Brown.

1257 Q. Did you notice any of his effects being taken along, taken in the wagon with the body?

A. A trunk was put in, I put in a pair of shoes and a hat. They claimed they was Hillmon's shoes; those folks said they were his effects.

Q. You put in a pair of shoes, did you? When and where did you last see them? A. At Kingman.

Q. Did you see the effects afterwards in Lawrence?

A. No, sir; I didn't.

Q. You don't know then whether they arrived in Lawrence? A. The shoes hadn't arrived at Hutchinson.

Q. How did you know they hadn't arrived at Hutchinson? A. Because I examined and they were not there.

Q. What did you examine at Hutchinson?

A. The shoes were in the wagon, and the shoes were not in the wagon when they came in there.

Q. Did you measure the height of the wagon, body and all? A. Yes, sir.

Q. How high was it? A. Four feet ten inches.

Q. Did you measure the depth of the wagon box?
A. No, I think not;—just from the ground up on the outside. There was a small wagon bed, about that high—(measuring with his hands—Rep.)—and then side boards on top.
Q. What would be your best judgment in regard to the depth of that box?
A. I should say from fifteen to eighteen inches.
Q. Did you afterwards see this same body at Lawrence?
A. Yes, sir.
Q. Where was this body taken then?
A. To Bailey & Smith's undertaking establishment.
Q. Was it the same body over which the coroner's inquest was held at Lawrence?
A. It was the same body that started from Medicine Lodge.

2158 Cross-examination.

Questions by Mr. Wheat:
Q. What is your occupation? A. What is it now?
Q. What was it at that time?
A. I was in the livery business and deputy sheriff.
Q. How long were you in the employ of these companies?
A. I have never been in the actual employ of them, only when they would get me to go to certain places for them.
Q. On certain specific matters? A. Yes, sir.
Q. Did they get you to do that several times?
A. Yes, sir.
Q. Did they compensate you for it? A. Yes, sir.
Q. What is the total compensation these defendants have paid you for what you have done for them in these matters?
A. I couldn't say; they always paid me so much a day and my expenses.
Q. How much did they pay you a day?
A. Five dollars a day.
Q. Five dollars a day? A. Yes, sir.
Q. Can you tell me how many days you worked at this business?
A. Indeed I could not. I expect I got in the neighborhood of—except when I was a witness—probably in the neighborhood of one hundred and fifty dollars.
Q. State as near as you can?

1259 A. I say, I think, except as a witness here, and at the other trial of court, that I got in the neighborhood of one hundred and fifty dollars, but I never kept count.
Q. How much did you get as a witness?
A. I got my mileage and my witness' fees.
Q. Did you get anything more than the regular per diem?
A. No.

Q. State whether your occupation has not, at different periods of your life, been that [what] is commonly called a detective?

A. I never claimed to be a detective. I have been employed in different cases.

Q. State whether, in behalf of these companies, you didn't go down to see Brown, the father of John H. Brown?

A. Yes, sir.

Q. How many times did you go to see him? A. Twice.

Q. State whether you ever went to see Reuben Brown?

A. I have seen a Mr. Reuben Brown there and at Mr. Buchan's. I never seen him anywhere else except when he went to help me hunt Brown.

Q. You did that in the employ of these insurance companies?

A. Not for the insurance companies but for Mr. Wiseman.

Q. Did you hear the testimony of Mr. Wiseman?

A. No, sir, not all; only a part of it before dinner.

Q. State the first time you noticed this tooth was out—was that the last time he was in your office?

A. The last time he was in Lawrence, I think.

Q. And you had known him since 1872?

A. Yes, sir. I never had noticed his teeth at all, because he had always worn a big mustache.

Q. How long have you worn glasses?

A. Well, I have worn glasses to read at night ever
1260 since I was about forty-five, I think.

Q. How long before 1879?

A. That would [—] 1862; at night, but not in the daytime.

Q. Were you wearing them in the daytime in 1879?

A. No, sir.

Q. Were you wearing them in the night?

A. Yes, sir, to read.

Q. How many times had you seen Hillmon, do you think, before that last time?

A. Well, I could not tell you. He used to always, when he lived with Major Houston, he always put his horse up here, and when he lived with Mr. Baldwin he either put it up there with me or Mr. Eldridge; and he frequently got teams of me.

Q. So that it amounted to seeing him a great many times?

A. I could not tell how many times it amounted to. Sometimes Hillmon was gone a year or two.

Q. So that it would run into hundreds of times?

A. No, not that many.

Q. Give us the best estimate that you can. A. I could not.

Q. Fifty times?

A. Well, I judge more than that.

Q. Did you talk with him these different times considerably?

A. Every time he would come in with his horse or to get a team.

Q. That was a good many times?

A. I couldn't tell how often.. A great many times.

Q. Now, you don't mean that he wore a mustache all that time, do you?

A. I never saw him without one.

Q. Do you mean that he wore his mustache long all that times?

A. I never saw him without a mustache and a pretty good one.

Q. Do you mean to say that it was shorter at that
1261 time than you had seen it?

A. It might have been often, but I never particularly noticed him until that day.

Q. Why did you notice him that day?

A. Simply because he was right over me, hanging up his coat right over my head.

Q. How could you look at his mouth when he was right up over you?

A. You stand up over a man when you are talking, and you will show your mouth when you wouldn't otherwise.

Q. What were you lying on? A. Lying on my bunk.

Q. Was there anything other than the mere situation to call your attention to the condition of his mouth at that time?

A. No, sir, nothing that I know of.

Q. Can you tell us any instance of ever looking in any other person's mouth under similar circumstances?

A. No. I have seen lots of people—

Q. With reference to your associates, people with whom you are acquainted? people who don't wear mustaches—can you tell who has missing teeth and who has not?

A. If you would particularly ask me I think I could.

Q. How many do you think you could tell?

A. I don't know.

Q. Do you know W. W. Nevison?

A. W. W. Nevison has not got good teeth.

Q. Has he got any teeth out?

A. I don't know certain; I never looked at them.

Q. You know him well?

A. I know him as well as I do any other lawyer there.

1262 Q. Do you know Mr. Horton?

A. B. J. Horton?

Q. Yes. A. Yes, I know him.

Q. You have seen him a great many times?

A. Yes, I have seen him often.

Q. Does he wear a mustache?

A. I couldn't tell you that.

Q. Another species of test that I would like to ask this gen-eman in reference to. Mr. B. J. Horton has lost one of his gs, has he not?
A. I have seen him going with a crutch.
Q. Can you tell me which leg is missing?
A. It is his right leg.
Q. Are you sure of that?
A. No, I think it is his left.
By the witness: If the Court please, I would like to explain ay—why my attention was called to that tooth in the first lace.
By Mr. Wheat: We are asking questions now. You spoke vith reference to a trunk that was brought up from Medicine Lodge.
A. I don't know whether it was brought up or not.
[A.] It was started from there?
A. Yes; there was some clothing—
Q. Where did you last see the trunk?
A. At Hutchinson, I believe.
Q. Have you not seen it in Lawrence? A. No, sir.
Q. What was done with it at Hutchinson?
1263 A. I don't know. It was in Mr. Baldwin's care.
Q. How do you know the shoes didn't arrive at Hutchinson? A. They were not in the wagon.
Q. Were those an especially valuable pair of shoes?
A. No, they were common shoes, but they were an extra-ordinary pair; I should judge tens.
Q. Were they any longer than the foot of the corpse re-quired?
A. I don't think they were any longer than the foot of that corpse.
Q. You think that the shoes, then, were appropriate for the foot of the corpse?
A. I think the shoes belonged to the corpse.
Q. The question is whether they were appropriate for the corpse? A. I should think so.
Q. The feet went to Lawrence, didn't they?
A. I suppose so.
Q. It is very easy to determine what length of shoes re-quired by the corpse is, [it]it not?
A. I couldn't tell. I know what shoes fit me.
Q. It would be easy to determine by the foot what size the shoes were? and is it not a matter of fact that shoemakers de-termine that constantly?
A. Yes. There was nothing peculiar about this pair. I should judge them to be tens or elevens.
Q. And the feet were long too?
A. Yes, looked so in the coffin.

Q. You think that those feet were tens or elevens, and that the shoes were tens or elevens?
A. I think the shoes were tens or elevens.
Q. Do you think the feet required tens or elevens?
A. I think they were pretty long feet.
Q. Do you know what length the feet were?
A. No sir; I don't know what length the corpse was.
Q. Do you know where Orrick is in Missouri?
A. Yes sir.
1264 Q. It has another name,—sometimes called Missouri City, is it not?
A. There is a little town over there I understood was called Orrick.
Q. You went there, did you, on this business?
A. Yes, I went there that time on my own solicitation.
Q. Were you not in the employ of one of these companies at that time? A. No sir, not at that time.
Q. Were you not paid for that trip?
A. Yes sir, afterwards.
Q. With whom did you go?
A. With young Brown and Buchan.
Q. Which one of the Browns—Reuben or John?
A. I don't remember the first name; one of the young men.
Q. It was not John Brown?
A. No sir, we went to see John Brown.
Q. About when was this as near as you can state?
A. It was a short time after the coroner's inquest.
Q. It was the next week, was it not?
A. It was a short time after.
Q. Will you explain to the jury what object you had in going there? A. I wanted to see John Brown.
Q. You saw John Brown in Lawrence, did you not?
A. Yes sir.
Q. That was the fore part of the week, after the inquest at Lawrence, that you went down there?
A. It was a short time after John got away from the sheriff there in Lawrence.
Q. What do you mean by that?
A. The sheriff had him under arrest and a guard with him, and he got away.
Q. What sheriff? A. H. S. Clark.
Q. Under what sort of process?
A. He had him arrested; a man by the name of
1265 Brockelsby was with him.
Q. How do you know that?
A. Only from hearsay.
Q. Who told you that?
A. Brockel told me he had been guarding him.

Q. Who is Brockel?
A. He was at that time on the police, or marshal force. He is now on a transfer.
Q. Who paid him for that work?
A. I don't know; I didn't.
Q. He told you he was guarding him? A. Yes sir.
Q. And Mr. Brown was going around there, around the city of Lawrence all the time just like any other citizen?
A. Yes sir. Brockel was with him most of the time. I never saw him but once and at that time he was with the sheriff.
Q. Has he ever been restrained one moment of his liberty?
A. I considered that he was at that time.
Q. On what business were you up in Valley Falls—for these insurance companies? A. Yes sir.
Q. During the inquest, you were there hunting witnesses, were you not? A. I went up to see Miss McCall.
Q. You have went around the country a good deal hunting witnesses, have you not? A. No sir.
Q. Been to several places? A. That was the only place.
Q. Did you not at that time search about Lawrence for witnesses?
A. I may have asked folks around Lawrence if they knew Hillmon; I think I did.
Q. Didn't you talk with Dr. Simmons on this subject?
A. Never.
1266 Q. Didn't you send your son to do it?
A. I never sent my son anywhere.

Redirect Examination.

Questions by Mr. Barker:
Q. State if you recognize that photograph (handing witness picture—Rep.) A. I do.
Q. It is a photograph of whom?
A. John W. Hillmon,—a good one too.
Q. Is that the Hillmon you have been speaking of?
A. Yes.
Q. Did you ever see a photograph of that kind before, like the one which I just showed you?
A. I have saw several.
Q. Where did you first see one like that?
A. The first one I seen like that—no, I saw some before that, but I saw one just like that in Mrs. Hillmon's mother's house.
Q. When?
A. I think it is about four years ago—four or five.
Q. Where?
A. In Mrs. Hillmon's mother's house, in the album.
Q. Where—in Lawrence?

A. No; up in Jefferson County—Jefferson County or Leavenworth County; it is very close to the line.

Q. They asked you in regard to your having acted as detective. I want you state now what other positions you have held in this State?

A. I have held so many—

Q. Just state now briefly; state if you were in the army?

A. Yes sir.

Q. Were you sheriff of Douglas County?

A. Four terms.

Q. City marshal? A. Three years.

1267 Q. Now you state you went after witnesses at this coroner's inquest. State who you solicited to go there to look at those remains?

A. Quite a number, but I could not state—

1268 The defendants and each of them next offered in evidence the testimony of Ollie Walker, given upon the trial of 1885. It is admitted by the parties that Mr. Walker is not within the jurisdiction of the court.

Said testimony was thereon read in evidence and is in words and figures as follows, to wit:

Ollie Walker, called for the defense, and after being duly sworn, testified as follows:

Questions by Mr. Barker:

Q. State where you live?

A. In Chicago, Cook County, Ills.

Q. State if you formerly lived in Lawrence?

A. I did, sir.

Q. State if you are a son of the witness who has just left the stand, Colonel Walker, of Lawrence? A. Yes, sir.

Q. State how long you lived in Lawrence?

A. From the time I was born until 1872 or 1873, when I went to Texas and stayed until 1875; I came back to Lawrence then and stayed there until the winter of 1878, December.

Q. State if you were acquainted with one John W. Hillmon? A. I was, sir.

Q. State if you know the fact of certain remains being brought to the city of Lawrence in the month of April, 1879?

A. I do, sir.

Q. State if you remember the fact of a coroner's inquest being held over those remains? A. I do, sir.

Q. State if you saw those remains at any place, and if so, state where?

A. I saw those remains in the rear of Bailey & Smith's furniture store, sir.

Q. Who are Bailey & Smith?

A. A furniture firm on Massachusetts street, Lawrence.

Q. State when you saw them there first?
A. I saw them there at one or two o'clock of the day they arrived.
1269 Q. How long had you known John W. Hillmon?
A. As near as I can recollect, for a year before the accident.
Q. How many times did you see those remains?
A. Three different times.
Q. You may state whether or not those were the remains of John W. Hillmon? A. They were not.
Q. You may state if you know the condition of John W. Hillmon's teeth? A. I do, sir.
Q. You may state whether they were sound or whether he had lost a tooth? A. He had lost a tooth.
Q. You may state if you are able to identify that picture—(handing witness photograph—Rep.)
A. I am, sir.
Q. State of whom that is a picture?
A. John W. Hillmon.
Q. Is that a picture of the person whom you have been speaking of? A. Yes, sir.

Cross-examination.

Questions by Mr. Wheat:
Q. State whether you ever saw any other corpse which had been dead as long as this one?
A. I think I have sir, yes, sir.
Q. Where? A. In Texas.
Q. Did you know the person?
A. I didn't know the person.
Q. Did know him in life? You mean the one I have reference to in life? A. I didn't know the person.
Q. Did you ever see the corpse of any person that you knew in life so long after death as this Hillmon corpse?
A. I can't say as I do sir, not quite as long. I don't know exactly how long this man was dead before I saw him.
Q. On which day in April was it that you saw this
1270 corpse in Lawrence?
A. I couldn't tell the date exactly, when it was.
Q. Supposing he died on the 18th of March; then you saw him at the time you did in April—What I want to get at is if you ever saw a corpse that had been dead as long as this corpse? A. I couldn't say I had.
Q. You know the changes in a corpse by that time are very considerable?
A. To a certain extent, I should say, yes.

Q. Do you know what change takes place during that time?

A. I should judge that was according to the climate the corpse was kept in.

Q. State whether the mold had begun to accumulate about the eyes, so far as you saw?

A. The first time I saw the corpse it was a little black under the eyes.

Q. I asked about the mold? A. No, sir.

Q. Hadn't the eyes become quite sunken?

A. No, sir, not the first time I saw him.

Q. How long was it between the first and last times you saw him? A. It was the following afternoon I saw it.

Q. You first saw him in Bailey & Smith's?

A. Yes, sir.

Q. The following afternoon, where did you see him?

A. In the same place.

Q. Were his eyes quite sunken then?

A. They were more so than when I first saw him.

Q. A good deal more so? A. I couldn't say they were.

Q. Hadn't some decomposition set in at some other places than at the eyes when you first saw him?

A. In the face, do you have reference to?

1271 Q. Yes.

A. The color in the face had changed, some, yes.

Q. What was the color of the face; you spoke of black under the eyes.

A. The color of the face was the color of most dead persons, and hadn't changed to any great extent. It was white

Q. Do you mean it looked like a dead person's face say who had been dead just a day or two?

A. To some extent it did.

Q. Hadn't the jaw swollen, and when the bandage was taken off did not it fall open?

A. No, sir, not the first day.

Q. Was not the mouth open on the first day?

A. No, sir, the uper lip—

Q. Hadn't the lip dropped down the first day?

A. No, sir.

Q. Was it tied up? A. Yes, sir, it was tied up.

Q. When did you first know Hillmon?

A. As near as I can recollect, it was in the spring of 1878.

Q. How frequently did you see him from that time until the time of his death?

A. I could not say how frequently. I used to see him off and on,—probably every week for a couple of weeks, and then maybe not for two weeks.

Q. If I understand you then, you saw him first some time in the spring of 1878? A. Yes, sir.

Q. Where? A. At my father's stable in Lawrence.

Q. In the spring of 1878? A. Yes, sir.

Q. How often did you see him during the remainder of the spring and summer of 1878? A. That I couldn't say.

Q. Well, state as near as you can?

1272 A. Probably twenty or twenty-five times, up to the last time I saw him.

Q. Now, about the spring and summer of 1878, how often did you see him?

A. That I could not say, because I kept no memorandum. I would make it at random twenty-five times.

Q. By the spring and summer I mean to end with the end of August? A. Yes, sir.

Q. Twenty-five times during the spring and summer?

A. I don't say twenty-five times. I say I guess that at random; twenty or twenty-five times.

Q. How many of those times will you fix during the summer months? A. Well, put it at half.

Q. And the balance of them in the spring, of course?

A. Yes.

Q. Now, you are as certain of that as anything you have testified to, are you?

A. Certainly not, sir, because I have no memorandum.

Q. Are you as certain that you saw him in the summer months as anything else you have testified to?

A. Certainly not, sir.

Q. Are you certain that you saw him at all during the summer of 1878 at Lawrence? A. Yes, sir.

Q. Also in the spring? A. Yes, sir.

Q. When did you first notice this missing tooth?

A. I think it was late in the fall.

Q. Where were you? A. Right in the stable, sir.

Q. How came you to notice it?

A. I was standing there talking to him. He had a horse there; we were getting the horse ready for him to go out.

Q. That was the first time you ever noticed it?

A. Yes; we were standing there talking of some business that he was going to do.

Q. You had frequently talked to him before?

A. No, sir, not to any extent; I had had very little to say to him.

1273 Q. Do you pretend that you can remember with reference to the missing teeth of all the persons of your acquaintance that you have talked with, had conversation with?

A. I guess I could, sir, especially when they had a tooth out like that.

Q. What drew your attention to that particularly?

A. Because it was a tooth out just like mine.

Q. When was that tooth taken out? A. In 1871 or 1872.

Q. You know a great many people who have a tooth out in the same place, don't you?

A. I don't say as I do. I know of one gentleman who has.

Q. Don't you know of more than one?

A. I don't know as I do.

Q. Is not it a very common thing for a tooth to be out in that place?

A. I don't know but it is just as common as any other place in the mouth.

Q. It is just as common as any other place?

A. Certainly, sir.

Q. And you have never noticed any other but the one person? A. I don't know as I have, sir.

Witness dismissed.

1274 The defendants and each of them next offered in evidence the testimony of Mrs. J. M. Dart, given upon the trial of 1885.

It is admitted by the parties that Mrs. Dart is not within the jurisdiction of the court.

Said testimony was thereupon read in evidence, and is in words and figures as follows, to wit:

Mrs. J. M. Dart, called for the defense, and after being duly sworn, testified as follows:

Questions by Mr. Green:

Q. Where do you reside, Mrs. Dart? A. In Dallas, Texas.

Q. How long have you resided at Dallas?

A. Over three years.

Q. Where did you reside before going to Texas?

A. In Lawrence, Kansas.

Q. How long did you reside there? A. Abuot seven years.

Q. Did you know a person by the name of John W. Hillmon? A. I met such a person.

Q. Where did you meet Mr. Hillmon?

A. At Mr. Faxon's.

Q. William Faxon's? A. The butcher Faxon's.

Q. When was that, if you remember?

A. It was some little time before his wife died.

Q. Before Faxon's wife died? A. Yes, sir.

Q. Who was present there at the time you met him, if you remember?

A. Mrs. Sanders, her daughter and Mrs. Hillmon came in while I was in there.

Q. Were you introduced to him there at the house at that time? A. At the house, yes, sir.

Q. Did you notice anything with regard to his teeth,—whether they were perfect or imperfect.

A. I noticed they were imperfect.

1275 Q. In what respect? A. One being gone.

Q. Will you state which one? A. I cannot.

Q. Can you state in which jaw?

A. I am not positive, I can't state which one.

Q. Did you see him after that? A. No, sir.

Q. That is the only time? A. Yes, sir.

Q. Where were you in the room at the time you noticed this?

A. I was sitting at the foot of the lounge; Mrs. Faxon was lying on the lounge.

Q. Where was he?

A. He was sitting about opposite the centre of the lounge.

Q. How did you come to notice it?

A. There was some remark made about—

By Mr. Riggs: Don't state anything that was said.

Q. How came you to notice it—you need not state anything that was said? A. It was his laughing.

Q. There was some remark made in which he laughed, and you noticed it? A. Yes, sir.

Q. Do you recognize those pictures? (showing witness photographs.) A. I don't.

Q. You only saw him the once? A. Yes, sir.

Q. Do you recognize that picture? A. No, sir, I don't.

Q. You didn't see him often enough to recognize these pictures? A. No, sir, I only saw him the once.

Cross-Examination.

Questions by Mr. Riggs:

Q. How long was he in the room with you that evening?

A. Probably ten or fifteen minutes—not long.

Q. And you saw him laugh once? A. Once, yes, sir.

1276 Q. How many years ago was that?

A. It was before Mrs. Faxon died.

Q. How many years ago? A. I can't say.

Q. About how many years ago?

A. It was when Mrs. Hillmon had been married a few weeks. I can't give the date.

Q. You dont' remember what year it was, then?

A. No, sir.

Q. You can't testify to the teeth of all your friends that you have seen alive, can you? A. Not all.

Q. Do you think you could testify to the teeth of a good many of your friends in Lawrence?

A. I think I could, some.
Q. You were examined before in this case? A. Yes, sir.
Q. You were asked at that time to testify and you gave the names of two persons whose teeth you could testify to?
A. I don't recollect.
Q. Didn't you testify to the teeth of Louis M....l?
A. Yes, sir.
Q. Did you mention any other names than those of friends at Lawrence at that time?
A. I mentioned my husband's name.
Q. Any others? A. My children's, I think.
Q. Do you know Mr. Rudiger? A. Yes.
Q. You know him very well, don't you?
1277 A. Not very well.
Q. You have seen him a good many times?
A. Not very many times.
Q. Can't you say how his front teeth are?
A. I don't think I can.
Q. Do you know Mr. Albert Hadley? .A No, sir.
Q. Do you know John K. Rankin? A. By sight.
Q. You have seen him a good many times?
A. Never near.
Q. Do you know Mr. Osborn Shannon? A. No, sir.
Q. Not by sight? A. No, sir.
Q. Who is your family physician in Lawrence?
A. Dr. Smythe, now of Denver; Dr. Samuel Smythe.
Q. Can you state as to the condition of his front teeth?
A. He had good teeth.
Q. Do you swear to that? A. Yes, sir.
Q. You swear that he had no teeth out?
A. I can't swear to that.
Q. No front teeth, I mean? A. I don't think he has
Q. Do you swear that he has not?
A. I can't swear to that.
Q. Do you know his brother? A. Dr. Frank?
Q. Yes, Frank H. Smythe? A. Not well.
Q. You have seen him frequently? A. Yes, sir.
Q. Do you know as to his front teeth? A. No, sir.
Q. You live in Texas, do you not? A. Yes, sir.
Q. Came here to testify in this case? A. Yes, sir.
Q. And for no other purpose? [—] No, sir.
Q. You came here once before to testify in this case, didn't you? A. Yes, sir.
Q. The companies pay your expenses here and back?
A. Yes, sir.

Witness dismissed.

1278 The defendants and each of them next offered in evidence the testimony of Mrs. Harris given upon the trial of 1885.

It is admitted by the parties that Mrs. Harris is out of the jurisdiction of the court.

Said testimony was thereupon read in evidence, and is in words and figures as follows, to wit:

Mrs. Harris called for the defense, and after being duly sworn testified as follows:

Direct Examination

By Mr. Barker:

Q. Did you ever live in Lawrence? A. I did.

Q. Do you know how old you are? A. No, sir; I don't.

Q. Did you know Mrs. Hillmon?

A. I knowed Mrs. Hillmon well.

Q. Do you remember what her name was before she was married?

A. No, sir; I don't know what her parents' name was.

Q. Did you know John Hillmon? A. I knowed him.

Q. When did you become acquainted with him?

A. Before he was married.

Q. What was your opportunities of being acquainted with John W. Hillmon and Mrs. Hillmon?

A. I was going home—

Q. State whether or not you ever worked for them?

A. Yes, sir; I worked for them. I washed for Mrs. Hillmon.

Q. From what time to what time?

A. I have done some four or five washings for them.

Q. Before or after they were married?

A. Before or after they were married.

Q. What was Mrs. Hillmon doing when you became acquainted with her?

A. She was working for Mrs. Faxon. Then I took her place.

Q. Then you washed for them? A. Yes, sir.

Q. Do you remember when Mr. Hillmon went away?

1279 A. I went away near about the time he went off. I was there when she was a fixing for him to go.

Q. Do you remember when you first saw Mr. Hillmon?

A. I remember it just as well as if it was yesterday. It was on Monday.

Q. Where was it that you saw him?

A. He had been there at Mrs. Faxon's, and I had been to town. I met him going to town as I came back.

Q. Did you ever talk with Mrs. Hillmon in regard to him?

A. Yes, sir; we both stopped there and talked.

Q. What did she say to you?

A. She said that is my lover. Said I, "It is?" She says, "He is worth a million of dollars."

Q. What did you do?

A. I said, "If he is worth a million dollars, have him."

Q. What did you do?

A. I never done anything, only walked in front of him.

Q. Why did you walk in front of him?

A. I wanted to see what he looked like.

Q. Did you observe what he looked like? A. Yes, sir.

Q. Did you see anything peculiar about him then or at another time? A. He had one tooth gone.

Q. Was it after that that you washed for them?

A. Yes, it was after that.

Q. Do you remember anything in regard to a photograph?

A. I recollect of having a photograph, and recollect of its being scratched.

Q. Where was this photograph? A. At their house.

Q. Where did you see it? A. Lying on her stand.

Q. You spoke of her house; what do you mean?

A. She had rented a house.

Q. Do you remember with what family she was living at that time? A. I know whose house she was living in.

Q. Whose? A. A house they called Sudweek's.

1280 Q. Was that the house she was living in?

A. Yes sir, she was living there then.

Q. What I want to get at [it], where this photograph was —at whose house it was?

A. It was at the house she had rented herself.

Q. Where did you say it was?

A. It was lying on her stand, in a front room. Me and her lived together. That was the reason I came to see it.

Q. About when was that?—Before or after he went away?

A. After he went away.

Q. You say you saw the photograph again?

A. No, I said I saw it after he went away.

Q. What condition was it in?

A. When I see it it was all scratched up. She said she guessed some of the children had scratched it,—I don't know who it was.

Q. Did you ever have any conversation with Mr. Hillmon?

A. Well, I had talked a good deal with him before he went away.

Cross-examination

By Mr. Riggs:

Q. When did you first see Mr. Hillmon—how long before he was married? A. It was not a great while.

Q. About how long. A. I reckon about six weeks.

Q. Where was he boarding about that time?
A. I don't know where he was boarding. She was staying at Mrs. Judson's. He was boarding there too, if I am not mistaken.
Q. That was the first time you ever saw him?
A. Yes sir.
Q. You saw him, then, when he came to Mrs. Judson's?
A. I saw him when he came from Mrs. Faxon's. He took Mrs. Hillmon away from there.
1281 Q. They were going away from Faxon's and you met them on the road, did you? A. Yes sir.
Q. And she said that was her beloved? A. Yes sir.
Q. And she said he was worth millions?
A. Yes sir, and I said, "Get him."
Q. And you turned around and looked at him?
A. Yes, I turned around and looked at him.
Q. You didn't have much talk with him? A. No.
Q. But you looked him in the face? A. Yes sir.
Q. And you saw he had a tooth out at that time?
A. Yes sir.
Q. How did you happen to notice that he had a tooth out?
A. He was laughing and talking.
Q I thought you said he was not talking?
A. He was not talking to me.
Q. How long did you stand there talking?
A. I didn't stay but a few minutes—not more than fifteen or ten.
Q. Was it after night?
A. No, it was before night. It was about supper time.
Q. Where was it in Lawrence?
A. It was on the west part of Lawrence.
Q. What street?
A. I could not tell you to save my life.
Q. It was standing upon the street was it? A. Yes sir.
Q. That was the first time you ever noticed that he had a tooth out?
A. Yes sir. After that I washed for them.
Q. When you washed for them, he was not by the wash-tub all the time, was he?
A. No, he was not. He was at home; I was at home
1282 washing.
Q. You took the washing to your house?
A. Yes sir.
Q. Mr. Hillmon was not there when you were washing for him? A. No.
Q. How many times did you ever see Mr. Hillmon?
A. I could not tell how many times.
Q. Could you state about how many times.

A. No, I could not tell.

Q. He was in there when you were washing for him?

A. No, he was not at the house when I was washing for him.

Q. Was there ever any circumstance for that statement except that statement of Mrs. Hillmon, that he was worth a million dollars, that directed your attention to his teeth?

A. I don't know whether there was.

Q. You would not undertake to speak about the teeth of any other man except Mr. Hillmon, would you? A. No.

Witness dismissed.

1283 Eleanor Faxon, a witness produced by the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Green:

Q. State your name, please? A. Eleanor Faxon.

Q. Where do you reside? A. Lawrence, Kansas.

Q. How long have you resided at Lawrence, Kansas?

A. Since the raid; after the raid.

Q. Have you resided there ever since?

A. No, I was not; I went down to Kansas City once or twice but I came back.

Q. Where were you residing in 1878? A. In Lawrence.

Q. Were you acquainted at that time with the plaintiff, Mrs. Sallie E. Hillmon? A. Yes sir.

Q. Do you know where you became acquainted with her?

A. I met her at Mr. Faxon's when his first wife was living.

Q. Mr. William Faxon? A. William T. Faxon.

Q. What was she doing there at that time, if you know?

A. Doing housework.

Q. When was that?

A. About 1872, somewhere along there; I don't just remember what year it was now.

Q. Do you remember about the time she was married?

A. I remember when she was married, but I don't remember the time or the date.

Q. When was it with reference to the time she was married; before or after?

A. That she was living at Faxon's?

Q. Yes.

A. She was living there before she was married.

Q. Can you tell about how long before?

A. No, not very long long, I don't think.

Q. Now, did you meet a man by the name of John W. Hillmon? A. Yes.

Q. When did you become acquainted with him?

A. I met him while she was working at Mr. Faxon's.

Q. Where did you meet him?
A. Met him at Mr. Faxon's.
Q. Do you know how he came to be there?
A. Came to see Miss Quinn.
84 Q. She was Miss Quinn, and he came to see her?
A. Yes, sir.
Q. You were there? A. I was there.
Q. What were you doing there?
A. Oh, I did the plain sewing, and I was there part of the me waiting on her.
Q. Do you remember about how long it was before they ere married that you met her there?
A. No, I don't remember just how long it was; not so very ng.
Q. How often did you meet him there at Mr. Faxon's?
A. Oh, I don't remember how often I met him; didn't take ny notice of it.
Q. Did you meet him there more than once?
A. Oh, yes, several times.
Q. Now, you say you know they were married. How do ou know? A. Because I saw them married.
Q. You were at the wedding? A. Yes, sir.
Q. Where was that? A. Mrs. Judson's.
Q. Were you invited to the wedding? A. Yes, sir.
Q. Now, did you see Mr. Hillmon after that time?
A. Yes, sir, I saw him several times passing back and forth.
Q. Did you see him to converse with him prior to this wed- ing?
A. Why, yes, I met him and spoke to him quite often.
Q. And after that time did you see him to converse with im A. Yes.
Q. Now, you may state, Mrs. Faxon, if you ever noticed he condition of Mr. Hillmon's teeth?
A. I noticed he had one out in the front, either out or broken ff through to the gum.
Q. In which jaw was that tooth? A. Upper.
Q. In the upper jaw? A. Yes, sir.
Q. Now, you may state, Mrs. Faxon, if at any time you ever had any conversation with the plaintiff, Mrs. Hillmon, n regard to that tooth?
A. Yes, sir, I made the remark that the tooth being out spoiled his looks.
Q. What reply, if any, did she make?
A. She said he could have it put in.
1285 Q. When was that, before the marriage or after the marriage? A. Before they were married.
Q. Then you had noticed the absence of this tooth before they were married?

The plaintiff objects to the question as leading. Overruled, the plaintiff duly excepts.

A. Yes, sir.

Cross-examination

By Mr. Atwood:

Q. What did you say your name was, madam?

A. Eleanor Faxon.

Q. Is it Mrs. Faxon or Miss, I didn't quite understand.

A. Mrs. Faxon.

Q. Are you married now? A. No, sir.

Q. What relation are you to the Faxon whom you have been talking about and as owning the home at which Mrs. Hillmon was?

A. W. T. Faxon; his first wife was living then when Mrs. Hillmon was there; I am the second wife.

Q. You say you are unmarried now?

A. I am a widow now.

Q. Were you his wife at the time of his death?

A. Yes, sir.

Q. You say you met Mr. Hillmon first at Mr. Faxon's?

A. Yes, sir.

Q. Do you remember how long that was before his marriage to Miss Quinn?

A. No, I don't remember just how long it was.

Q. Of course, you couldn't tell just how long.

A. Not very long.

Q. Within a month or so, think you?

A. Oh, yes, a month or six weeks.

Q. Somewhere in that neighborhood. Did Miss Quinn go directly from the Faxon house to live with the Judson family at the time of her marriage; in other words, was she living at Faxon's at the time she was married?

A. No, she was living at Mrs. Judson's.

Q. How long before?

A. A few weeks; I don't remember just how long.

Q. You were employed in some capacity in the Faxon household at that time? A. Yes, sir.

1286 Q. And she was there too? A. Yes, sir.

Q. How long did you both work there together?

A. Not very long. I don't known; three or four weeks; until Mr. Hillmon came there.

Q. You say three or four weeks; did you continue to reside there at Faxon's after she left?

A. I did not reside there all the time; I went back and forth.

Q. You were in and out as your services were required?

A. Yes, sir.

Q. She was there all the time?

A. She was there all the time.
Q. Did you remain there during the evening and night?
A. No.
Q. You came there during the day? A. Yes, sir.
Q. What time did you usually go home?
A. Oh, I don't know; sometimes—
Q. Ordinarily. Did you stay there during the evening?
A. No, I didn't stay there during the evening.
Q. How many times during that three or four weeks do you say Mr. Hillmon came to the Faxon house?
A. He didn't come there only a few times.
Q. How many times did you see him there?
A. I didn't keep account of it.
Q. What is your best recollection about it?
A. Before they were married?
Q. Well, during the three or four weeks that you were working there and that she was staying there?
A. Half a dozen times, I guess.
Q. Did he come there in the day or evening? A. Day.
Q. The time that you met him there—was that the first time you met him?
A. Yes, the first time I ever met him.
Q. After that, where did you meet him, if at all, after she left there?
A. I would meet him on the road; I met him when he came to my house and as they passed back; they were there in the evenings at my house.
Q. What was your name at that time?
A. My name was Harrison.
1287 Q. He came to see you?
A. No, he didn't come to see me; they came to spend the evening.
Q. The two of them? A. Yes, sir.
Q. That occurred frequently?
A. Three or four times, I guess.
Q. And that all transpired prior to the time of the marriage? A. After the marriage.
Q. Three or four times, you say?
A. Yes, about that.
Q. When did these three or four times occur?
A. Evenings.
Q. I mean as to the time they were married; in October?
A. Yes, right after they were married.
Q. Shortly after they were married? A. Yes, sir.
Q. Did you see him after he went away to the southwest on any of his trips and came back again?
A. No, I didn't see him.
Q. Didn't see him at any of those times? A. No.
Witness excused.

1288 W. T. Griffiths, a witness produced by the defendants, being duly sworn, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name if you please?

A. My name is W. T. Griffiths.

Q. Where do you reside?

A. In Reno township, Leavenworth county.

Q. What official capacity or office have you held?

A. I don't hold any.

Q. Have you held any?

The plaintiff objects as immaterial; objection overruled, the plaintiff excepts.

A. Well, yes, I have held the office of trustee of my township.

Q. How long have you resided in Leavenworth county, Mr. Griffiths?

A. Well I have made Leavenworth county my home for about, well, since 1876.

Q. Where were you residing before that time?

A. Well, I made it my home in Jefferson county; my folks lived in Jefferson county, the south part of the county, Jefferson county; that was my home, that is, I called it my home and made it my home up until I had a home of my own in this county.

Q. Where were you residing about the years 1871 and 1872?

A. Well I made it my home, I called my mother's place my home at the time. Well, I wasn't there but very little of the time; it was my home though in Jefferson county, the south part of Jefferson county.

Q. Did you know a man by the name of Levi Baldwin?

A. I used to know Levi Baldwin, yes.

Q. Where did you know him?

A. Well, I knew him both in Douglas county and in Leavenworth county.

Q. Where was he living in Douglas county?

A. He lived when my folks came to the state, when we first came to the State of Kansas, he lived up the river; the firstyear we were in Kansas we lived right near him, right near his father and I knew him at the time.

1289 Q. How far west was that from Lawrence?

A. About five miles.

Q. West?

A. West; he lived right up the river north of west.

Q. Do you know when he went from there to Leavenworth county; about the time?

A. Well, yes, about the time; I don't know whether I could tell the exact time or not; I could tell right close.

Q. Did you work for him at any time? A. Yes sir.

Q. Was that while he was residing in Leavenworth county? A. Yes.

Q. About what year was that?

A. Well, to the best of my recollection [—] was 1872; I worked for him in 1872 is my best recollection.

Q. Now, did you ever know a man by the name of John W. Hillmon? A. Yes sir.

Q. Where did you become acquainted with him and when?

A. I became acquainted with him to the best of my recollection in 1871, with John W. Hillmon.

Q. What was he doing at the time you became acquainted with him, if you know?

A. He was herding cattle, or he was awhile I think; I am quite confident he was herding cattle; anyway he had charge of a bunch of cattle.

Q. What were you doing when you were working for Baldwin? A. I worked on the farm; done general farm work.

Q. Had you been herding cattle before that in that vicinity?

The plaintiff objects to the question as leading. Objection overruled, the plaintiff excepts.

A. The year before I worked for Mr. Baldwin I herded cattle.

Q. Whereabout was the range?

A. Well, it was—I herded just south adjoining Mr. Hillmon's herd or his bunch of cattle, just on the range just south at one of Governor Robinson's places, and still north—Mr. Hillmon was still north of me.

Q. Now, you may state Mr. Griffiths whether you saw him frequently at that time?

A. Well, yes, we became—I became acquainted with him along shortly after the herds wen out onto grass; I was with him quite frequently on the prairie, at watering places,
1290 and so forth as cowboys would always try to get together when possible.

Q. Did you meet him at social gatherings?

A. Well, the following winter, I did yes, sir, fall and winter, I met him at some parties, socials and so on.

Q. In what neighborhood was that?

A. Well, right there in the neighborhood, right there in the immediate neighborhood there.

Q. Did you know the plaintiff, Mrs. Hillmon at that time?

A. Not at that time. I became acquainted with Mrs. Hillmon, as I suppose it was Mrs. Hillmon afterwards. I became acquainted with her while I worked for Mr. Baldwin; became acquainted with her family.

Q. Will you describe the appearance of John W. Hillmon, Mr. Griffiths, in a general way?

A. Well, Mr. Hillmon was a man of medium size, medium height, and a good looking young man.

Q. Do you remember the color of his hair?

A. Well, he had dark hair or brown hair, brown hair, I think I would call it, yes sir.

Q. What was his carriage?

A. He was straight, stood erect, very nice looking man.

Q. In regard to his general build, what do you say?

A. My recollection of Mr. Hillmon was he was a well built man, he is a fairly well built man, fairly well built, square shoulders.

Q. In regard to his hands and feet; do you remember in regard to those?

A. Well, I don't know that I do particularly, now, more than he was a very nicely proportioned man; that is my recollection now.

Q. Now, you may state, Mr. Griffiths, if you ever observed his teeth?

A. Well, yes, he had, Mr. Hillmon had a tooth out in front, or I don't know, I don't know that it was direct in front, but he had a tooth out that was visible to most any one.

Q. Now, after this time that you knew Mr. Hillmon in that neighborhood did you see him again?

A. I don't understand you.

Q. I say, after the time that you became acquainted with him in 1871, did you see him after that?

A. Oh, yes, I seen him frequently after that.

1291 Q. For about how long, do you remember?

A. Well, I don't think I seen Mr. Hillmon—I left that neighborhood in the fall of 1872; I worked for Levi Baldwin in the spring—

The plaintiff objects to the answer as not responsive to the question.

Q. You left the neighborhood?

A. I left the neighborhood late in the fall of 1872 and I went to Texas, and I didn't see Mr. Hillmon any more until, well, 1876 or 1877.

Q. Where did you see him then?

A. I met him in Lawrence.

Q. When did you next see him if you saw him at all?

A. Well, I seen him, I met him frequently after I had returned; I seen him frequently then; I would meet him in Lawrence perhaps; I think I met him once or twice in Tonganoxie, later though.

Q. About when was it that you last saw him, Mr. Griffiths?

A. My best recollection is I saw him last in the winter, the latter part of the winter of 1879; the last time I seen him, I think to the best of my recollection it was the latter part of the winter of 1879, perhaps January or February 1879.

Q. Where did you meet him at that time?

A. I met him at that time in John Eldridge's livery stable in North Lawrence, and walked with him across onto the other side of the river and had a talk with him that day.

Q. Where was Eldridge's livery stable located, please?

A. On Bridge Street in North Lawrence.

Q. That would be on the north side of the river?

A. On the north side, yes sir.

Q. About how far from the bridge? A. Well—

Q. In a general way?

A. Well, I should judge probably 20, 25 to 30 rods; something like that.

Q. Now, did you have a conversation with him in Eldridge's livery stable?

A. He and I talked a while in Eldridge's livery stable.

Q. Did you observe his tooth at that time or his teeth at that time?

1292 The plaintiff objects to the question as leading. Objection overruled, the plaintiff excepts.

A. I don't remember whether I did at that time or not; I can't remember now whether I did at that time or not.

Q. Well, did you have a conversation with him regarding his teeth at that time?

A. I don't remember whether I did at that time or not I couldn't say whether I did that time or not; we were busy talking of other things.

Q. Did you meet him in the fall of 1878?

A. Why, yes, I met him frequently in 1878.

Q. Was that after he was married or before?

A. Well, I think—I can't remember about that; the last time that I seen him was the first time to my best recollection, was the first time I knew that he was married; the first time I knew he was married was the last time I seen him; that is my recollection. Of course, I am not altogether clear on that subject, though I know the last time I seen him we talked—the reason I remember that so well it was just after he was married; we talked about it and he told me at that time—

The plaintiff objects to the witness telling what he was told.

Q. Was reference made to the condition of his teeth at that time, in that conversation? A. I couldn't say whether—

Q. Did you at any time in your recollection have a conversation with him in regard to his teeth?

The plaintiff objects to the quesiton as incompetent, irrelevant and immaterial and hearsay. Objection overruled, the plaintiff excepts.

A. Yes, sir.
Q. Do you remember where that was?
A. Well, it was at a party; I remember that; I think it was at a man's by the name of Torrence where we were and he was there.
Q. About when was that Mr. Griffiths?
A. That must have been—I rather think that that was in the winter of 1871 or spring of 1872, somewheres along
1293 in there, somewhere along in there about that time.
Q. Do you remember the fact of a body being brought to Lawrence in the spring of 1879, claimed to be that of Mr. Hillmon? A. I heard of it, yes, sir.
Q. Did you see the body? A. No, sir.

Cross-examination

By Mr. Atwood:
Q. When did you first tell this tale, Mr. Griffiths, to the insurance companies, agents or lawyers?
A. Right here in the chair.
Q. Never [have] told it to them before that time?
A. No, sir.
Q. When you came here you didn't know what they had subpoenaed you about, did you? A. No, sir.
Q. You knew nothing of being a witness or that you were expected to be a witness until the paper was served on you to come up here? A. I never knew anything about it.
Q. So far as any statement made by you is concerned, these gentlemen over there didn't know what you did know about it? A. No, sir.
Q. Now, you say that your first acquaintance with Hillmon dates back to 1871, as your recollection serves you.
A. 1871 is my recollection.
Q. I understand that is all anybody can swear to, his best recollection. At that time, the tooth was out? A. Well—
Q. It was noticeable, I believe you said?
A. My first recollection of his tooth being out was being with him at parties.
Q. Well, then, it was not so noticeable, the absence of that tooth that you noticed it [—] you first became acquainted with him? A. I don't remember as to that.
Q. You remember meeting him? A. Yes, sir.
Q. And you remember the tooth being out? A. Yes, sir.
Q. And the absence of it was quite noticeable?

A. Yes, sir.
Q. Now, then, you say you saw a good deal of him in the summer of 1871? A. Yes, sir.
1294 Q. And then you met occasionally socially during the summer or winter of 1871 and '2? A. Yes, sir.
Q. And it was sometime during that time that you noticed that his tooth was out? A. Yes, sir.
Q. How does your recollection serve you as to being out from the beginning, so far as you know?
A. It possibly was out; I can't remember.
Q. You have testified as your recollection serves you?
A. Yes, sir.
Q. Was there anything that fixed it in your mind that made you come to discover it suddenly or anything important for some time? A. Yes, sir.
Q. The tooth was gone? A. Yes, sir.
Q. That is a fact, is it? A. Yes, sir.
Q. That was in the winter of 1871-2?
A. About that time, yes, sir.
Q. Did you ever notice it before this time that you mentioned when you met him at parties and noticed it?
A. I don't remember whether I noticed it; I can't remember as to that, whether I might have noticed it.
Q. You recollection does not cause you to say it was not out during the summer of 1871? A. No, sir.
Q. You don't remember much about that one way or the other at that time? A. No, sir.
Q. Now, your intercourse, practically that summer, was meeting occasionally on the range? A. On the range, yes, sir.
Q. Talking together? A. Yes, sir.
Q. Did that occur very frequently during that summer?
A. Well, yes, quite frequently, yes, sir.
Q. And the absence of this tooth was noticeable in conversation?
A. Well, I say I don't remember whether it was that summer or not; I don't remember during the summer.
Q. What I am asking you is was it noticeable when you talked with him? A. Yes, sir.
1295 Q. Now, how does your recollection serve you as to his having a tooth out during that summer?
A. If I would be allowed to explain—
Q. Just answer my question how your recollection serves you as to whether it was in at that time?
A. I could not say whether it was or was not; I could not say as to that; I don't remember as to that.
Q. You remember that you knew him but a short time?
A. I do.

Q. You remember that the absence of the tooth was very noticeable. Just answer that question. A. I remember—

Q. Is that a fact; the absence of the tooth was quite noticeable. Is that a fact? A. Well, yes, I will say yes.

Q. Yet you don't know when it was that you first noticed that it was out? A. Yes, I do.

Q. Didn't you say that you could not tell whether it was in 1871 or not, the summer of 1871?

A. I didn't aim to say that.

Q. Now let us get at the fact. Do you now remember whether or not that tooth was absent, the one you are speaking of, was out during the summer when you used to associate with him on the range in 1871?

A. I don't remember about the tooth during the summer.

Q. The fact is that the first you remember of meeting and knowing Hillmon was in the summer of 1871? A. Yes, sir.

Q. And you remember that tooth's absence was noticeable?

A. I remember the tooth.

Q. Just answer the question, the absence of the tooth was noticeable, that is a fact, is it not? A. Well, yes.

Q. And yet you don't remember whether the tooth was in or out during the summer of 1871; that is a fact, too, is it not?

A. The fall of 1871 was the first—

Q. Just answer my question, please. Is it a fact, you cannot say that your recollection does not serve you to say whether that tooth was out or in his head in the summer of 1871?

A. I say that I don't remember as to the—

Q. That is all? A. That summer.

1296 Q. That is what I understood you to say. You say that after that you met him occasionally?

A. Yes, sir.

Q. And he was out west part of the time, you say; I suppose you met him when he came back? A. Yes, sir.

Q. How frequently did you see him after his marriage?

A. I have no recollection of having met him but once after he was married; I may have met him oftener than that.

Q. You know as a matter of fact he went away shortly after his marriage and was gone most of that winter preceding the time it was claimed he was killed?

A. Yes, sir; I think so; that is my understanding.

Redirect Examination.

By Mr. Green:

Q. Mr. Griffiths, you say there is some circumstance by which you recollect that in the winter of 1871 that the tooth was out. State what that incident was, if you please?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

A. It was at a party along in the fall or winter of 1871; he remarked—Hillmon and I were joshing each other; he was joshing me about being bald-headed, and I was after him about his snag teeth.

The plaintiff moves to strike out the answer as not responsive to the question. Motion overruled, the plaintiff excepts.

Witness [excepts.]

1297 The defendant read in evidence the deposition of Henry Hillmon, which is in words and figures as follows, to wit:

Q. State your name, age and place of residence.

A. My name is Henry Hillmon. I am fifty-three years old. I reside in Lamar county, Texas.

Q. Please state your father's name?

A. Benjamin Hilmon.

Q. Is he living or dead? A. He is dead.

Q. Where did he die?

A. He died in Jefferson County, Kansas, about four miles northeast of Valley Falls.

Q. What was the cause of his death?

A. He was killed in a coal bank.

Q. Had you any brothers or sisters?

A. I had at that time two brothers and two sisters.

Q. State their names.

A. There was John Wesley Hilmon, Mary E. Hilmon, who is now Mary E. Nichols, and Martha J. Hillmon who is now Mrs. Martha J. McCoy, and Wm. G. Hilmon.

Q. When and where did you last see John W. Hilmon, your brother?

A. It was on the stream called the Picket Wire in Colorado north of Trinidad. I was encamped there when he came along.

Q. When was that?

A. It was in 1877 or 1878 somewhere between the 20th of August and the first of September.

Q. Who was with him?

A. There were ten to fifteen men with him the only

1298 one of whom I know was a partner of his named Jack Brown.

Q. What were they doing?

A. They were leaving teh buffalo range, going north with a bull-train.

Q. When had you last seen John W. Hillmon previous to this time?

A. It was three or four years before I was with him on the buffalo range on the head waters of McClelland Creek in the Texas Panhandle.

Q. How did you come to be with him there?

A. Marshal Sewell and my brother John W. Hilmon hired me to go out and skin buffalo for them.

Q. Where had you last seen him before that time?

A. It was in the neighborhood of two or three years, at Leavenworth City, Kansas.

Q. Had you seen him frequently before that?

A. I had seen him every two or three weeks since I left the service in 1865. We were boys brought up together until I went into the army.

Q. Describe your brother's appearance beginning with his height.

A. He was about five feet ten inches, in his boots; high square shoulders, his body tapering to the hips; his hair light brown; light mustache and light whiskers, light in color and thin set. He had very sharp keen brown eyes.

Q. What was the shape of his nose?

A. It was inclined to be high at the bridge and the point turned to one side which was occasioned by a knock of some kind.

Q. Describe his hands and feet.

A. He had very shapely hands and feet.

Q. Do you know what size boot he wore?

A. When he bought a fine boot, he got about a five and a half, I think.

Q. State the character of his teeth.

A. He had nice even teeth, but one of his front teeth was destroyed and broken off. It first turned black from a knock or something of the kind and afterwards began to decay and broke off on one side.

Q. Did he show his teeth plainly when he laughed?

A. Mediumly plain.

Q. Did you know of his having been wounded in the hand?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial. The Court sustained the objection, to which action and ruling of the Court the defendants at the time duly excepted.

A. Yes, I heard he was so wounded. When I left the buffalo range and went to Dodge City some buffalo hunters told me John had had his hand torn by a cartridge, down on the range.

HENRY HILLMON.

1299 The defendants, and each of them, next offered in evidence the testimony of William Hillmon given upon the trial of 1896.

It is admitted by the parties that William Hillmon is dead.

Said testimony was thereupon read in evidence to the court and jury, and is in words and figures as follows, to wit:

William Hillmon.

William Hillmon, called, on behalf of defendants, being duly sworn, deposes and says:

Direct Examination.

By Mr. Green:

Q. What is your name? A. William Hillmon.

Q. Where do you reside, Mr. Hillmon?

A. For the last 18 months I have been at Cripple Creek, Colorado, or within that vicinity.

Q. What is your business, Mr. Hillmon?

A. Mining and prospecting.

Q. How long have you followed that, Mr. Hillmon?

A. Well, that's been my principal work since 1871 with the exception of about six years I was on the west plains hunting buffalo.

Q. Now where did you formerly reside?

A. Jefferson County, Kansas, Valley Falls.

Q. What relation are you to Mrs. Nichols, who just testified? A. She is my sister.

Q. What other brother and sisters do you have?

A. I had one other sister, and two brothers.

Q. What were the names of your brothers?

A. The oldest was Henry Hillmon, second John W. Hillmon, and sisters, Mary E. Hillmon and Margaret J. Hillmon, who is now Mrs. Nichols and Mrs. McCoy.

Q. When did you leave Valley Falls?

A. I left Valley Falls the 4th of July, 1869.

Q. Had you been residing at home up to that time?

A. I had with the exception of about 11 months in 1864, I went up through Jonathan County and Atchison County, and was gone about 11 months.

1300 Q. Was your brother John W. Hillmon living there up to that time?

A. My brother John W. Hillmon lived there up to 1864 and went up north and stayed a year to the next fall, 1865. In the fall of '65 after he had been discharged he came back home.

Q. Did he stay there for that time as long as you stayed there? A. No, sir.

Q. Where was he, do you know?

A. In the spring of 1868 [we] left home and went on the plains.

Q. Did he return again before you went away?

A. He did some time that fall; came down here on some business and went out home and stayed over night, as near as I can remember.

Q. Now all this time prior to 1869 did you know, and do you know the condition of his teeth? A. Yes, sir.

Q. What was the condition of his teeth at that time?

A. Well I can't say just the time they began to decay but at the time he left home in 1864, one tooth had begun to decay before he left home at the age of 17, or a little past that.

Q. And did you notice that in 1869, when he was there?

A. Yes, sir.

Q. What was the condition at that time?

A. A little bit worse.

Q. Now did you see John W. Hillmon after you left there in 1869? A. Did I see John W. after I left in 1869?

Q. Yes, sir. A. Yes, sir.

Q. Where did you next see him?

A. Central City, Colorado.

Q. What year was that, do you remember? A. 1872.

Q. How long did you see him there at that time?

A. He came there at Central City some time along in May, 1872, and we worked together and didn't leave that country together until along September, 1872, he went off to hunt, and before he came back I went down on the plains and went to hunting buffalo.

Q. Did you see him again after that? A. Yes, sir.

Q. Where did you next see him?

A. The next time I met him I think it was some time
1301 early in 1875--early in 1875—might have been some time in January. It was early in 1875 that I run onto him south of the Canadian river or down there pretty near—in the southwestern corner of Kansas.

Q. When was the last time you saw John W. Hillmon?

A. It was some time in July, 1878.

Q. Where did you see him at that time?

A. It was at a creek called Yellow Horse; out on the edge of the [state] plains.

Q. Was he there with you? A. Yes, sir.

Q. How long was he there?

A. We got together there sometime along in June it must be—I don't know—along about June.

Q. Where did you first meet him at this time?

A. A place called Redbud.

Q. Who was with him at that time?

A. He came down there alone.

Q. Did any one join him while you and he were there together at this time? A. No, sir, not there.
Q. Now, where did you and he go from Redbud?
A. Went down to Sandrock Spring at McCaney's store.
Q. How long were you together at that time, Mr. Hillmon?
A. It must have been something like six weeks we were knocking around that country together.
Q. Now, during this time, did any one join him?
A. Yes, sir.
Q. Who was that?
A. Well, sir, we run,—we got with his outfit.
Q. Whose was that?
A. John W.'s outfit—his hunting outfit all came to us; overtook us at McCaney's store, and one of these fellows was named Gilbert; the other fellow I didn't know what his name was; and after we pulled back on the plain, then his partner Jack Brown came up there to us at ..... House.
Q. The one you call Jack Brown, do you know his other name? A. No, sir; they called him Jack Brown.
Q. What did this outfit consist of?
A. It consisted of four teams; there was either 31 or 32 yoke of cattle and large steer, and I believe about 3 wagons.
Q. Do you know where he got that outfit?

302 Objected to as immaterial. Sustained.

By Mr. Barker: After we make certain proofs, we will want to know in regard to that.

Q. Now, when did you part with John W. at this time, if you remember?
A. Well, I haven't got exactly recollection of dates, simply because I lose track of time out that way, and we don't know what day of the month it is, Sunday or any other time; but it was sometime the latter part of July we parted.
Q. What year? A. 1878.
Q. Have you ever seen him since? A. No, sir.
Q. Do you remember, Mr. Hillmon, the condition of his teeth at that time? A. They were bad.
Q. Well, how bad were they, if you remember?
A. They were that bad that every storm he was bothered with the toothache—every rain or storm—anything of that description, he would be bothered with the toothache. He had one root that broke off, and afterwards got one on each side of it had partly broke of, and all of them you might say showed they began to turn black around the roots, or decayed.
Q. Do you know the condition of the teeth of the Hillmon family?

Objected to as incompetent—sustained.

Q. Now, Mr. Hillmon, do you know whether your brother John W. was in the habit of using tobacco?

A. He wasn't a constant user of tobacco, but I have seen him chew and smoke both—it was nothing uncommon.

Q. And when was that that you have seen him using tobacco?

Objected to as incompetent and immaterial—overruled.

Q. When did you see him using tobacco?

A. At times that I have been with him.

Q. Now, was there anything at the time you were with him last time, any circumstance which called your attention particularly to his teeth? A. Yes, sir.

Q. What was it? A. He had the toothache.

Adjourned until 2 o'clock. Mrs. Nixon and Geo. W. Nichols recalled first by plaintiff on convening of court in afternoon.

1303 Saturday afternoon, March 21, 1896.

Cross-Examination. (William Hillmon.)

By Mr. Wheat:

Q. Mr. Hillmon, when did you say your brother's teeth first began to decay?

A. I can't say the exact date they began to decay.

Q. As near as you can?

A. They was decayed when he left home in 1864.

Q. How old was he then? A. Something past 17.

Q. Was that before or after he was in the army?

A. Before he was in the army.

Q. Which one of his teeth was it?

A. It was the left hand tooth on the upper jaw.

Q. Was he not born in 1848—was he more than 16 in 1864?

A. He was born in 1847 I guess.

Q. How much was that tooth decayed at that time?

A. I couldn't say exactly how much it was decayed, but enough to be aching.

Q. Was any other teeth decayed at that time?

A. I don't know whether there was at that time.

Q. Or any other discolored at that time, '64 I am talking about now? A. I can't say that there were.

Q. How long was he gone at that time?

A. Something in the neighborhood of 18 months—16 or 18 months. Something like that.

Q. Then he came back and stayed some time? A. Yes, sir.

Q. When did he leave again?

A. He left in the spring of '68.

Q. Where did he go to? A. Went out on the plains.

Q. What part of the plains?

A. Went out west of Junction City—pretty much all over the plains.
Q. When did he come back?
A. He was back in the fall of 1869.
Q. Back in the fall of '69? A. Yes, sir.
1304 Q. At Valley Falls?
A. Yes, sir, came back home and stayed over night.
Q. You were living on the farm? A. Yes, sir.
Q. The whole family was living there?
A. Yes, sir, all except the oldest brother.
Q. He stayed over night? A. That is my recollection.
Q. Did you notice his teeth then? A. Yes, sir.
Q. What teeth were discolored, do you claim then?
A. Well, this same tooth was discolored some; probably some others began to show at that time.
Q. What do you say?
A. I say this tooth was discolored at that time, and probably some others was discolored.
Q. I want to know what you remmber about it?
A. My recollection is from the time he left home,—
Q. Never mind about that; we are talking about 1869, when he was there at that time, just what others was discolored then?
A. Well, he had one tooth discolored at that time.
Q. Well, how about the others?
A. He had one discolored.
Q. How about the others at that time?
A. There might have been some others.
Q. I ain't talking about what "might have been"; I want to know your memory?
A. I recollect distinctly he had a discolored tooth at that time.
Q. You spoke about some others—you may state what the conditions were at the time if you remember?
A. I said they might have been discolored.
Q. I didn't ask you what they might have been; I ask you of you remember?
A. I don't remember definitely that there was at that time.
Q. He went away again? A. Don't know—
[—] Where did he go?
A. I don't know; I didn't go with him.
Q. How long did you stay about Valley Falls then?
A. I stayed around that country until 1869.
1305 Q. Where did you go to then? A. I went west.
Q. Where did you go—where west did you go?
A. How far west?
Q. Yes sir, where did you go in 1869 when you left?
A. Went out to St. Mary's Mission.

Q. How long did you stay there? A. A short time.
Q. Well how long?
A. Might have been a month and a half.
Q. Where did you go from there? A. Ellsworth.
Q. How long did you stay there?
A. I was around there until,—around there probably two months.
Q. Where did you go to from there?
A. Went to Ft. Simms.
Q. How long did you stay there?
A Was there perhaps a month and a half.
Q. Where did you go then?
A. Came back to Ellsworth.
Q. How long did you stay there? A. Over night.
Q. Where did you go from there? A. Denver.
Q. How long did you stay there?
(Didn't catch answer.)
Q. Where did you go to from there?
A. Went to Golding.
Q. How long did you stay there?
A. About, only a few hours.
Q. Where did you go to from there?
A. Went to Black Hawk.
Q. How long did you stay there?
A. Ain't positive whether I stayed over night or not there.
Q. Where did you go to from there?
A. Central City.
Q. How long did you stay there?
A. Was around that country something like a year and a half.
Q. Where did you go from there?
A. Came back on the plains.
Q. What part of the plains?
A. Down about Ft. Wallace.
Q. How long did you stay about Ft. Wallace?
A. I was in that section of the country, there between the Platte and Arkansas something like 3 or 4 years.
Q. What was you doing? A. Hunting buffalo.
Q. When did you leave that section of country between the Platte and the Arkansas?
A. I went south of the Arkansas.
1306 Q. When?
A. Went south of the Arkansas in the fall of 1874.
Q. Did you remain in the country about Ft. Wallace between the Platte and the Arkansas all that time?
A. Yes sir, around in that section.
Q. Then you went south of the Arkansas?
A. Yes sir.

Q. Which part?
A. About the southwest part of Kansas.
Q. How long did you remain there?
A. During that winter, fall of 1874 and spring of '75.
Q. When did you leave there?
A. The following spring.
Q. The spring of 1875? A. 1875.
Q. Where did you go then?
A. On the K. P. around Wallace.
Q. How long did you stay there? A. A short time.
Q. Where did you go then?
A. North of the K. P. probably.
Q. How long did you stay there?
A. Couple of weeks probably, something like that.
Q. Where did you go from there?
A. Went back south to Dodge City.
Q. That's in Kansas—Dodge City, Kansas? A. Yes sir.
Q. How long did you stay there?
A. Might have stayed there over night, or a day or two there.
Q. About what day of the month and year was that, as near as you can tell?
A. Must have been somewhere, something like the fore-part of August.
Q. What year? A. 1875.
Q. '75? A. Yes sir.
Q. How long did you remain there?
A. I don't know exactly; must have been over night.
Q. Where did you go to from there? A. South.
Q. Which way? A. Southwest.
Q. How far? A. I don't know exactly the distance.
Q. As near as you can tell?
A. I might be a poor judge of distances.
1307 Q. How far was that?
A. Might be a poor judge of distance.
Q. Give us your judgment?
A. I was over that country anywhere from forty to one hundred miles south and west of Dodge.
Q. What were you doing there? A. Hunting.
Q. How long did you remain there?
A. Until some time in November, about the fore part of November.
Q. What year? A. '75.
Q. Where did you go from there?
A. Came back to Dodge.
Q. How long did you remain there at Dodge?
A. Only a very short time.
Q. Where did you go from there?

A. Went back south.
Q. What part of the country?
A. Back towards the Panhandle of Texas.
Q. What were you doing? A. Hunting.
Q. How long did you remain in that section?
A. Might have camped a week or more in that place.
Q. How long was you out on that trip?
A. In fact the trip didn't wind up—ain't wound up yet.
Q. How long did you remain in that section of the country? If I understand, you were engaged in hunting buffalo?
A. Yes sir.
Q. How long were you engaged in hunting buffalo in that section of the country?
A. I was around through that section of the country there until along December.
Q. What year?
A. 1875, in that state—I put out, in fact wound up at Griffin, Texas.
Q. What time were you at Griffin, Texas?
A. Some time in the fore part of January, 1876.
Q. How long did you remain there?
A. Couldn't say just how long.
Q. As near as you can tell?
A. Couldn't say just how long I was there.
Q. I ain't asking you to give the exact time—as near as you can?
A. I was around in that section of country, in west
1308 of there, northwest and southwest, until the fall of 1878.
Q. Didn't you come out of that country during that time? A. No sir.
Q. Well how far from Ft. Frinnin was you at that time?
A. I was around there within,—well, from Ft. Griffin it was probably 350 miles west of Ft. Griffin.
Q. How far from the Mexico line was you at that time?
A. That would take it down I guess into New Mexico, south of where the line is.
Q. How long did you remain in that section of the country?
A. I remained in that section of the country from the spring of 1876, until the fall of 1878.
Q. Where dod you go to then? To Ft. Counsul.
Q. Which way is that from St. Angelo?
A. Just across the creek from St. Angelo.
Q. How long did you remain there? A. That winter.
Q. Then where did you go to? A. Went to New Mexico.
Q. That brings you up to the spring of 1879? A. Yes sir.
Q. Where along in 1879 did you leave the Ft. Counsul country?

A. It must have been something like the neighborhood of May—something like the fore part of May.
Q. Then you went to what place?
A. Went to Silver City.
Q. What state or territory?
A. Silver City, New Mexico.
Q. How long did you remain there?
A. Lived at Silver City the whole, I believe, of that summer.
Q. Around there the summer of 1879?
A. Yes sir, the summer of 1879.
Q. Well how much longer, if at all, did you stay there?
A. Left there that fall, and went to Colorado.
Q. What place in Colorado?
A. San Francis Range, east of the San Luis Valley.
1309 Q. Into the range?
A. Yes, sir, into the mountains.
Q. What did you do there? A. Prospecting.
Q. How long did you remain there? A. That winter.
Q. When you left there, where did you go?
A. Uncompahgre river.
Q. When did you go to the Uncompahgre river?
A. I think in May.
Q. To the river or mountains?
A. I went to Uncompahgre river first.
Q. How long did you remain there?
A. Well on that river a little while.
Q. What part of the river—no city there?
A. No, there was no city there.

(The Court suggests that attorney has gone far enough, but Mr. Wheat wants to proceed,—allowed).

Q. From Uncompahgre where did you go to?

A. Your Honor I think the attorney should take a trip himself, if he wants to get an idea of that country.

By the Court: You may answer and they will object when they want.

A. Up from there, up to Ouray.
Q. Was this the city, you mean? A. Yes, sir.
Q. How long did you remain there?
A. Remained around there in that section of the country until the fall of 1885.
Q. Until the fall of '85? A. Yes, sir.
Q. You reached Ouray about what time?
A. Went in there the 25th of June, 1880, and remained around in that section of the country until the fall of 1885.
Q. Where did you go then?

A. Went off further—took in the northwest part of the state, round up to Leadville—round in that country there.
Q. How long did you remain there?
A. Along until the spring of '88.
Q. Where did you go to then?
A. Went to the southern part of the state, on the Platte course.
Q. How long did you remain there?
A. Remained there until the fall of '90.
Q. Where did you go then? A. Came home.
Q. What do you mean by "home"?
A. Back to Valley Falls.
Q. How long did you remain there?
A. Only a short time.
Q. Where did you go then?
A. Went back to the plateaus.
Q. Where is that?
A. On the east side of the divide—on the east side of the Conejos river, about 63 miles north [—] the Colorado line.
1310 Q. North of the Colorado line?
A. Yes, sir, on the nort-east north of the Colorado line.
Q. How long did you remain there?
A. Until the spring, until the latter part of April.
Objected to—overruled.
Q. Where did you go to from there?
A. Went from there to Salt Lake City.
Q. When did you reach Salt Lake City?
A. The next day after I got there.
Q. I ask you when you reached Salt Lake City?
A. Some time in the spring—in,—I can't tell the exact date; the latter part of April, or fore part of May.
Q. What year? A. 1891.
Q. Where did you go to from there?
A. Boise City, Idaho.
Q. How long did you remain there?
A. Probably a week.
Q. Where did you go from there?
A. Went up to Washington—
Q. How long did you remain there?
A. Over night I believe.
Q. Where did you go from there?
A. Took a trip around south of Little Carps (?) north of there, and then back to Boise City.
[—] How long did you remain there?
A. A week, or such a matter.
Q. Where did you go then? A. Rock Creek, Idaho.
Q. How long did you remain there?
A. Remained there a month and a half.

Q. Where did you go from there? A. On Wood river.
Q. How long did you remain there?
A. No longer that I could travel and get out.
Q. Where did you go to from there?
A. Over to Salmon Creek.
Q. When did you reach there? A. Some time in July.
Q What year? A. 1891.
Q. Where did you go to from there?
A. Went down the Salmon River.
Q. How long did you remain there?
A. I don't think I laid off anytime; went down Sal-
1311 mon river to the mouth of the —— river; went up Salmon river to the head of it; up to the Bitter Root river, and down the Bitter Root river to the Missouri river; went down the Missouri River; went down then until about 20 miles of Congra Lake; cut across the mountains and went to Wallace and from there to Wardner; left Wardner and went to Old Mission, Idaho, and from there took the train and went to Spokane Falls, Washington.
Q. When did you reach there?
A. Must have been getting along to August, 1891.
Q. After you left there,—?
A. After left Spokane Falls I came back to Aspin, Colorado.
Q. When did you reach there?
A. Last of August, or first of September, 1891.
Q. How long did you remain in that section?
A. Remained there until 12th of January, 11th of January.
Q. Where did you go then?
A. To Creede, Colorado.
Q. How long did you remain there?
A. A month or six weeks—along there for pretty near two months.
Q. About when did you leave there?
A. Left there along in March,
Q. What year? A. 1892.
Q. Where did you go then?
A. Went back to the plateau.
Q. How long did you remain there? A. That summer.
Q. Where did you go from there? A. To Rico.
Q. How long did you remain there?
A. Something like three or four months.
Q Where did you go from there?
A. Went down then to the gold excitement on the Lower San Juan that winter.
Q. How long did you remain there? A. That winter.

Q. Where did you go from there?
A. Came back to the plateau.
Q. How long remain there? A. Part of the summer.
1312 Q. Where did you go then?
A. Went back down there—
Q. When was that date? A. When I went back there?
Q. Yes, sir, the last time you spoke of? A. 1894.
Q. Where did you go from there?
A. Went there in the fall of '94.
Q. Where did you go from there?
A. Cripple Creek, Colorado.
Q. When did you reach Cripple Creek? A. April (?)
Q. What year? A. 1894.
Q. How long did you remain there?
A. Remained in that section of the country until the 11th day of last month.
Q. Where did you go then?
A. Came to Valley Falls.
Q. And you have been about Valley Falls and here since that, have you? A. Yes, sir, and out west the other day.
Q. State whether you have seen Mr. Schleppy—and Mr. W. W. Nichols? A. Whether I saw them or not?
Q. Yes, sir, anywhere in the western country when you was out there, on these trips you have been mentioning?
A. Yes, sir, I saw Mr. Schleppy in 1873, I think on the plain—1873, or '74.
Q. Have you been here during this trial all the time?
A. During this trial? Yes, sir.
Q. You were sworn as a witness on the first day of the trial? A. Yes, sir.
Q. Have been in attendance ever since?
A. I have been at all the evidence given in since then.
Q. And you have seen Mr. Schleppy and W. W. Nichols?
A. Yes, sir.
Q. You came into Valley Falls about a month ago?
A. Got in Valley Falls on the 12th.
Q. If I understood you right on examination in chief, you said you saw your brother, John W. Hillmon in Central City?
A. Yes, sir, saw him at Central City.
Q You first met there about what time?
A. He came to me there it was some time in May, 1872.
1313 Q. About how long did he remain?
A. Well, we was around all that country together along the last of the summer and along September I think it was, if I recollect rightly, he went off west there somewhere, and our,—and before he came back I left and wentoff on the plains.

Q. What was the condition of his teeth during the time he was there in 1872?

A. His teet's was getting decayed and bothered him considerable.

Q. You spoke of one tooth, and if you saw others that was decayed,— A. I say I saw more than one.

Q. Well which ones was getting decayed?

A. Well, sir, all that time he had three teeth together on one side that was aching.

Q. I didn't ask you about the aching just then; I was asking about which was decayed?

A. Well, he had three teeth on the left side becoming decayed.

Q. Which three was that?

A. These three right along here (indicating.)

Q. Can't you tell us with reference to the front; was either of the front; either of the two fronth teeth decayed; either of them?

A. I ain't positive whether it was one of the front teeth, or the one next to it, that was decayed.

Q. Was it one or the other of them?

A. It was either the front tooth or the one next to it that began to decay on the side.

Q. Which side? A. On the left side.

Q. Are you talking about the front tooth or the one on the side?

A. I don't remember just which—I ain't certain whether tdat was the tooth decayed—I couldn't say.
that was the tooth decayed—I couldn't say.

Objected to—sustained.

Q. Did you notice that tooth was decayed before you saw him in 1872? A. Yes sir.

Q. That same tooth?

A. That same tooth that he had a long time was decayed yet.

1314 Q. That was either the front tooth or the one next to it? A. I was talking.

Q. I was asking you about the front tooth or the one next to it, when you first noticed that one become decayed?

A. I noticed that he had,—

Q. I am asking you about those teeth—when did you notice those two, either the front or the one next to it?

A. I noticed them two teeth when he came to me in 1872.

Q. That was the first time that you noticed that these two, front and the one next to it? A. Yes sir.

Q. You had not noticed either one of them was beginning to decay before?

A. No, I don't know that I had noticed that either of them other two began to decay before that.

Q. When and where did you next see him after Central City?

A. Somewhere about the southwest corner of Kansas.

Q. When?

A. That would be seven,—about the first day of January, 1875, or some where about the early part of '75.

Q. And you spoke something about his teeth then—what was the condition? A. A little worse than when I felt him.

Q. Were there any more teeth involved in the decay than when you saw him in 1872? A. I think there were.

Q. How many at that time?

A. I couldn't say just the number because I don't know just how many teeth a man has got.

Q. Well how many, as near as you can tell?

A. Well I can't remember just when his teeth began to decay, or how long it took the next one to decay.

Q. I am asking you now just about that time when you saw him there about the first of January, 1875; I want to find how many were involved in this decay then; had they extended any further round to the front, to the right, had they decayed?

A. Yes sir, his teeth was in worse fix when I met him there, than before.

Q. What was the condition of the two upper teeth—
1315 the two center upper teeth?

A. If I recollect rightly his front teeth by that time had begun to show little signs of decay.

Q. Both those center upper teeth? A. Yes sir.

Q. And had this decay extended further around to the right of these two center upper teeth?

A. In fact of the business, I don't know that he had a perfectly sound tooth in his head at that time.

Q. Had it extended any further to the right; the decay at that time; the teeth in the upper jaw from the two center?

[—] Yes sir.

Q. Was it plainly noticeable?

A. Plainly if any one looked.

Q. Would anyone see it without closely examining?

A. It would be owing to whether he had his mouth open or not.

Q. When he would laugh?

A. You would plainly see the teeth was decayed.

Q. You are including the two central upper teeth?

A. I am alluding to most any of his teeth.

Q. I would like to know definitely about these two center upper teeth; when did you next see him after that, January,
1875 A. Was with him a good portion of the summer.

Q. With him a good portion of the summer?

A. With him until something like July, I guess.
Q. Then when did you next see him?
A. We was separated then for something like a month or two, I might say that I was not with him but that I was knocking around and seeing him once and a while.
Q. And when did you separate from him?
A. Along in the fall of 1875 when I started to go south.
Q. Who started to go south, you or he when you separated?
A. I went south first.
Q. And left him? A. Yes sir.
Q. When did you see him after?
A. After I left him in the fall of 1875 the next time I saw him it must have been along sometime in June 1878.
1316 Q. Where was that?
A. He came to me at——— Store to Redbud.
Q. Had his teeth grown noticeably worse in the meantime?
A. Yes sir.
Q. Were any of his teeth out at this time 1878 that you mention?
A. At that time his teeth some of them along here (indicating) were broken down close to the gum.
Q. Along here—which do you mean?
A. Along about the eye tooth.
Q. How many were out?
A. There was one broken down close to the gums and two more getting down short.
Q. About how short—more than half of them?
A. Fully half; fully half of the teeth I should think.
Q. More than half of the other teeth; is that correct?
A. I guess it was that.
Q. More than half of two more?

Objected to—discussion—(Questions and answers read.)

"Q. Along here—What do you mean?
A. Just along about the eye tooth.
Q. "Q. How many out?
A. There was one broken down close to the gums, and two more getting down close."
Q. "Q. About how short—more than half of them?
A. Fully half—fuly half of them I should think."
Q. "Q. More than half of the other teeth—is that correct?
A. I guess it was that."
Q. "Q. Half of two more?"
A. Now, my understanding was to not include more than three teeth.

By the Court:

Q. Now were these two teeth next to where the eye tooth should have been?—I want to know whether the two, these two,—were they half down?

A. I might not have words to explain it sir.

Q. Well, was either one of these two teeth that you speak of, front center?

By the Court: Can't you ask him this: If they were farther to the left than the ones broken down?

1317 A. These teeth were at the left of the center teeth.

Q. Was either one of them, one of the two central teeth?

By the Court: He said left of the central.

Q. Did they join the two central teeth?

A. I don't understand you.

Q. Were they farther to the front than the eye tooth?

A. Farther to the front teeth than the eye tooth?

Q. Yes, sir; were they nearer the front of the mouth than the eye tooth?

A. Why, I said that I think that the eye tooth was one that was partly gone and the next one was broken down pretty close to the gums and the next one to that was partly gone.

Q. So that the back one of these you were speaking of was the eye tooth? A. Yes, sir, that's my understanding of it.

Q. This, as I understand, was in June, 1878?

A. Yes, sir.

Q. Did you say that was the last time you saw him?

A. That time I got with him in June, 1876, that time I was with him was the last time I saw him.

Q. About when did you separate?

A. It must have been something like the middle of July; perhaps afterwards.

Q. Afterwards—You mean July, 1878?

A. Yes, sir, July, 1878.

Q. Do you know Neill McClough, trustee of Valley Falls Township?

A. I seen some McCloughs up there; I have no acquaintance very much with them.

Q. Well, do you know Neill McClough?

A. I can't say that I know him; there was some McCloughs there—I wouldn't say positive about the given name.

Q. Do you know one that is trustee of the Township?

A. I don't know anything about what he was, sir.

Q. Did you have a conversation then with this McClough about the middle of February, or a little later, in the clothing store of Hutchings & Hutchings, Valley Falls?

By the Court: Answer yes or no if you remember.

A. I talked with a man in there who claimed his
1318 name was McClough.

Q. In the store of Hutchings & Hutchings?

A. I don't know whose store it was.
Q. Was it a clothing store? A. Yes, sir.
Q. Did you talk with him about going to school?
A. Well, he was talking to me about that.
Q. You recognized him, did you? A. I did not.
Q. Well, you recognized the man now that you was talking with?
A. I recollect talking with a man that passed himself off for McClough.
A. It was in a clothing store? A. Yes, sir.
Q. About a month ago? A. About like that.
Q. Now, if you had more than one conversation with anybody calling himself McClough since you have been back there this time, can you give the exact date of that conversation?
A. No, I can't.
Q. Well, have you had a conversation with any other than one McClough or than this one? A. Yes, sir.
Q. In the store—clothing store?
A. No, not in that clothing store.
Q. Did you have any conversation more than one time with McClough in that store? A. No.
Q. I will ask you if this John W. Hillmon that you knew, if he didn't commonly go by the name of "Wesley"?
A. Yes, sir, that's what we called him at home.
Q. Well, that's the name he was known by?
A. Yes, sir, at home.

1319 Redirect Examination.

Q. Are you acquainted with your brother John W. Hillmon's handwriting?

Objected to—overruled.

A. I might say I was somewhat acquainted with it one time I saw some of his handwriting since 1878—don't suppose I saw his signature more than a time or two at that time and that was in some old letters written.
Q. Look at paper marked Exhibit "Q," and state if you know in whose handwriting the signature is? (Handing witness H.'s notes.)

Objected to as incompetent.

By the Court: If he knows he may testify—that's merely a matter of knowledge. He says he has not seen it since 1878.

A. Yes, sir.
Q. Go on.
A. Yes, sir, I recollect that is about his handwriting, to the best of my memory of it.

Q. Now, as to exhibit "R," (handing witness paper) whose signature is that?

Same objection—same ruling.

A. I should take it to be his handwriting.

Q. Look at exhibit "S" and state in whose handwriting the signature on that paper is, if you know?

A. That looks natural with the exception of that "H;" I never knowed him to sign his name in that way. Hillmon and Brown—the same whom was his partner—the handwriting looks natural with the exception of the "H" the way he sarts to sign "Hillmon"—I never knew him to write "H" just in that way.

Q. Look at the signature "Hillmon & Brown" on exhibit "T," and see if you know that signature.

Same objection—same ruling.

A. That, sir, I think is his name—I have reason to believe it is his handwriting.

Q. Look at exhibit "T" (attorney should have said "U") and state in whose handwriting the signature of "Hillmon & Brown" is on that paper?

1320 A. I should say the same handwriting.

Q. The handwriting of John W. Hillmon?

A. The handwriting of John W. Hillmon.

Q. Look at exhibit marked "Z" and say in whose handwriting the signature, "J. W. Hillmon and Brown" is on that paper?

A. This looks better, because that's the way he usually makes "H."

Q. Whose signature do you say that is?

A. This is the signature of J. W. Hillmon's, to the best of my knowledge.

Recross-Examination.

By Mr. Riggs: We have no questions—the papers are in.

Witness excused.

1321 Mrs. George A. Nichols, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to her by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name, if you please, Mrs. Nichols.

A. Mary A. Nichols.

Q. Where do you reside?

A. Washington county, Kansas.

Q. What was your mother's name?

A. Mary E. Hillmon.
Q. What is your husband's name?
A. George A. Nichols.
Q. Will you please give the name of your father.
A. Benjamin Hillmon.
Q. Where did you father reside, Mrs. Nichols?
A. Near Valley Falls, in Jefferson county, in this state.
Q. Can you tell about how many miles from Valley Falls?
A. About four miles north of Valley Falls.
Q. Where were you born, Mrs. Nichols?
A. In Indiana; Montgomery county, Indiana.
Q. Do you remember about how old you were when you removed to Kansas?
A. Well, I was born in 1849 and removed to Kansas in 1858.
Q. Of whom did your father's family consist?
A. Five children.
Q. How many boys? A. Three.
Q. And two girls? A. Yes, sir.
Q. Who was the oldest of the family?
A. Henry Hillmon.
Q. Do you remember about how old he is at the present time? A. He is about fifty-five.
Q. And which is the next oldest? A. John Wesley.
Q. About how old is he? A. About 53.
Q. Who was the next one to John Wesley? A. Myself.
Q. About how old are you? A. Fifty?
Q. Then, William next?
A. Yes, William is next.
Q. William testified the last time this case was tried, did he? A. Yes, sir.
1322 Q. Is he now living or dead?
A. He is dead.
Q. What was the name of the youngest member of the family? A. Martha—McCoy now.
Q. Her name is McCoy now? A. Yes, sir.
Q. Where does she reside?
A. Near Valley Falls, this state.
Q. Where does Henry reside if you know now?
A. The last I heard of him he was in Texas.
Q. Near Paris? A. Yes, somewheres there.
Q. Now, when did you last see John Wesley?
A. In 1877.
Q. Where was he?
A. At our home in Washington county, this state.
Q. Now, when did you leave Jefferson county to go to Washington county? A. In the spring of 1874.
Q. Had you been married prior to that time? A. Yes, sir.
Q. When were you married?

A. In 1870; in the year of 1870; spring of 1870.

Q. Did John Wesley live at home up until the time that you were married? A. No, sir.

Q. How long before that did he leave home?

A. Well, he was at home awhile the winter before.

Q. That would be the winter of—You said that you were married in 1870?

A. He was at home awhile the winter of 1869.

Q. Excuse me, I don't remember the date of your marriage now. A. Spring of 1870

Q. When did John Wesley leave home, if you remember, the first time? A. No, sir, I don't remember.

Q. Was he in the army at any time? A. Yes, sir.

Q. Do you remember about when he returned?

A. Well, it was about the close of the war.

Q. Then, was he living at home or in that vicinity from that time on?

A. Well, a part of the time, and part of the time he was off on the plains. Away from home and around buffalo hunting.

Q. Do you remember what years he was off on the plains?

[--] No, sir.

[--] No, sir, I don't remember.

1323 Q. About what was his age when he left to go on to the plains, if you remember?

A. About 18 I think; 17 or 18 when he left home.

Q. Do you remember how old he was when he went into the army?

A. I think he was 19 if I remember right.

Q. Up until the time that he went into the army, had he been at home all the time? A. No, sir.

Q. Had been away from home prior to that?

A. Yes, sir.

Q. Where was he living prior to that, do you know or where did he go when he went away from home prior to that, prior to the time of his going into the army?

A. Well, he went west on the buffalo range I don't know just where he went to.

Q. Was that before he went into the army?

A. Yes, sir.

Q. Did you see him in 1870? A. Yes, sir.

Q. Was he at your wedding? A. Yes, sir.

Q. How long did he remain in that vicinity at that time?

A. He remained around there until that winter.

Q. Where was he living if you know?

A. He worked for Mr. McCoy the summer of 1870.

Q. Now did you see him often at that time?

A. Yes, sir.

Q. Where did you see him?
A. Well, he frequently came to Father Nichols' where we lived.
Q. You were living at that time with your husband's father, were you? A. Yes, sir.
Q. And he came there frequently? A. Yes, sir.
Q. When did he leave that vicinity, if you know, at that time?
A. Well, it was in the winter, November or December, of 1870.
Q. Where did you next see him after he left there, after that time? A. In 1877.
Q. At your house as you state in Washington county?
A. Yes, sir.
Q. How long did he remain with you at that time?
A. He came on Saturday and went away Monday.
1324 Q. Now, did you hear from him at any time after he visited your house in Washington county in 1877?
A. Yes, sir.
Q. Where was he at that time, if you know?
A. He was somewheres about Lawrence.
Q. Did this letter which you received from him, sent from Lawrence have any enclosure?
A. It had a picture of himself.
Q. Look at the exhibit marked Exhibit No. 11 for this trial, and state whether it was that picture or one similar to it?
A. Yes, sir. That picture or one like it.
Q. You may state while the picture is in your hands, is that a good picture of your brother, John Wesley?
A. Yes, that is a good picture of him at that time.
Q. Is that the last picture you ever received from him?
A. Yes, sir.
Q. Look at the picture which has been marked Exhibit No. 10 and state if you recognize that as the picture of any one, and if so, state whom?
A. No sir, I do not think so; this has some resemblance to him, but I could not swear it was him; his forehead there has some resemblance to Wesley.
By the Court: Speak louder.
I don't think that that is: I say I couldn't testify that that was anybody I ever seen; it has some resemblance, his forehead, to Wesley, but then I could not say that it was him.
Q. Now, do you know where the letter is that he wrote to you at that time?
A. No, sir, I don't know where it is; I turned it over to you men, you lawyers.
Q. And the picture also that it contained? A. Yes, sir.
Q. When was that, Mrs. Nichols?

A. Well, I can't tell; it was at one of the trials that we attended.

Q. Do you remember whether it was the first trial?

A. No, sir, it was not the first trial; I think not.

Q. Did you have any papers or documents of any kind in your possession belonging to your brother, John Wesley?

A. Yes, sir.

Q. What did you do with those?

A. Sent them to him.

1325 Q. From what place did you send those letters to him? A. From what place?

Q. From what place did you send those letters to him?

A. From our home in Washington county.

Q. What papers did you send to him if you remember?

A. There was a deed to some land and his discharge from the army; his army discharge.

Q. Look at the paper now shown you marked Exhibit E, and state if you recognize that as the paper that you sent him?

A. Well, I could not say because I cannot see that without glasses; I could just tell his name on there; that is all; I don't suppose I can see through these—No, I can't see; I can tell his name here and that is about all I can read on there.

Q. You stated it was a discharge from the army, did you?

A. Yes, discharge from the army.

Q. Now, when did you send him that with reference to the time he was visiting at your house?

A. Well, we got the letter either in October or November, 1878, that he wrote for them, and they were sent right immediately, or in a day or two.

Q. How were they sent? A. By register.

Q. Did you get the return card of the register?

A. Yes, sir.

Q. That was in November, you think, or December?

A. It was in October or November that he wrote for them.

Q. Now, can you give us a description of your brother, John Wesley. How tall was he, do you know?

A. Well, I don't know just how tall he was; he was somewheres near the size of my husband. About the same sized man.

Q. Do you remember the color of his hair? A. Brown.

Q. Do you remember the color of his eyes?

A. He had brown eyes.

Q. Now, his nose; what was the shape of his nose?

A. He had rather a large nose, had a high bridge here, and his nose at the end was turned to one side.

1326 Q. In shape, how did it correspond with yours?

A. Something the same.

Q. Now, as to his build?
A. He was square shouldered, straight.
Q. And did he wear any whiskers the last time you saw him? A. Wore a mustache.
Q. How did he carry himself in walking, erect or otherwise? A. Carried himself straight, yes, sir.
Q. Now, as to his teeth, Mrs. Nichols; what was the condition of his teeth, if you know? A. He had poor teeth.
Q. Now, when did you know that he had poor teeth?
A. Well, I don't know just when; I know his teeth had been partly decayed for some time, but I don't know just when I first noticed them.
Q. Did you notice any defects in his teeth at the time you saw him or before the time that you saw him at your marriage? A. Yes, sir.
Q. What defect had you noticed prior to that time?
A. His teeth had begun to decay and turn black; that is, decayed spots in them.
Q. Did he ever complain of his teeth?
A. Yes, sir; a great deal.
Q. What did he complain of? A. Aching. Toothache.
Q. When was that; prior to the time of your marriage?
A. Yes, sir.
Q. What was the condition of his teeth in 1877 at the time he visited at your house?
A. There was one of his teeth clear gone or gone down, broke off down to the gum, any way.
Q. In which jaw was this tooth? A. Upper jaw.
Q. This was now, in 1877? A. Yes, sir.
Q. Was it the subject of remark there at that time?

The plaintiff objects to the question as calling for hearsay evidence. The court sustained the objection, to which ruling the defendants and each of them at the time duly excepted.

[A.] Do you know the plaintiff?
A. I have met her once.
Q. Where did you meet her?
A. At the Continental Hotel, I believe in Leavenworth.
Q. Do you remember when that was?
1327 A. No, sir; it was at the first trial of the case.
Q. In this city, at the time of the first trial of this suit? A. Yes, sir.
Q. How did she come to the hotel, if you remember, or whom did she come with?
A. She came in with W. W. Nichols.
Q. Who is W. W. Nichols?
A. My brother-in-law; my husband's brother.
Q. Now, whereabouts in the hotel did you see her?

A. [In] was in the sitting room of the hotel.
Q. In your room?
A. I believe it was in the sitting room; I aint positive where it was, whether it was in the sitting room, or whether it was in our room; it was in the hotel.
Q. Now, who was present at that time?
A. Well, my husband; Mr. Sam Nixon, and William Nichols, and my sister-in-law Mrs. Nixon.
Q. Was your husband there? A. Yes, sir.
Q. Now, did you have any conversation with her at that time? A. Yes.
Q. You say you had not met her before that time?
A. No, sir.
Q. How did you get acquainted with her?
A. W. W. Nichols introduced her.
Q. He came there with her, I think you said?
A. Yes, sir.
Q. And he introduced her? A. Yes, sir.
Q. Now, what did she say her purpose of coming there was?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff duly excepting.

A. She said she came to see what we was going to testify to.
Q. To whom did she address this, if you remember?
A. Well, I don't know as to any one in particular.
Q. You may state what you said to her, if anything?

The plaintiff objects to the question as calling for hearsay and immaterial evidence. Objection overruled; the plaintiff duly excepts.

1328 Q. She asked us what we said about his teeth, and we told her, I told her that he had poor teeth.
Q. What did she say in reply to that?
A. She said that her husband had good teeth.
Q. What was said then, if you remember?
A. Well, I said to her, if her husband had good teeth, it was not my brother.

The plaintiff moves to strike out the answer of the witness as immaterial. Motion overruled; the plaintiff duly excepted.

Q. What further conversation did you have in regard to this matter?
A. Well, she said, Yes, it was the same man; she said he might have had false teeth, but if he did, she didn't know it.
Q. What was finally said by her?
A. She said he was very distant and hard to get acquainted with.

Q. What further was said, if anything?
A. Well, she said, then she said, if that was what we was going to testify to, she would go back and give up the case, drop the case or something of that kind and turn him over to the authorities.
Q. Did she leave then?
A. Shortly afterwards. I think that was the last conversation.
[—] Now, who was present at the time of this conversation?
A. Mr. Nixon, Mrs. Nixon, William Nichols and my husband.
Q. Was that the last conversation you ever had with her?
A. Yes, sir.
Q. Have you seen her at different times when you have been here at the trial? A. Yes, sir.
Q. Now, do you remember the fact of a dead body coming to Lawrence in the spring of 1879; do you know of that?
A. Well, I heard about it; that is all.
Q. From whom did you hear it, if you remember?
A. Well, I don't know whether I ever heard it before I came to the trial or not; I don't remember whether I did or not before I came to the trial.
1329 Q. Were you informed by the plaintiff in this action of that fact? A. Sir.
Q. Were you informed by the plaintiff in this action of that fact?

The plaintiff objects to the question as immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

And in answer to cross-interrogatories propounded to her by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit.

Q. In this conversation, Mrs. Nichols, that was had between yourself and others and Mrs. Hillmon, who did you say was present besides yourself?
A. My husband and Mr. Nichols, Mrs. Nixon and Mr. Sam Nixon.
Q. They are all living? A. Yes, sir.
Q. All here at the trial are they not? A. Yes, sir.
Q. Been here at all of the trials as well as yourself?
A. Well, I haven't been to all of them.
Q. How many have you missed? A. I missed one.
Q. How did that come to happen?
A. Well, I did not come.
Q. Were you asked to come? A. Yes, sir.

Q. What was the occasion of your staying away?
A. My health prevented me from coming.
Q. Oh, it was only your ill-health that prevented your coming? A. Yes, sir.
Q. You wanted to come?
A. Well, I can't say that I wanted to come.
Q. No. Now, at the time you had this conversation with Mrs. Hillmon, she told you that if you were going to testify in that way, she might as well turn over John Wesley Hillmon to the authorities? A. Yes, sir.
Q. You understood that meant your brother?
A. Yes, sir.
Q. And supposed he would be turned over to the authorities; had no doubt about it, had you?
1330 A. I didn't know.
Q. You went on and testified just the same, didn't you? A. Yes.
Q. Had you any grudge against your brother John Wesley?
A. No, sir.
Q. Always been good friends? A. Yes, sir.
Q. No particular desire to have him turned over to the authorities? A. No, sir.
Q. At that time she also said that the teeth of her husband were so good that they might have been false, and she not have known it? A. Yes, sir.
Q. That was the only thing that she said about the goodness or badness of his teeth, was it? A. I believe so.
Q. Now, then, as to the condition of those teeth; what was their condition in 1870? A. Well, they was—
Q. John Wesley's teeth.
A. They was partly decayed; his front teeth.
Q. By that, do you mean that they had crumbled?
A. Well, they was some broken or rotten.
Q. With spots of decay in them? A. Yes, sir.
Q. Which teeth were they, Mrs. Nichols?
A. The ones most noticeable was his teeth in the upper jaw.
Q. Do you mean the front teeth?
A. Yes, sir, immediately in front.
Q. Or a little to one side?
A. I mean these four teeth here between the eye teeth.
Q. Yes, madam, I understand you, to be right in front, these two on either side and then come the eye teeth. Those four teeth were discolored and somewhat crumbled in 1870?
A. Yes, sir.
Q. How much had he been at home prior to that time; I mean John W.? A. Prior to 1870?

Q. You have just described his teeth at that time; how much had he been at home the last three or four years preceding that? A. Well, I don't know.

1331 Q. Of course, you could not tell exactly; he was home some of the time and away some of the time?

A. He was here some of the time and away some of the time.

Q. It is a fact, Mrs. Nichols, that his teeth were bad from his boyhood, almost? A. Well yes, almost.

Q. When he came out of the army he was nothing but a boy sixteen or seventeen years old; that is a fact?

A. He was young.

Q. You would not call him very old 16 or 17, and his teeth were bad then? A. Yes, sir.

Q. He came out of the army in 1864 or 1865, 1864 at the close of the war? A. Yes, sir.

Q. At that time, you remember that his teeth were bad, do you? A. Yes, sir.

Q. And these same teeth were impressed upon your memory; these same four teeth were then decaying?

A. I don't know that they were all bad.

Q. But some of them were bad even at that time?

A. Yes, sir.

Q. And by the time that 1870 came, they were in very bad condition, crumbled and decayed and broken off; is that a fact? A. They kept getting worse all the time.

Q. That is the natural way those things go; is that a fact that in 1870 they had gotten to be considerably crumbled?

A. Not so very and yet very noticeable.

Q. They were very noticeable? A. Yes, sir.

Q. Any person could see; in talking and laughing, they could observe the fact that those four teeth were in the condition you have described?

A. I don't say the whole four front teeth were.

Q. Then I certainly misunderstood you.

A. I don't say they were all; I can't testify to which ones.

Q. Now, which, madam; give us an idea as to which of those four. A. No, sir, I can't.

Q. Whether it was one or two or three or four?

A. There was two or three of them.

1332 Q. But you can't say definitely which three it was?

A. No, sir.

Q. But three of those four were discolored and crumbled in 1870? A. Two or three.

Q. Of the four? A. Yes, sir.

Q. Was that condition relative to decay and crumbling so plainly noticeable to any person who should see him laughing or talking; is that a fact? A. Yes, sir.

Q. In 1870, I think you said in the winter of that year he went away? A. Yes, sir.

Q. It is a fact that he went away in the winter of 1870, is it? A. Yes, sir.

Q. Now, when did you see him after that? A. In 1877.

Q. And did you ever see him after 1877? A. No, sir.

Q. Then you have only seen John W. Hillmon once since 1870? A. Yes, sir.

Q. That is 29 years? A. Yes, sir.

Q. Now, what condition had his teeth gotten to by the time you saw him in 1877?

A. There was one tooth clear gone.

Q. Worse than they were in 1870, of course?

A. There was one clear gone.

Q. They were altogether worse than they were in 1870?

A. I think so.

Q. How about the other three of the four? There was one of those four gone, gone now, in 1877? A. Yes, sir.

Q. And how about the other three?

A. I think they were in worse condition than when I saw him before.

Q. They were all blackened and in some degree crumbled in 1877? A. No, I don't think they were all that way.

Q. All of them showed evidences of decay, in some degree? A. I don't know about all of them.

Q. I don't mean all of his teeth; I mean just those four.

A. I say I don't know that all of his front teeth was discolored but I said two or three of them.

1333 Q. That was true in 1870, was it not? A. Yes sir.

Q. Now, when he came there in 1877, one of those two or three discolored and decayed teeth was gone entirely?

A. Yes sir.

Q. How about the remaining three of that four?

A. Well, I can't say that they were all at that time partially gone.

Q. What would be your best recollection now?

A. There was one gone.

Q. As far back as 1877. A. Yes sir.

Q. That leaves three, and of those three there was a couple of them in bad shape, do you think? A. Yes sir.

Q. One might have been good?

A. There might have one been good.

Q. Now, would that one good one be in the center of the black teeth, or on either side of it, or were the black, discolored and decayed teeth together?

A. I don't know; I couldn't say positive whether he had ary good tooth.

Q. Now, your best recollection is, Mrs. Nichols, if you will kindly give it to us, you don't know whether he had ary good tooth; what is your best recollection as to his having any good teeth in front?

A. I can't say that he did have nor I can't say that he didn't have.

Q Your best recollection would rather be that he didn't, I take it. Am I right? Of course, you could only speak from your recollection.

A. Well, I don't know whether he had ary good tooth in front or not; I know that there was as many as three of them that was bad.

Q. Decayed and one gone?

A. I can't say that he even had one good tooth.

Q. What I am trying to get is, you say you don't know whether he had one good one; is it your recollection rather, however, that he did not have one good one; of course, you cannot state positively? A. I could not say.

Q. The one that had fallen out, or gone, disappeared between 1870 and 1877? A. Yes sir.

Q. When he left in 1870, of these four teeth, two or
1334 three were bad and partially gone, and the next time wholly gone in 1877? A. No sir.

Q. But the two or three out of the four showed signs of decay, crumbling and discoloration? A. Yes sir.

Q. Now, then, in 1877, I gather from your answer to Mr. Green's question, that he made you a little visit?

A. Yes sir.

Q. Visited at your home? A. Yes sir.

Q. Came there Saturday? A. Yes sir.

Q. And stayed until Monday? A. Yes sir.

Q. I suppose he ate at your table with you? A. Yes sir.

Q. As any other guest would? A. Yes sir.

Q. You were at the table with him? A. Yes sir.

Q. During the meals on those days— What time did he come there to your home Saturday, if you remember?

A. I think it was afternoon, but I got him his dinner; he hadn't had dinner.

Q. He also was there at supper on Saturday? A. Yes sir.

Q. And the three meals on Sunday? A. Yes sir.

Q. And he breakfasted with you on Monday morning?

A. Yes sir.

Q. Did he go away Monday morning?

A. He went away between breakfast and dinner.

Q. During the forenoon some time? A. Yes sir.

Q. You say you ate with him at the same table?

A. Yes sir.
Q. Did you notice any scar on either of his hands?
A. No sir, I did not.
Q. Now, that was in 1877? A. Yes sir.
Q. He didn't wear gloves all the time, of course?
A. No sir, I think not.
Q. What time of year was it? A. It was in April.
Q. Now, Mrs. Nichols, have you any other photograph of your brother, John W., except the one you turned over to these people?
A. I have a tintype, an old-fashioned picture.
Q. Taken quite a long time before the photograph was?
A. Yes sir.
Q. The photograph, I take it from what you say, was a better likeness?
1335 A. Yes, better of him when he left; when I last saw him.
Q. In April, 1877? A. Yes sir.
Q. The tintype was taken—
A. When he was quite a boy.
Q. Now, where has this photograph been during the last 12 or 15 or 20 years, since the first trial?
A. Well, Mr. Green has had it since the first trial; I don't think he got it at the first trial; probably the second one.
Q. He got it at that time? A. Yes sir.
Q. Did you take it back home after it had served the purpose?
A. No sir, I never have had it in my possession since.
Q. You left it with him all the while? A. Yes sir.
Q. And the letter also that accompanied it? A. Yes sir.
Q. Was that the last letter that you received from him?
A. Yes sir.
Q. That was in 1878? A. Yes sir.
Q. How frequently had he written to you prior to that when he was out on the plains? A. Well, I—
Q. Got a letter occasionally?
A. Letter occasionally; not very often though.
Q. Heard from him?

The defendants object to the question as incompetent, irrelevant and immaterial and not proper cross-examination. The court overruled the objection to which action and ruling of the court the defendants at the time duly excepted and still except.

Q. Heard from him you say occasionally?
A. Occasionally, yes sir.
Q. He wrote from Texas, Colorado, and so on, wherever he was? A. Different places.

Q. But you say you never heard from [—] since this time in 1878? A. That is the last.

Q. What time of year?

A. That was the fall of 1878, it was October or Noverber that the last letter was written.

Q. That was about the time he was married?

A. That was just after he was married; he was married at that time; had been only a short time.

1336 Q. Just after that, he took this trip into the southwest? A. I suppose so.

Q. And you have never seen him since? A. No sir.

Q. And you say you have never heard from him since?

A. No.

Q. Though occasionally you had heard from him prior to that time? A. Yes sir.

Q. You say in describing him, that your brother's nose had a high bridge? A. Yes sir.

Q. You mean arched here?

A. Right across here it was large; rather large.

Q. You mean by that large in that way, or wide here, or how do you mean?

A. His nose was large across here; right across here.

Q. Raised? A. Yes sir.

Q. Your nose is very nearly straight. Was it arched, do you mean by that?

A. His nose was larger here than mine is some, I think.

Q. Just name what you mean; you know when you say here, it does not get into the record. On the bridge of the nose? A. On the bridge of the nose, yes.

Q. Considerably larger at the bridge of the nose than your own? A. Well, not considerably larger; somewhat larger.

Q. It is what you call a large nose at the bridge; his nose had a bridge? A. Yes sir.

Q. And the point, you say, was turned to one side by some accident that had happened to him? A. Yes sir.

Q. Which side? A. I could not state which side.

Q. To refresh your recollection, to the left?

A. No sir, I could not begin to say which side.

Q. But it had had something happen to it which resulted in turning it a little to one side?

A. Yes, turned to one side anyhow; I never heard what did it.

1337 And in answer to redirect interrogatories propounded to her by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Now, you say you have been here at several trials? No answer.

Q. Now, you said on your cross-examination that you had been at each of these trials excepting one? A. Yes sir.

Q. I will ask you whether or not at each of those times you have been served with a subpoena? A. Yes sir.

Q. And it was in obedience to that subpoena that you attended these trials? A. Yes sir.

Q. Now, in 1877, what beard, if any, did he wear at that time? A. He wore a mustache.

Q. Wore a mustache at that time? A. Yes sir.

Q. And did he have a goatee at that time, do you remember? A. Yes sir.

Q. Mustache and goatee? A. Yes sir.

Q. Now, you were asked in regard to whether he had a scar, or whether you observed any scar on his hand; I will ask you if you observed any scar on his nose at that time, in 1877?

The plaintiff objects to the question as leading. Objection overruled, the plaintiff duly excepting.

A. I don't remember that he had.

Q. Or on the [cheeck]? A. No sir.

Q. Can you examine this?

A. No sir, I could not read it.

(Handing paper to the witness.)

A. Yes, sir, that is the letter.

By Mr. Barker: What is the date of the letter, Mr. Green?

By Mr. Green: November 22d, 1878.

Q. Look at that picture and state if that is the picture, if you know? A. Yes, sir, that is the picture.

The paper and picture are marked Exhibits F and G.

Q. Will you look at Exhibit E, and state if you recognize that as the paper you sent to your brother?

A. Yes sir.

1338 By Mr. Green: We now offer in evidence, Exhibit G, which is a small picture of John W. Hillmon, like the one already in evidence.

Admitted without objection.

By Mr. Green: We also offer in evidence, the letter identified by the witness as having been written to her by John W. Hillmon, dated November 22nd, 1878.

The plaintiff objects to the admission of said letter in evidence as incompetent, irrelevant and immaterial. The court overruled the objection, to which ruling, the plaintiff at the time duly excepted.

Said letter was thereupon read to the jury, and is in words and figures as follows, to wit:

1339 Lawrence, Kan.
Nov. 222nd, 1878.

Dear Brother and Sister

I have again returned to this place came back here the 26 of August. I do not expect to remain here very long. I left William in west Texas he was doing very well. I came through Mexico and met Henry in the Rattone Mountains. His family was with him. I think I will look up a location west this winter to move to in the spring. I was married the 3rd of Oct. to a Miss Quinn of Lawrence. I shall leave her here until I return we are keeping house in west Lawrence. I wrote to you when I was here a year ago, and sent a photograph and since have been back this time I got it returned from the Dead letter office so I will enclose it again. I have grown some since then: I weigh 170 live weight. I wish you would forward my Discharge and other papers as soon as possible to me. I want to use some of them. I received a letter from Mat a short time since they are all well 4 in number.

I will not write any more until I hear from you write soon.

J. W. HILLMON,
Lawrence,
Kan.

Exhibit F. Oct. '99. W. C. H., Judge.

1340 By Mr. Green: We next offer in evidence, Exhibit E, which is the army discharge of John W. Hillmon, and which was sent to him by the witness, for all purposes which it will serve.

The plaintiff objects to the admission of the same in evidence as incompetent, irrelevant and immaterial.

By the Court: It will be admitted with the statement to the jury that it shall not be received as evidence of the height of John W. Hillmon, what his height was at the time he procured the policies of insurance in this case, or subsequent thereto.

To which ruling of the court, the defendants and each of them at the time duly excepted.

Said paper is in words and figures as follows, to wit:

Paid Oct. 25/65
$177.07
J. Bowman.

TO ALL WHOM IT MAY CONCERN.

KNOW YE, That John W. Hillman, a Private of Captain Henry H. Ribble's Company ("I"), First Regiment of Ne-

braska Vet. Cavalry VOLUNTEERS who was enrolled on the Twentieth day of September one thousand eight hundred and sixty-four to serve one year, or during the war, is hereby DISCHARGED from the service of the United States, this 24th day of October, 1865, at Ft. Leavenworth, Kansas, by reason of Expiration of Term of Service.

(No objection to his being re-enlisted is known to exist.)*

Said John W. Hillman was born in Montgomery Co., in the State of Indiana, is Eighteen years of age, Five feet eight inches high, Dark complexion, Brown eyes, Brown hair, and by occupation, when enrolled, a Farmer.

GIVEN at Ft. Leavenworth this Twenty-fourth day of October, 1865.

W. D. HUBBARD,
Capt. 1st Mo. Cav. Vol.
and Ass.....

*This sentence will be erased should there be anything in the conduct or physical condition of the soldier rendering him unfit for the army.

Endorsed on back as follows: Exhibit E. Oct. 99. W. C. H.
Judge.
A. G. O. No. 99.

1341 And in answer to recross-interrogatories propounded to her by Jno. H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. What was the birthday and year of John W. Hillmon? What was the year that Mr. John W. Hillmon was born in, if you know?

A. I think it was 1845, the year of 1845.

Q. Do you remember the day of the year?

A. January 11th.

Q. You said that you came here upon subpoena or summons? A. Yes, sir.

Q. Don't you live more than one hundred miles from here?

A. Yes, sir.

Q. Don't you know that you are not required to come unless you wish to when you are more than one hundred miles from the court? A. I do not.

Q. They never told you that?

By Mr. Green: That is not the law.

Q. You say you have not been requested to come other than the times the subpoena directed at no time?

A. No, sir.

Q. You and your husband both have come?

A. Yes, sir.

Q. And have come at each of the trials except the one that you were absent? A. Yes, sir.

And in answer to further redirect interrogatories propounded to her by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Now, Mrs. Nichols, what is your age?
A. Fifty years old.
Q. When were you fifty? A. In August last.
Q. Now, how much older than you was your brother John W. Hillmon?
A. Five, I think—not five; three years, pretty near three years older than I am.
Q. When was he born? What month? A. January.
Q. And he would be two years and from January to August older than you? A. I think that is the difference.

1342 Q. You were asked if at any time you had come here without a subpoena. You may state, so that we may understand fully, if at times you have been allowed to go home and return? A. Yes, sir.
Q. At the same term of court? A. Yes, sir.
Q. Under what circumstances were those?

The plaintiff objects to the question as immaterial.
Objection overruled, the plaintiff duly excepting.

A. Well, they wasn't ready for us when we came down here and we was allowed to go back home again.
Witness excused.

The hour of 5:30 o'clock p. m. having arrived, the Court arose and adjourned until 9:30 a. m. Wednesday, November 1st, 1899.

1343 Mrs. George A. Nicholls, a witness heretofore sworn on behalf of the defendants, being recalled for further examination upon their behalf, testified as follows:

Direct Examination

By Mr. Barker:

Q. Mrs. Nichols, you have already testified that you are a sister of John W. Hillmon? A. Yes, sir.
Q. You are the same lady who testified here the other day?
A. Yes, sir.
Q. Now, I desire to call your attention particularly to the size and shape of your brother, John W. Hillmon's hands. I wish you would tell the jury, as well as you can, what kind of a hand he had?

The plaintiff objects to the question for the reason that the subject has already been fully gone over. No ruling.

A. He had a small hand.

Q. How in regard to its being a long hand or a short hand?

A. He had a short hand.

Q. How was it as compared in form and shape to your hand?

A. Well, something the same shape, I should say, as my own, short fingers.

Q. In regard to the hand and fingers, whether they were tapering or otherwise, state, as well as you can, in regard to that?

A. No, his fingers was not tapering any more than mine, I don't think, rather blunt fingers.

Q. That is as good a description as you can give of his hand? A. Yes, sir.

Q. Now you have already testified in regard to his teeth. Now do you know in regard to the character of the teeth of the other members of the Hillmon family, commencing with the oldest daughter, whether they had good teeth or bad teeth?

The plaintiff objects to the question as incompetent,
1344 irrelevant and immaterial, and as calling for remote and speculative evidence. The Court sustained the objection, to which action and ruling of the Court the defendants and each of them then and there duly excepted.

Q. Now I wish you would look at this picture which is marked "Exhibit G," and, assuming that that photograph represents a body which had a perfect set of teeth, state whether or not that is a photograph of John W. Hillmon?

The plaintiff objects to the question as incompetent, irrelevant and immaterial.

The Court sustained the objection, to which action and ruling of the Court the defendants and each of them then and there duly excepted.

Q. State whether that is the photograph of John W. Hillmon?

Question withdrawn.

Witness excused.

1345 Wednesday, November 1st, 1899. 9:30 o'clock a. m. Court convened pursuant to the adjournment. All parties present as before.

George A. Nichols, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. Please state your name? A. George A. Nichols.
Q. Where do you reside, Mr. Nichols?
A. In Washington County, Kans.
Q. What is your business? A. Farming.
Q. How long have you resided in Washington County, Kansas? A. Twenty-five years ago last March I went there.
Q. Where did you reside before that time?
A. In Jefferson County, Kansas.
Q. Near what place? A. Near Valley Falls.
Q. About how far from Valley Falls?
A. We called it then five miles angling roads; didn't make square corners.
Q. Did you know a family residing near Valley Falls by the name of Hillmon? A. Yes, sir.
Q. What was the father's name if you remember?
A. Benjamin.
Q. About how far did Benjamin Hillmon and his family reside from your place? A. About two mile.
Q. While you were residing in Jefferson county, were you keeping house or were you living with your father's family?
A. I was living with my father's family.
Q. Now, you say you are acquainted with the family of Benjamin Hillmon. Will you state of whom that family consisted.
A. That family consisted of Benjmain Hillmon, his wife, and three of her children, two of his children and herself, and then the original family.
1346 Q. Now, how many children were there in the original family? A. Five.
Q. Do you know who they were? A. Who they were?
Q. Yes? A. Their names?
Q. Yes.
A. Well, there was Henry Hillmon, John W. Hillmon, Mary E. Hillmon, William Hillmon and Martha Hillmon.
Q. You may state if you married one of the family?
A. Yes, sir.
Q. Which one? A. Mary E.
Q. Was that your wife who was on the stand yesterday evening at the close of court? A. Yes, sir.
Q. Now, when were you married?
A. The 7th of March, 1870.
Q. Where? A. Married in Valley Falls.
Q. Now, when did you first become acquainted with this family?
A. First became acquainted with the family in the fall of 1865.
Q. Where had you liver prior to that time, prior to 1865?
A. I lived with my father about two miles east of where the Hillmons lived.

Q. You hadn't known this family until that time?
A. No, sir, I knew of them but I had no acquaintance.
Q. Now, I wish to inquire more particularly of John W. Hillmon. What was he usually called there, if you remember?
A. Wes. Called him Wes.
Q. [How] name was John Wesley? A. John Wesley.
Q. When did you become acquainted with him if you remember? A. Fall of 1865.
Q. Do you know whether he had been living with his father immediately before you became acquainted with him?
A. He had just come out of the army when I became acquainted with him.
Q. How long after that were you acquainted with him; how long did it continue — your acquaintance with him?— In other words, when did you see him last?
A. I seen him last in 1877.
Q. Now, after you became acquainted with him in
1347 1864— A. 1865.
Q. How intimate did your acquaintance become?
A. How is that?
Q. After you became acquainted with him in 1865, how intimately did you become acquainted with him?
A. Well, he and I was what was commonly called chums together; we always ran together and went to parties or anything like that; we were always together; I was with him more than any other young fellow in the neighborhood.
Q. Was he younger or older than you?
A. He was older than I.
Q. You attended parties together? A. Yes, sir.
Q. Did you see him at other times than at parties?
A. Oh, yes.
Q. Now, after you became acquainted with him in 1865, say from that time up until you were married, was he at home all the time? A. Not all the time, no, sir.
Q. What portion of the time, if you remember, was he away from home?
A. Oh, I should think something like half of his time was spent away from home.
Q. Do you know where he went on those occasions?
A. Only that he went west is all that I know.
Q. Do you know what portion of the west?
A. He went west at any rate, to Harker, Fort Harker, and Ellsworth; somewhere out there; had a claim.
Q. But he was back and forth, was he? A. Yes, sir.
Q. During this time, from 1865 until 1870? A. Yes, sir.
Q. Now, you were married in April, 1870? A. March, 1870.
Q. State if John W. Hillmon was present at the time you were married? A. Yes, sir.

Q. Now, after you were married, how long did he remain in that neighborhood?

A. The summer after I was married in the spring, he worked for a man by the name of William McCoy, just about two miles from where we lived.

Q. After you were married, did you continue to live with your father? A. Yes, sir.

Q. At your father's house?

A. Yes, sir, I lived there four years after I was married.

Q. And during this time that he was working for
1348 McCoy, did you see him?

A. Oh, yes, frequently at our house.

Q. Will you briefly describe John W. Hillmon. What was his height, for instance? A. He was five feet nine inches high.

Q. How did you arrive at that?

A. Well, he is my height; he and I have often stood with our backs together and have frequently measured on the side of a door or something like that.

Q. Was it in his boots or in his stocking feet?

A. In his stocking feet.

Q. Now, do you remember the color of his hair?

A. Yes, sir, his hair was brown.

Q. Do you remember the color of his eyes?

A. Yes, sir, his eyes were brown.

Q. Now, as to his nose; what was the character of his nose?

A. Well, his was what I would call a slightly Roman nose. I never heard a Roman nose definitely described, but his was what I would call a slightly Roman nose, with the point of his nose turned a little to one side.

Q. Raised?

A. His nose had a slight rise in it about the bridge.

Q. You may state whether or not his nose resembled that of your wife? A. Yes, sir.

Q. Now, what beard did he wear?

A. I never seen him with a beard until 1877; the first time I ever seen him wear a beard.

Q. What portion of his face was covered with a beard at that time? A. He wore a moustache and goatee.

Q. Now, what was his bearing; erect or stooping?

A. He was what I would say uncommonly straight and square shouldred, because the shoulders, the points of his shoulders seemed to be uncommonly high.

Q. Full chested? A. Yes, sir, very full chested.

Q. Do you remember in regard to his hands and feet?

A. Well, yes, he had rather small hands and feet for his size.

Q. Do you remember the size of his foot; what number boot he wore?

A. He generally wore a No. 7 for a fine shoe or boot, but wearing heavy coarse boots or shoes he commonly wore
1349 a number 8.

Q. Do you remember the condition of his teeth in the year, say, 1870? A. Yes, sir.

Q. What was the condition of his teeth at that time?

A. He had one or two teeth decayed in 1870 and one partly gone at that time.

Q. Did you ever hear him complain of his teeth; if so, what did he say?

A. I have heard him complain of the toothache.

Q. Do you remember of his having toothache?

A. I remember of him saying that he had the toothache.

Q. When was this; as early as 1870?

A. Yes, and before that.

Q. Now, in 1877, did you notice his teeth when he was visiting at your house? A. Yes, sir.

Q. What was the condition of his teeth at that time?

A. Well, he had one tooth entirely gone at that time, and another tooth or teeth close to it was somewhat decayed.

Q. Now, at the time that you saw him in 1877, at your house, did you notice his hands? A. Yes, sir.

Q. What did you notice, if anything, upon his hands or hand at that time?

A. I noticed a scar upon his hand that I never had seen up until that time.

Q. Where was that scar?

A. That scar was located betwen the thumb and main part of the hand.

Q. Do you remember upon which hand?

A. It was the right hand, I think.

Q. How far back on the hand did it extend?

A. I can only give that approximately; I didn't measure it; it extended back between the thumb and main part of the hand, oh, perhaps three quarters of an inch; maybe a little more than that, and around perhaps that far on the front of the thumb.

Q. What you call the ball of the thumb? A. Yes, sir.

Q. Now, you may state whether that was a matter of conversation between you and him at that time?

A. It was.

1350 [A.] Did you make any examination of his hand at that time?

A. I took hold of his hand and looked at it, and he told me how he happened to get it that way.

The plaintiff moves to strike out the answer of the witness as incompetent, and hearsay. Motion sustained, the defendants and each of them at the time duly excepting.

By the Court: Answer the questions and don't go beyond proper answers to the questions.

Q. Now, you may state, Mr. Nichols, if he told you how it happened; Not what he said in regard to it?

The plaintiff objects to the question as incompetent, irrelevant immaterial and hearsay. The court overruled the objection, to which action and ruling of the Court, the plaintiff at the time duly excepted.

A. He did.

Q. Look at the picture marked Exhibit 11, and state if you recognize that as the picture of any one you have known?

A. Yes sir.

Q. Of whom is that a picture? A. John W. Hillmon.

Q. Now, look at the picture marked Exhibit D, and state if you recognize that as the picture of any one you have known?

A. There is a man living in our neighborhood now that looks something like that.

Q. You don't recognize that as the picture of John W. Hillmon? A. No sir.

Q. Look at the picture marked Exhibit No. 10 and state if you recognize that as the picture of any person you have known, and if so, state who it is?

A. It looks to me a little like a picture of Hillmon, but I would call it a pretty poor picture.

[—] You may state whether Benjamin Hillmon is alive or dead? A. He is dead.

Q. Do you remember about when he died?

A. He was killed, I think in 1869.

1351 Q. Met with an accident? A. Yes sir.

Q. Now, are any of the members of the family whose names you have mentioned dead? A. Yes sir.

Q. Which one? A. William.

Q. Do you remember when he died? A. Yes sir.

Q. About when was that?

A. It will be four years next April.

Q. Where did he die?

A. He died at the Interocean Hotel at Denver, Colorado.

Q. Now, Mr. Nichols, are you acquainted with the plaintiff Mrs. Sallie E. Hillmon? A. I met her once.

Q. Where did you meet her?

A. At the Continental Hotel in this town.

Q. About when was that? A. In 1882, June 1882.

Q. What was your business here at that time, if any; did you have any business here?

A. Yes sir, I was subpoeaned here as a witness in this case.

Q. It was during the progress of the trial in 1882?

A. Yes sir.
Q. Did you meet her? A. Yes sir.
Q. Where were you stopping at that time?
A. At the Continental Hotel.
Q. Was she stopping there at that time?
A. I think not.
Q. How did it come about that you met her?
A. Why, she came to our rooms there.
Q. Whom did she come with? A. W. W. Nichols.
Q. Who is W. W. Nichols? A. He is a brother of mine.
Q. Were you introduced to her there at that time?
A. Yes sir.
Q. What room was it in, do you remember?
A. I don't remember the number of the room.
Q. Was it your room or the public parlor, if you remember?
A. I think it was in our room.
Q. Now, who was present there at that time?
A. There was W. W. Nichols, S. D. Nixon, Mrs. J. H. Nixon; my wife; Mrs. Sallie E. Hillmon and myself.
1352 Q. Did you say Mr. or Mrs. S. D. Nixon?
A. Mr. S. D. Nixon.
Q. And Mrs. Nixon? A. Mrs. J. H. Nixon; yes.
Q. Did you have any conversation with her, or was any conversation had there at that time in reference to this case?
A. Yes sir.
Q. Will you state what that conversation was. How did it arise?
A. Well, after she—
Q. Who was she?
A. Mrs. Hillmon; Mrs. Sallie E. Hillmon; after she was introduced some slight conversation occurred between her and my wife and my sister. She said she had come to see what evidence we was going to give in regard to this trial.
Q. What was said in answer to that?
A. Well, she was answered by my wife or by my sister, one or the other of them.
Q. Did she ask anything in regard to any particular part of the body as to what your evidence would be?

The plaintiff objects to the question as leading.

By the Court: Ask him to state all that was said?

Q. Well, go on and state, as you remember it, what was said there between Mrs. Hillmon and the other parties present?
A. Well, she said, "What do you say regarding his teeth?" My wife said to her that his teeth were decayed and poor, and she said her husband had good teeth.
Q. Mrs. Hilmon?

A. Mrs. Hillmon, yes. My wife told her if her husband had good teeth, it was not her brother.

Q. What did she say in answer to that if you remember?

By the Court: What further was said.

A. Well, she said—I can't state just in the words. I don't think; that if we was going to give such evidence as that, she would go and withdraw the case and turn him over to the authorities.

Q. Well, what did you wife do at that?

A. Well, I don't think my wife said anything; she immediately burst out crying.

Q. Made no answer?

A. Don't think she had any further conversation.

By the Court: Did you take that seriously from her, that she would turn John W. Hillmon over to the authorities?

A. Did I, you say?

1353 By the Court: Take it seriously, yes?

A. I can't say that I did, speaking for myself.

Q. Did you have any further conversation with her yourself at that time?

A. Yes, I had some conversation with her myself.

Q. Now, when was that?

A. Why, that was at this meeting at the Continental.

Q. When as to the time this other conversation was held?

A. It was just after this other conversation.

Q. What was she doing when you had the conversation?

A. She was in the act of leaving the room; I stood not very far from the door where she passed out; she halted there close to where I was, and I said to her, "If you have lived as long with him as you say you have you certainly would know whether his teeth were good or not." She said that his teeth were good, that perhaps one of them was a little shorter than the others or something like that. And then I said to her, "If you have lived with him as long as you say you have, you certainly could have noticed that scar on his hand.

Q. What did she say to that, if anything?

A. She said that he did have a small scar on his hand there but when he left it was almost entirely gone.

Q. What did she say then?

A. She went out of the door then.

Q. Have you met her and conversed with her since?

A. No sir.

1354 And in answer to cross-interrogatories propounded to him by John H. Atwood, Esq., Counsel for the plaintiff, the witness testified as follows, to wit:

Q. You say you live in what county, Mr. Nichols?

A. In Washington county.

Q. What is your postoffice or nearest town or village?
A. My nearest town is Branford. My postoffice is Cuba. Cuba is in Republic county.
Q. But that is your postoffice?
A. And the nearest town is Branford.
Q. You say that you knew Mr. Hillmon up to and prior to 1870? A. Up to 1877.
Q. Well, you had known him up, and prior to 1870?
A. Yes, sir.
Q. At that time he went away? A. At that time?
Q. In 1870.
A. He was right there within two miles of us the summer of 1870.
Q. Did he go away in 1870 or didn't he?
A. Well, along that winter; I couldn't say whether it was the winter of 1870 or 1871; I don't know whether it was 1870 or 1871. My impression is it was the latter part of the winter of 1870.
Q. Then I am right, according to your recollection, in saying that he went away in 1870? A. I guess that is it.
Q. Now, how long was he gone?
A. I did not see him again until 1877.
Q. When did you next see him in 1877?
A. Will you allow me to correct that last answer?
Q. If it is not true, I want you to correct it; I want the truth, whatever you believe it to be, if I can get it.
A. I met him in this town some time in 1871 after he left there in 1870.
Q. Then you saw him not again until 1877?
A. No, sir; I didn't see him until 1877.
Q. Then when did you next see him again, if at all?
1355 A. Never seen him any more.
Q. You have seen him but once since 1817?
A. Yes, sir.
Q. Twenty-eight years ago? A. Yes. sir.
Q. How early would your recollection serve you that you noticed that his teeth in front were bad; you knew him for some years prior to 1870?
A. Why, the first I recollect of his teeth being discolored was about the first I got acquainted with him.
Q. You say when you first got acquainted with him in the fall of 1865, his teeth were in some degree bad at that time? A. Discolored.
Q. Now, which portion of his teeth; which of the teeth were discolored?
A. Well, I could not say that he had more than one discolored; might have had.
Q. You are sure of one? A. Yes, sir.

Q. Sure of one being discolored in 1865? A. Yes, sir.
Q. And there might have been more?
A. Might have been more.
Q. In 1870, what condition were they in?
A. In 1870, why, they was one or two of them was discolored, one partly broke off.
Q. Where were these teeth located?
A. Located in the upper jaw.
Q. Front or back?
A. I would say on the corner, like.
Q. They all could not be on the corner, could they?
A. Not exactly in front.
Q. Three of them you have got involved in the decay?
A. No, I haven't.
Q. All right; how many have you?
A. I have two; I think he had as much as two; but in the first place I saw one for certain and might have been more.
Q. Well, what is your best recollection about it?
A. That is my best recollection.
Q. That he had more than one?
A. Might have had more than one.
Q. Of course, he might have had them all gone; I am not talking about what might have been done; what is your recollection about it?
[Q.] My recollection is there was one discolored, one
356 in 1865 when I first became acquainted with him.
Q. How about 1870?
A. That tooth was partly gone in 1870.
Q. How about the other teeth? A. I don't know.
Q. Don't know whether any of the teeth were discolored or gone except the one in 1870?
A. I think the one next to it in 1870 was somewhat discolored at that time.
Q. Now, where was the one that was gone; where was it located when it was in the jaw? A. In the upper jaw.
Q. Was it a front tooth? A. No, sir.
Q. An eye tooth? A. No, sir.
Q. One between what we call the front or incisor teeth and the eye tooth? A. Yes, sir.
Q. That was gone in 1870? A. Partly gone.
Q. And the one next to it was discolored; which way was that discolored tooth from the one that was gone? A. Back.
Q. Back or front? A. Back from it.
Q. Then his two front teeth, what we call the incisor teeth, these cutting, flat teeth in front, both of them were good in 1870; is that right?
A. I don't know whether they were or not.
Q. Well, what is your recollection about it?

A. My recollection—

Q. You remember so well about the other teeth; what is your best recollection about these?

A. Well, my recollection is that they was perhaps good; I don't know whether they was or not.

Q. And perhaps they might be all gone. I think you will recognize the propriety of leaving "perhapses" out of it, and telling us what you remember about it? What is your recollection about these two front teeth?

A. My recollection is they were there in his jaw.

Q. White or discolored, decayed or sound?

A. Well, I couldn't say.

Q. Have no recollection about that at all; is that right?

A. I have an impression in my mind—

Q. Yes; is the impression the result of recollection,
1357 or something that has been told you since. Where did you get this impression? A. From seeing his teeth.

Q. Then it is from recollection. Then you must remember something about it? [Q.] Yes, sir.

Q. Now, what is that recollection; just give it to us?

A. I say my recollection is that his teeth were there; the teeth was there.

Q. How about them being decayed or discolored?

A. Well, I don't think they were discolored much, the two front ones.

Q. You don't think they were discolored much?

A. No, sir.

Q. You think they were discolored at all? Don't you know they were sound?

A. No, I don't know that they were sound.

Q. Do you remember of their not being sound or white?

A. No, I don't remember of their not being sound.

Q. You don't remember of their being discolored?

A. No.

Q. Then, so far as your recollection serves you, you remember that they were there? A. Yes, sir.

Q. You don't remember of their being decayed or discolored, the two front teeth? A. No, sir.

Q. That is a fact? A. Yes, sir.

Q. Then your recollection is that in 1870, one tooth was what you call,—in the upper jaw—was gone?

A. Partly gone, I said.

Q. Partly gone, and the one next to it toward the back of the mouth, was discolored? A. Yes, sir.

Q. But the other teeth so far as your recollection serves you were good? A. Yes, sir.

Q. That is your tooth recollection? A. Yes, sir.

Q. Now, you say that you measured, and you know he was five feet, nine inches because you measured him?
A. Yes, sir.
Q. Is it not a fact that for the first three trials, of this case you said that you could not state his height except by approximation or guess? A. No, sir.
Q. It is not a fact? A. Not a fact, no, sir.
1358 Q. Now, you have told Mr. Green that you measured frequently by standing up back to back, and by measuring against a door, and so on? A. Yes, sir.
Q. Now, when and where was the first time that you remember of measuring in this way, either by standing back to back or at a door? A. I could not tell when.
Q. Do you remember any place?
A. Yes, sir, I remember one place.
Q. Just name one place?
A. It was at his father's.
[—] When was that?
A. I could not tell you.
Q. Approximate it. It was not before you knew him, and it was not after he went away?
A. It was along between 1865 and 1870 sometime.
Q. Now, how many times—You said to Mr. Green that you frequently did this? A. Yes, sir.
Q. Now, what would frequently mean in your language; what do you mean by frequently; how many times?
A. I mean several times.
Q. Half a dozen or something like that?
A. I wouldn't put a number on it.
Q. You used the word frequently and I want you to tell me what you mean. Would you call once a year frequently?
A. Yes, that might be termed frequently.
Q. Then if once a year was frequently, and you knew him between 1865 and 1870, you must have been measured in this way five times; would that be about as your recollection serves you?
A. Somtime between two or three and five times; I don't know how often.
Q. But it was often enough so that your recollection serves you that it was frequently? A. Yes, sir.
Q. Now, then, how old were you in 1865?
A. Fifteen years old. Sixteen years old in 1865.
Q. Had you reached your full growth at 16?
A. I was very near as large then—
Q. Do you think you were?
A. Yes, I think I was about as tall then as I am now.
1359 Q. When you measured, you being five feet nine, you found that his height was the same as yours? A. A. Yes, sir.

Q. His height was the same as yours? A. Yes, sir.

Q. Now, then, can you explain to the jury what occasion there was for your measuring every year?

A. I never said that we measured every year.

Q. But you said that every year would be frequently, and then you said that you measured frequently. Well, leave the year out. Will you explain to the jury here how it is that you measured so frequently. Were you applying for life insurance at that time?

A. No, sir, we were just young fellows, and when amongst ourselves, several in a crowd, perhaps, we would measure.

Q. Wouldn't recollect the fact from one measurement to the next; that you had measured and found you were of the same height? A. Oh, yes, I didn't forget that.

Q. What occasion would there be for measuring a second time, and much less a third and fourth time, after you had once measured and found you were of the same height.

The defendants object to the question as incompetent, irrelevant and immaterial, Objection overruled, the defendants and each of them duly excepting.

A. Sometimes a few of us would be together, probably, of us boys and girls, and we would measure all around.

Q. Where was it that you boys and girls crowded together and measured all around?

A. This time I spoke of at his father's.

Q. Any other time? You wouldn't call one time frequently, would you? A. No.

[—] Give us another time when the boys and girls were together and measured all around?

A. I don't remember just exactly.

Q. Do you remember inexactly? A. No, sir.

Q. You don't remember at all?

A. I remember that we did.

Q. But you don't remember any time or place?

A. No, sir.

1360 Q. And you can't give any reason, as I understand you, why, having measured once, and found what the result of the measurement was, you measured again a third, and a fourth and a fifth time?

A. I think I gave the reason.

Q. What was the reason?

A. A few of the young folks being together and talking of their heights.

Q. Well, two of the young folks who had measured, were John W. Hillmon and Mr. Nichols, were they not?

A. We generally all measured.

Q. You located this measuring bee at whose house?

A. At his father's.
Q. At Benjamin Hillmon's? A. Yes, sir.
Q. Who was present besides yourself and John W. Hillmon?
A. Oh, I couldn't name them; there was so many times that—
Q. That you measured?
A. There was crowds of us there.
Q. How many times did you measure?
A. Didn't measure every time we was there.
Q. You said you had in mind a partcular time that this measuring business occurred, and that you remembered it was at Hillmon's house when the boys and girls were there, and they were all measured around.
A. I didn't date that time.
Q. I didn't say that you did; I was mentioning that as one of the times; that is a fact, is it not? A. Yes, sir.
Q. Now, who was there?
A. Well, I could not state who was there.
Q. But you remember though, that you and John were measured and that you just plumbed even up on top of the head? A. Yes, sir.
Q. You remember that they measured all round, don't you?
A. Yes.
Q. But you can't remember anybody else that was there?
A. No not at that particular time, I can't.
Q. Now, what was anybody's else measurement besides yours and Hillmon's?
A. I don't know that we ever measured, measured by the height to see what it was in feet and inches; I didn't give that statement.
1361 Q. Didn't you say to Green that you measured frequently back to back and against the wall that kind of a measurement? A. Yes, sir.
Q. Consequently, when you measured against the wall, you would do that for the purpose of determining the feet and inches, wouldn't you, or wouldn't you?
A. No, sir, we did not.
Q. Then you didn't measure the height by getting the feet and inches? A. No, sir.
Q. But it was only the comparative height?
A. Yes, sir.
Q. You remember now that you measured at that particular time at Hillmon's? A. Yes, sir.
Q. But who the spectators were, you can't remember?
A. No, sir.
Q. Nor who else were measured besides you and Mr. Hillmon on that occasion?

A. I know several other people were measured at some of those gatherings, yes, sir.

Q. You have been a witness at every trial of this case?

A. Yes, sir.

Q. Was a witness here in 1882? A. Yes, sir.

Q. At the time of this alleged interview between yourself and Mrs. Hillmon was the trial in progress, or had it not yet begun: You were here as a witness, and she called upon you you say, at the hotel. Was the trial in progress, or had it not yet begun?

A. The trial was in progress, but no witnesses had been examined.

Q. The trial had begun but the witnesses had not yet been examined? A. No, sir.

Q. You say that when she said she would turn him over to the authorities, you did not take that seriously? For yourself, that is what you told Judge Hook, was it not?

A. Yes, sir.

Q. That is a fact, is it not?

A. Why, yes, that is a fact.

Q. You thought she was joking?

A. Oh, I couldn't say I thought she was joking.

Q. What did you mean by not taking it seriously?

A. I didn't stop to consider at the time.

Q. You have had twenty years to consider, and I
1362 am asking you now what you mean by not taking it seriously unless you understood that she was joking about it. A. I wouldn't know how to answer that.

Q. I am not surprised at the answer. Now, then, this second talk that you had with her, you were sitting near the door?

A. Yes. Nearer the door than the others were.

Q. Did I understand you that you went out into another room with her? A. No, sir.

Q. That was as she went out, when she stopped and began talking with you there?

A. Yes, sir, I spoke to her as she was going out of the door.

Q. After the conversation took place in the room?

A. Yes, sir.

Q. With your wife, and your brother? A. Yes, sir.

Q. What did you say the other people's names were?

A. Mrs. J. H. Nixon, and Mr. S. D. Nixon.

Q. Who were they; any kin of yours? A. Yes, sir.

Q. What was the relationship?

A. Mrs. Nixon is my sister.

Q. And the man is her husband?

A. S. D. Nixon is my mother's brother.

Q. It was your wife, your mother's brother, your sister and your brother? A. Yes, sir.

Q. That was the gathering that was met there by Mr. Hillmon, and that she told she might as well turn over John W. Hillmon to the authorities; that is a fact? A. Yes, sir.

Q. The parties that were there? A. Yes, sir.

Q. That is a fact, all of them were your relatives?

A. Yes, sir.

Q. Mother's brother, wife, brother and sister; and there was nobody else there except those I have just named except Mrs. Hillmon; that is a fact, is it not? A. Yes, sir.

Q. It was to you that she made the statement, while this trial was in progress, that she might as well dismiss the suit and turn Hillmon over to the authorities? A. To me?

Q. To the crowd there? A. Yes, sir.

Q. That is a fact? A. Yes, sir.

1363 Q. Well, the case was not dismissed, was it?

A. No.

Q. And so far as you know, John W. Hillmon has not been turned over to the authorities; that is also a fact, is it not?

A. Yes, sir.

Q. Now, do you know, or did you ever know of a man named Munn, H. B. Munn, one of the insurance agents or attorneys? A. No, sir.

Q. Never met him? A. Never met him, no sir.

Q. Not at any of these trials?

A. Oh, yes, I will take that back.

Q. Where was it and when as near as you can remember?

A. I don't think I ever had any conversation with Mr. Munn; think I just had him pointed out to me; I remember of such a man.

Q. Don't you remember his paying you some money?

A. No, sir, I don't.

Q. When was it that you had him pointed out to you?

A. At some of the first trials.

Q. Do you remember whether it was here or at Topeka?

A. I think it was at Topeka.

Q. You say that he did not pay you any money?

A. Not that I remember of now.

Q. Could you tell us, Mr. Nichols, how much money has been paid to you and your wife during these twenty years by the insurance companies for being a witness in this case?

A. No, sir, I cannot.

Q. Do you mean by that that there was so much of it that you could not count it, or what do you mean?

A. I kept no record.

Q. You can approximate it; you know whether it is more than half a dollar. It was more than a dollar, was it not?

A. I guess so.

Q. I should guess so too, if I was permitted to guess, but how much do you say it was, approximately; was it five hundred dollars altogether in those twenty years?

A. I don't think our fee has ever amounted to that.

Q. You say you did not have any transactions with Mr. Munn? A. That is my recollection now, yes, sir.

Q. Of course, recollections are fallible, but to refresh your recollection, I will call your attention to the trial of 1895, and ask you whether or not this question was not propounded to you and if you did not make the following answer:

1364 "Did a man by the name of Munn pay you $65.00 at the first trial of this case? A. I could not tell you; he paid me some money, yes, sir."

Do you remember it now?

A. I remember the man, yes, I think I remember Munn paid us some money; we had come here; the trial was put off and we were let go back home.

Q. Now, you remember that this man Munn did pay you some money? A. Yes, sir, I guess he did.

Q. This Mr. Munn who paid it to you was the same Mr. Munn who was one of the agents or attorneys of the insurance companies? A. Yes.

Q. Now, that was at the first trial of this case?

A. Yes, sir.

Q. That was money that was paid on that trial; you don't know how much has been paid since?

A. No, I have kept no record of it.

Q. When was the first time that you told the insurance people, the first time that that was ever mentioned by you, was scar that you say was on the hand of John W. Hillmon?

A. You mean during the trials?

Q. That is just what I mean. Is it not a fact that the first time you mentioned the scar was on the witness stand at one of these trials? A. I don't understand that.

Q. Well, perhaps I am at fault. What I mean to say is this: Is it not a fact that the first time you ever stated to these gentlemen, or to anybody representing the insurance people, the first time that that was ever mentioned by you, was while you were on the witness stand at some of these trials that have been had; in other words, that you never mentioned the scar to them before you were put upon the stand; not this time, but some other time?

A. Well, I don't remember.

Q. You don't remember? A. No, sir.

Q. But you have no recollection of telling anybody about it until you got upon the stand? A. No answer.

Q. How about the mention of the teeth? You have testified about the teeth at this time and at other trials?

1365 A. Yes, sir.

Q. Now, is it not a fact that you testified heretofore, and I will fix the time in a moment, that you had not told the insurance people anything about the teeth and that you did not know they were going to ask you anything about the teeth when you got upon the witness stand?

The defendants object to the question because no proper foundation has been laid for impeachment.

By Mr. Atwood: I will modify the question by fixing the time as the trial of 1895. Have I made matters plain to you, Mr. Nichols?

A. No, I don't understand this 1895, part of it.

Q. What I am trying to get at is this: Whether or not you, did not testify in 1895 at the trial of this case, that you said when you testified about the teeth, which was probably at the first trial, that you did not know they were going to ask you about it until you were asked about it on the witness stand?

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: That would not be a proper question without preliminary questions. It would depend upon what he says now as to whether such a question would be proper.

Q. I will ask you this question: Did you ever tell the insurance people, their agents or any of their emissaries, or any of their lawyers—

The defendants object to the use of the word "emissaries" and ask to have their exceptions saved to the use of such language in the cross-examination of a witness.

By the Court: That word should not be used.

By Mr. Atwood: I didn't know that it implied mala fides or moral turpitude, but if it is so interpreted by counsel, I cannot help but think of the biblical quotation.

I will put the question this way: Did you ever say to any of the insurance agents or their attorneys, anything about
1366 your testimony upon the tooth question or upon the scar question, before you went upon the witness stand to testify the first time? A. No, sir.

Q. You did not? A. No sir.

Q. Then, it is a fact that, so far as you know, they did not know what your testimony would be upon the tooth or teeth, or upon the scar, at the time they put you on the witness stand the first time? A. Upon anything.

Q. Upon anything? They never examined you for your knowledge or information upon anything prior to your going upon the witness stand; the first time, I mean? A. No sir.

Q. Now, you spoke of his nose, that it was what you would call slightly Roman? A. Yes sir.

Q. Slightly Roman—by that you mean, arched in the bridge, if I understood you correctly?

A. Slightly Roman, yes.

Q. By that, do I understand you to mean that there is an arch at the bridge, rather than coming down straight, as yours does, for instance?

A. Yes, a slight rise there.

Q. So that the line instead of coming down straight, would come down to a sort of an arch?

A. A little that way.

Q. And you say it was turned to one side?

A. The point of the nose was a little to one side.

Q. Evidently the result of some accident?

A. Well, I don't know as to that.

Q. Don't know, but the fact remains it was turned to one side? A. Yes sir.

Q. Is it a fact that yon ever knew another man by the name of John W. Hillmon? A. No sir, I never did.

Q. Or any other man by that name?

A. I knowed a John Hillmon.

Q. But not John W.? A. No sir.

Q. Where did he live; in Kansas?

A. He lived close to Hiawatha in Brown county.

Q. In this state? A. Yes sir.

1367 And in answer to redirect interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Now, Mr. Nichols, you have been asked in regard to the amounts of money that you have received from the insurance companies. I will ask you if you have ever received anything other than your witness fees and mileage to come here to testify? A. No sir, I have not.

Q. You said you were paid a certain amount of money by a man representing the insurance companies at the first trial?

A. Yes sir.

Q. Now, you may state what the facts were in regard to that matter if you remember. You were subpoenaed to some here?

A. Yes sir. We came here, we came here, me and my wife in company with Mrs. S. D. Nixon; we came to the Continental Hotel and we learned that the trial had been put off a week or ten days, it would not take up for a week or ten days and

it was impossible for us to stay on account of leaving our children at home, and yourself, I think and Mr. Barker and another man that my recollection now was Mr. Munn, told us that we could go home and return again; I didn't have anything to go home on, nothing to pay our way home, and you gave us this money.

Q. What, if any, arrangements were made for your return?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff at the time duly excepting.

A. What arrangements were made?

Q. Yes.

A. Yes, you told us at that [that] time that we could keep ourselves in readiness; you did not know just the day, but you would send a man from Clyde for us.

The plaintiff moves to strike out the answer as hearsay. Motion overruled, the plaintiff at the time duly excepting.

Q. Now, was this money which was handed to you at that time, deducted from your witness fees and mileage when you made settlement? A. Yes sir.

Q. Now, do you remember how much you were al-
1368 lowed as mileage; not the amount, but how it was allowed to you at that time?

The plaintiff objects to the question as immaterial. Overruled, the plaintiff at the time duly excepting.

A. Our mileage was figured at ten cents a mile on that trial and since that they have only figured it at five cents.

Q. Ten cents a mile each way? A. Yes sir.

Q. Was that your mistake or the mistake of the other party? A. It certainly was not mine.

Q. Now, since that time you say that you have been allowed five cents a mile or ten cents a mile one way?

A. Yes sir.

The plaintiff objects to the question as leading.

By the Court: The answer may stand. The plaintiff duly excepted.

Q. As I understand, then, that you have only received for coming here to testify, the amount of money which was due you as fees and mileage?

The plaintiff objects to the question as leading. Overruled, the plaintiff duly excepting.

A. That is all, yes sir.

Q. Now, what time in the year was this that you were here the first time? A. In June.

Q. You are a farmer? A. Yes sir.
Q. You may state whether or not at that time your crops were needing your attention?
A. They certainly was, yes sir.
Q. What was the effect upon the crops, the time that you did stay here?

By the Court: Going a little too far, Mr. Green. He said that all he has received was the mileage and per diem.

To which ruling the defendants and each of them at the time duly excepted.

Q. You may state if at that time you were given the choice of either remaining here and claiming your per diem
1369 here or returning home and coming back?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff at the time duly excepting.

A. We were given the choice, yes sir.
Q. You took the choice; which choice did you take?

The plaintiff objects to the question as incompetent, irrelevant and immaterial; objection overruled, the plaintiff at the time duly excepting.

A. Why, we went home.
Q. What family did you have at home at that time?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff duly excepting.

A. We had four or five small children; I could not just tell whether it was four or five.
Q. In whose charge were they, if you remember?

The plaintiff objects to the question as immaterial. Overruled, the plaintiff duly excepting.

A. A neighbor boy that I had got to stay there.
Q. Now, you were asked further in regard to whether you had told any parties in regard to what your testimony would be in regard to the teeth. I will ask you if, up until the time you came to Leavenworth, you had seen or talked with any one whom you knew was connected with the insurance companies in any way, in regard to your testimony?
A. I had not.
Q. Did you know that you were to be subpoenaed?
A. No sir, not until we were.
Q. Now, in speaking about the measurement, do you recollect when you were first measured to know your exact height?

A. Yes, I remember.
Q. When and where was that?
A. That was in the court-room during the first trial in ine, 1882.
Q. Was it in the court-room or in the room adjoining?
A. Well, in the court house, I mean to say, yes.
70 Q. Who was present there at that time, if you remember?
A. The United States Marshal was in the room, I [belve], r. Sam Riggs was there, Mr. Barker and perhaps yourself; wouldn't be positive of that; I think perhaps there was anher man there; I think he was a clerk; I don't know his me.
Q. Do you remember whether Mr. Wheat was there?
A. I think he was, yes.
Q. What was your measurement at that time?
A. I was five feet nine.
Q. At whose request, do you remember, that you were easured at that time?

The plaintiff objects to the question as immaterial.
By the Court: That is immaterial.
The question was withdrawn.
Witness excused.

71 George A. Nichols, a witness heretofore duly sworn, being recalled for further examination by the defendts, testified as follows, to wit:

Direct Examination

Mr. Green:
Q. You are the same Mr. Nichols who testified the other y? A. Yes, sir.
Q. You are the husband of the witness who has preceded n? A. Yes, sir.
Q. Do you remember in regard to the shape and form of hn W. Hillmon's hands? A. Yes, sir.
Q. You may state whether he had a long hand or a short nd, describing his hand as well as you can?
A. I would say, from the best of my recollection, that he l a rather small hand in comparison to his size, rather road hand, short fingers, fingers somewhat stubby.
Q. That is the best description you can give of his hand?
A. That is the best description, yes, sir.

Cross-Examination

Mr. Atwood:
Q. How many times have you seen him since 1871?
A. Since 1871?

Q. Yes. A. I seen him a good many times since 1871.
Q. Yes. A. In 1877?
Q. I said 1871? A. I saw [—] in 1877.
Q. Once? A. Yes, sir.
Witness excused.

1372 W. W. Nichols, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to Direct Interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. You may state your name. A. W. W. Nichols.
Q. Where do you reside?
A. In Jefferson county, close to Valley Falls.
Q. About how far from Valley Falls?
A. About seven miles.
Q. How long have you lived there or in that vicinity?
A. I have made that my home since 1864.
Q. How long have you lived on the farm on which you now reside? A. Since 1864.
Q. What is your business? A. Farmer.
Q. Did you know a family in that vicinity by the name of Hillmon? A. Yes, sir.
Q. When did you become acquainted with that family?
A. 1865.
Q. About how far from your place did they live?
A. Two miles.
Q. Who were you living with at that time? A. My father.
Q. Did you know John Wesley Hillmon? A. Yes, sir.
Q. What was he commonly called in that neighborhood?
A. Wes.
Q. When did you become acquainted with him?
A. Winter of 1865.
Q. Where was he living at that time?
A. I think he was at home with his father.
Q. Do you remember how long he continued to live there?
A. No, I can't tell exactly how long.
Q. Do you know if he lived in the neighborhood, the school neighborhood in which you resided?
A. I don't understand the question.
Q. Did he live in the same school district in which you resided? A. No, sir.
Q. Did you go to school with him at any time? A. No, sir.
Q. How intimately did you become acquainted with him?

1373 A. Oh, him and me was together quite often at spelling schools and entertainments.

Q. Did you meet him at other places then spelling schools and entertainments? A. Yes, sir.

Q. Now, did he live there continuously up until, we will say, 1870? A. No, I don't think he did.

Q. Do you remember of his being away? A. Yes, sir.

Q. About how long?

A. Well, I couldn't really say, for I was, part of the time too.

Q. Now, up until what time did you see him in that neighborhood? A. About 1870.

Q. When did you last see him in the neighborhood, if you remember? A. When I last seen him in that neighborhood?

Q. Yes. A. 1877.

Q. Now, prior to that time, when did you last see him?

A. In 1870.

Q. Do you remember what time in 1870?

A. I think it was along in March.

Q. On what occasion did you meet him at that time?

A. At my brother's wedding.

Q. Did you see him after that? A. Yes, sir.

Q. I mean, in that vicinity?

A. No, I don't know as I did; no, I didn't see him in that vicinity after that.

Q. Did you see him after that? A. Yes, sir.

Q. Where did you next see him?

A. After my brother's wedding?

Q. Yes. A. On the buffalo range.

Q. In what part of the country?

A. On the Pease River, Texas.

Q. About what time was that, if you remember?

A. I think that was 1876.

Q. About how long were you with him at that time?

A. About a week.

Q. What was he doing, and what were you doing at that time? A. We was killing buffalo.

Q. Were you in the same camp?

A. We was in the same camp for a week.

1374 Q. Did you belong to the same outfit? A. No, sir.

Q. What outfit did you belong to?

A. My partner's name was Plummer..

Q. You were in partnership with a man by the name of Plummer? A. Yes, sir.

Q. Who was Hillmon with, if you know?

A. Marshall Sewell.

Q. Then you next saw him in 1877? A. Yes, sir.

Q. Where was that? A. In Jefferson County.

Q. At what place? A. At my place.
Q. At your house? A. Yes, sir.
Q. What was the occasion of that?
A. Nothing more than a visit I suppose.
Q. Well, was he visiting you or you visiting him?
A. He was visiting me.
Q. How long did he stay there at that time?
A. Oh, a couple or three hours.
Q. Now, will you briefly describe the appearance of this John W. Hillmon, state his height, and so forth. Do you know how tall he was? A. I don't positively know.
Q. What is your judgment as to his height?
A. About five feet nine.
Q. Do you remember the color of his hair? A. Yes.
Q. What was it? A. Brown hair.
Q. Did he have whiskers? A. Yes, in 1877.
Q. What did he have at that time?
A. Mustache and goatee.
Q. What was the color of his mustache?
A. It was light brown.
Q. How was it in comparison with his hair?
A. I think his mustache was lighter than the hair.
Q. As to his eyes: Do you remember the color of his eyes?
A. His eyes were brown.
Q. Do you remember the condition of his teeth?
A. Oh, not exactly. His teeth was defective.
Q. Now, how were they in 1870, in your recollection?
1375 A. He had defective teeth in 1870.
Q. How was it prior to that time?
A. Well, I would say he had defective teeth ever since I was acquainted with him.
Q. Did you ever hear him speak about his teeth?

The plaintiff objected to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. Yes, sir.
Q. What did he say?

The plaintiff objects to the question as calling for hearsay evidence. Objection sustained, the defendants and each of them at the time duly excepting.

Q. Did you hear him complaining in regard to his teeth at any time? A. Yes, sir.
Q. What did he complain of? A. Toothache.
Q. Now, when was that; about when?

The plaintiff moves to strike out the last question and answer as hearsay.

By the Court: It may stand. To which ruling the plaintiff duly excepted.

A. In the '60's.

Q. Now, the last time you saw him there in 1870, can you more particularly describe his teeth?

A. No, I don't think I could.

Q. Do you remember at that time whether any of them were gone? A. No, I don't.

Q. Now, you say in 1876 you met him on the range; do you remember in regard to his teeth at that time?

A. I don't know as I noticed his teeth at that time.

Q. How was it in 1877, when he was visiting at your house?

A. I couldn't say as I paid much attention to his teeth in 1877; he wasn't there but a short time.

Q. Now, do you remember anything in regard to his hand?

A. Yes, sir.

Q. What do you remember, if anything, in regard to the hand? A. He had quite a scar on his hand.

1376 Q. Do you remember on which hand? A. Yes, sir.

Q. Do you remember or do you know how he received that scar? A. Yes, sir.

Q. Please state where it was; how it came about?

A. It was on the Pease River in Texas, by the busting of a cartridge in the gun.

Q. Explain to the jury how that was?

A. He had loaded the cartridge so heavy that it swelled and the chamber of the gun would not receive it, and he was forcing it in, and in forcing it in the cartridge busted.

Q. How was he forcing it in?

A. With a stick he had in his hand.

Q. What was the effect of the bursting of that shell?

A. The effect was tearing the thumb from the hand and lacerating it pretty badly.

Q. What portion of the hand?

A. Between the thumb and forefinger.

Q. This scar: Do you remember how far this scar extended back on the back of the hand?

The plaintiff objects to the question because it assumes a fact which has not been proven.

Q. What did you observe in 1877, if anything, in regard to the effects of this wound which he had received down on the Pease River?

A. I observed quite a scar on the right hand.

Q. Now, who was present at the time, if you remember, when this accident occurred?

A. There was myself, my outfit, myself, my hired man that we had named Jake Sligel, and Joe Plummer, and Mr. John

W. Hillmon was there, and I think Henry Hillmon; I don't know whether Marshall Sewell was there or not, and two other men that was in the camp; I don't remember their names; I don't know as I ever heard their names.

Q. What kind of a gun was it he was using at that time?

A. It was what we called a Sharp's sporting rifle, No. 50.

Q. Was it a muzzle loading or a breech loading gun?

A. A breech loading gun.

Q. What did they use in that gun? A. Brass cartridges.

Q. Loaded cartridges; did they load the brass cart-

1377 ridges; is that it? A. Yes, sir.

Q. How were those cartridges discharged?

[—] Why, by a primer on the end of the cartridge; what we called a primer.

Q. Did you see him after the wound was received?

A. Yes, sir.

Q. What was done after he received that wound?

A. We did the wound up the best we could.

Q. How did he carry his hand after that?

A. He carried his hand in a sling.

Q. Was that wound healed at the time you parted company with him down on the Pease River? A. No, sir.

Q. How was he carrying his hand when you left?

A. In a sling.

Q. Are you acquainted with the plaintiff, Mrs. Sallie E. Hillmon, now Mrs. Smith? A. I have met her, yes, sir.

Q. When did you first meet her and where?

A. In my own house in Jefferson County sometime in May prior to the first trial of this case.

Q. Who was with her at that time, if you remember?

A. Mr. Thomas McCoy and his wife.

Q. They came to your house? A. Yes, sir.

Q. Did you have any conversation with him at that time?

A. Yes, sir.

Q. Did you have a conversation with her in reference to this suit there at that time? A. Yes, sir.

Q. Now, you may state what that conversation was?

A. Well, that conversation was a description of what I called Wes. Hillmon. They call him here John W.

Q. That don't state the conversation. A. Did you ask—

Q. What did she say and what did you say?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff duly excepted.

A. She asked me to describe her husband, John W. Hillmon, which I did, as I have on the witness stand here before.

1378 Q. What did you say? A. What did I say?

Q. Yes.
A. I said John W. Hillmon was a medium height man with brown hair and brown eyes, and the last I seen him, with a heavy mustache and goatee.
Q. Another description? A. I described this —

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection overruled, the plaintiff duly excepting.

[A.] What further did you say?
A. I described this scar on the right hand, just as I seen it in 1877.
Q. Now, what did she say to that?
A. She didn't make no objections to the scar nor to the description.

The plaintiff moves to strike out the answer of the witness as not responsive to the question and as a conclusion.
No ruling.

Q. State what she said?
A. She said I could describe John W. Hillmon better than she could, and she would have to have me for a witness.
Q. How long did she remain there at that time?
A. She came there some time in the forenoon, and went away that evening.
Q. By evening, do you mean after dinner, or in the dusk?
A. We had eat supper before she went away,
Q. Now, when did you next see her, if you met her at all?
A. Some time in June in the court house.
Q. Where? A. Leavenworth.
Q. In which court house?
A. It was not this one; I think it was the court house the case was tried in somewhere south here.
Q. Did you have any conversation with her at that time?
A. Yes sir.
Q. Where did you go with her from there, if you went any place? A. Went to the Continental Hotel.
Q. How did you come to go to the Continental Hotel with her? A. At her request.
1379 Q. What did she request you to do?
A. She asked me if there was any other persons from the country in there; I told her that I understood that my brother and his wife was at the Continental Hotel and she said to me that there was one of Hillmon's sisters she had never met, and would I be so kind as to give her an introduction and I told her I would if she would go down to the Continental Hotel.
Q. What did you do then?

A. We went down to the Continental Hotel, ascertained they was in, went up and I gave her an introduction.

Q. Did you have any conversation with her in regard to this case going down to the hotel? A. Yes sir.

Q. What was that conversation?

A. She said she wished I wouldn't testify anything in regard to the scar on Mr. Hillmon's hand.

Q. Did she know yon were a witness at the trial?

A. She surely must have; she subpoenaed me.

Q. More than one subpoena served on you at that time?

A. Yes sir.

Q. When you got to the hotel, whom did you meet?

A. I met my brother, G. A. Nichols.

Q. What did you reply to her when she made that requests that you should not testify in regard to that scar?

A. Well, I made reply that I told her about that scar in my house in Jefferson county and she then made no objections to it.

Q. Anything further?

A. Yes, she said he might have had a scar on his hand but scarcely perceptible by a magnifying glass.

Q. Now, when you got to the hotel, whom did you meet there?

A. My brother, G. A. Nichols, my uncle S. D. Nixon, my sister Mrs. J. H. Nixon and my sister-in-law, Mary E. Nichols.

Q. Where were they?

A. They was in a room in the Continental Hotel.

Q. Now, after the introduction, did they have any conversation in regard to this case? A. Yes sir.

1380 Q. Do you remember that conversation?

A. I do not.

Q. Did you hear it? A. Only in part.

Q. Did you hear any part of it?

A. Yes sir, I heard part of it.

Q. What was said so far as your recollection serves you?

A. My attention was first called to somebody being turned over to the authorities.

Q. You paid no attention to the conversation prior to that?

A. No sir, I did not.

Q. Did you hear any of the conversation after that?

A. No.

Q. If you heard that conversation on that subject, state what you did hear? A. I have already stated.

Q. You have stated all that you remember of that conversation there at that time? A. Yes sir.

Q. Do you remember what Mrs. Nichols was doing there after you heard that part of the conversation?

A. I think she was crying.

Q. How long did Mrs. Hillmon stay there after that?
A. A few minutes.
Q. Who went away with her, if any one?
A. I don't know as anybody went away with her.
Q. I will ask you Mr. Nichols, to look at the picture marked Exhibit No. 10 and state if you recognize that as the picture of any one you know?
A. That has a slight resemblance to John W. Hillmon.
Q. Might that be a picture of John W. Hillmon?
A. It might, yes.
Q. Look at the picture marked Exhibit D?
A. I wouldn't recognize that picture as any one I ever seen.
Q. Look at the picture marked Exhibit 11.
A. That is a picture of John W. Hillmon.

1381 And in answer to cross-interrogatories propounded to him [—] C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. The last time you saw John W. Hillmon was in 1877?
A. Yes sir.
Q. At your house in Jefferson county? A. Yes sir.
Q. How long did you see him at this time?
A. Two or three hours, I think.
Q. The time next before 1877 that you saw him was in Texas, was it not? A. Yes, sir.
Q. The time next before you saw him in 1877, was in Texas in 1876? A. Yes sir.
Q. On the Pease River? A. Yes sir.
Q. It was while you were on the Pease River that you say this accident occurred in relation to the injury to his hand?
A. Yes sir.
Q. In what month was it?
A. That was in the month of August.
Q. When did you leave that country to come back to Kansas? A. In September.
Q. You left there about a month after he received this injury in 1876? A. Yes, I think it was about a month.
Q. You say that at the time of the explosion of this shell which injured his hand, that Henry Hillmon was there among others?
A. I don't remember that I said Henry was there.
Q. Didn't you so state in your direct examination that your recollection was that Henry Hillmon was one of the persons that were there at the time?
A. Well, I am not sure now whether I did state it on the direct examination or not.
Q. You don't remember now; do I understand you to say that you don't remember whether you said it in your direct

examination, or whether it is true or not; what is your recollection now?

A. I don't remember a thing that Henry Hillmon was there.

Q. Who was present at that time?

A. Myself, Jake Sligel and Joe Plummer.

Q. It was a metallic shell, was it? A. Yes sir.

1882 A. It exploded in his hand did it?

A. I didn't say it exploded in his hand.

Q. Was his hand on the shell?

A. His hand was in the act of putting the shell into the chamber of the gun.

Q. Then the shell was in his hand?

A. No, I didn't so state.

Q. Did he hold the shell in his hand? A. No.

Q. Was he putting the shell into the gun with his hand?

A. His hand was int he act of putting the shell into the gun.

Q. How was his hand situated with reference to the shell?

[Q.] We generally took the shell in the thumb and finger; you don't take it in your hand.

[A.] He took in his thumb and finger as distinguished from his hand? A. Yes sir.

Q. He had the shell in his thumb and finger? A. Yes sir.

Q. And was putting it in the gun? A. Yes sir.

Q. It was loaded with 140 grains of powder, was it not?

A. I didn't so state.

Q. Well, that is the fact?

A. It was loaded with 110 grains of powder.

Q. You testified at the previous trial that it was loaded with 140 grains? A. I don't think I did.

Q. It was loaded with 110 grains of powder? A. Yes sir.

Q. And it exploded while he had it between his thumb and finger? A. I didn't say so.

Q. Did it or not? A. No, it did not.

Q. He did have it between his thumb and finger when he was putting it into the gun? A. Yes sir.

Q. Well, did it explode when he was putting it into the gun? A. Yes sir.

Q. Now, it tore his thumb off, didn't it?

A. No, sir I didn't so state.

Q. You have testified at every trial of this case?

A. Yes sir.

1383 Q. You have been interrogated with reference to this same matter at every previous trial of this case? Have you not? A. What do you mean by interrogated.

Q. Questioned. A. Yes, sir.

Q. You have been questioned? A. Yes, sir.

Q. With reference to this same matter at every previous trial of this case? A. Yes, sir.

Q. And you have testified upon the subject?
A. Yes, sir.
Q. I will get you to state if you remember of testifying upon the trial of this case before Judge Thomas in the federal court-house at Topeka in the year 1895; do you remember of being cross-examined by me? A. Yes, sir.
Q. In relation to this same matter, the explosion of this shell? A. Yes, sir.
Q. I will get you to state whether you did not testify as follows on that occasion in your cross-examination:
"What did you say to the jury about the end of his thumb being torn off? I didnt say anything about the end of his thumb being torn off:
Q. Didn't you say that his thumb was apparently torn loose from his hand?" And if you did not answer, "Yes, sir, I did."
A. Yes sir, I did.
Q. That is correct? A. That is correct.
"Q. His thumb was apparently torn entirely loose from his hand? A. I didn't say entirely loose.
"Q. His thumb was apparently torn loose from his hand?
A. Yes, sir.
Q. Did he bleed profusely?
A. Yes, sir, it bled pretty well.
A. This was his right hand, wasn't it?
A. Yes, sir, right hand.
Q. He was down there buffalo hunting? A. Yes, sir.
Q. Was he engaged in the business of shooting or cleaning; what part of the work did he do?
A. He was huntsman.
Q. Did he stay there? He continued, and you came away?
A. Yes, sir.
1384 Q. You did not see him again until the spring of 1877 when he came to Jefferson county? A. Correct.
Q. Now, then, his hand was still disabled when you left there in September, 1876? A. Yes, sir.
Q. And the only time that you ever saw it after that time was when he was at your house in 1877?
A. I left the buffalo range, I left Mr. Hillmon's camp in August, not in September.
Q. I thought you said the injury was in August, and that you left there in September. A. No.
Q. In what month was the injury? A. In August.
Q. And when did you leave there?
A. I left there shortly after that.
Q. In the month of August? A. In the month of August.
Q. Not in the month of September?
A. I left that camp in the month of August.
Q. Now, then, when you left there, the hand was still disabled? A. Yes, sir.

Q. You did not see any scar during that time? A. No, sir.
Q. And the only time that you ever saw any scar on his hand was when he was at your house in 1877? A. Yes, sir.
Q. And he was at your house then for two hours?
A. Yes, sir.
Q. You never saw him afterwards?
A. I have never seen him since.
Q. This scar that you saw there in 1877, was at least half an inch wide, was it not?
A. I don't think it was half an inch wide.
Q. You don't think it was? A. No, sir.
Q. It was a very bad scar and very discernible so that anybody would see it that would see his hand?
A. I don't know what anybody else would see.
Q. But in your opinion was it so plainly discernible that if a man should look for a scar—
A. He would surely see it.
Q. He hadn't any scar on his finger—Where was the scar?
A. The scar was right up there (illustrating) around the ball of the thumb here.
1385 Q. The scar extended, if I undestand you, clear around the thumb?
A. Oh, no; no, you don't understand me.
Q. Then make it plain.
A. If it had extended clear around the thumb, the thumb would have had to have come off; I said it extended an inch and a quarter.
Q. That is, on the outside of the hand? A. Yes, sir.
Q. How large a scar was it on the inside of the hand?
A. Probably about the same.
Q. Now, I will get you to state if that scar was not at least half an inch wide, white and plainly discernible?
A. I would not make any such statement.
Q. Referring to your testimony given before Judge Thomas at the federal court-house in Topeka in 1895, I will ask you if you didn't testify as follows:
"How far did that scar extend up on the hand? A. On the side of the hand about an inch and a quarter.
Q. About an inch and a quarter? A. Yes, sir.
Q. Plainly visible? A. Yes, sir.
Q. And on the other side of the hand, how far, the inside of the hand?
A. It was a little more than an inch and a quarter; did not exceed an inch and a half.
Q. How wide was this scar?
A. It must have been a quarter of an inch wide."
[—] Didn't you so testify?
A. Yes, a quarter of an inch and half an inch is some difference

Q. A quarter of an inch wide?
A. Did I say half an inch?
Q. That is what you said.
A. I should have said a quarter of an inch.
Q. So the scar was a quarter of an inch wide?
A. Yes, sir.
Q. And plainly discernible?
A. Yes, sir, to anybody that was looking for a scar, they could surely see it.

1386 Q. Now, then, I understand you to say that you have no recollection about his teeth except that you think they were defective; is that right? A. That is right.

Q. How old are you? A. I am 51 years old.
Q. You were born, then in 1845?
A. I was born in 1848.
Q. When did you first]know] John W. Hilmon?
A. In 1865.
Q. And you say his teeth were defective at that time?
A. Yes, sir, he had trouble with his teeth at that time.
Q. They always were defective?
A. Yes, sir, that is my recollection, as long as I ever knew him.
Q. You say in 1877 you did not notice his teeth?
A. In 1877, John W. Hillmon had quite a mustache.
Q. Wil- you answer my question. I didn't notice his teeth.
Q. You didn't notice his teeth in 1876?
A. No, not particularly.
Q. You have been interrogated upon each trial of this case in relation to his teeth, have you not? A. Yes sir.

Q. Did you not testify in substance in the trial of this case in 1895 before Judge Thomas at the federal court house in Topeka, that John W. Hillmon had no tooth out in 1877, the last time you saw him?

The defendants object to the question for the reason that it does purport to state definitely enough what the witness did say.

Objection overruled, the defendants and each of them duly excepting.

Q. Did you not testify in the trial of this case in 1895 before Judge Thomas, at the federal court-house in Topeka, that when you saw Mr. Hillmon at your house, and the last time that you ever saw him, in 1877, that he had no tooth out?
A. I don't remember.
Q. Did you not testify on that occasion that you did particularly notice his teeth, and that he had no tooth out in 1877? A. I don't remember.

Q. Did you not on that occasion testify that you did particularly notice his teeth and that he did not have any tooth out in 1876? A. I don't remember.

Q. And didn't you testify upon that occasion that
1387 you did particularly notice his teeth, and that he had one tooth that was discolored, but that he had no tooth out, and the last time you ever saw him that the discolored tooth.

Q. Don't you remember that you testified that that discolored tooth was in and that he had no absent tooth; that the discolored tooth was in his jaw the last time you saw him?

A. I don't remember testifying to that.

Q. I will ask you if you did not testify as follows in relation to that matter:

"Q. I want you to say that to the jury. You have stated on your direct examination that in 1875 or 1876, you noticed that Hillmon had a black tooth; is that correct?

A. I guess it is.

Q. And your recollection is that it was between 1875 and 1876? A. Yes, sir.

Q. Had you, prior to that time, ever noticed that he had a black tooth?

A. Well, I don't know as I could say that I had.

Q. Well, now, this black tooth was all intact, wasn't it; the tooth was in there but it was black?

A. The tooth was in there to the best of my recollection, yes, sir.

Q. And he didn't have any tooth out at all at that time, did he? A. Well, I couldn't say that he did.

Q. You took sufficient notice of his teeth to see that he had a black tooth? A. Yes, sir.

Q. You have no recollection up to 1875 and 1876 that he had any tooth out, and if he did you didn't notice it?

A. That is my recollection.

Q. Where was that black tooth?

A. It was in the upper jaw, in the front part of his mouth.

Q. Was it one of the front or of the two front teeth?

A. I think it was.

Q. One of the two front teeth? A. Yes, sir.

[—] Do you remember of so testifying?

1388 The defendants object to the question for the reason that it does not tend to impeach the witness. Objection overruled, the defendants and each of them duly excepting.

Q. Do you remember of so testifying?

A. No, I could not remember.

Q. Do you remember of testifying as follows:

"When did you next see him anywhere?

A. I think it was in 1877.
Q. Where? A. In Jefferson county.
Q. When you met him while on Pease River in Texas. did you notice this black tooth? A. Yes, sir.
Q. He still had the black tooth? A. Yes, sir.
Q. That would be along in the fall of 1876?
A. When he was camping on Pease River?
Q. Yes. A. August.
Q. August, 1876? A. Yes, sir.
Q. You have a distinct recollection at that time he still had this black tooth? A. Yes, sir."
[—] Didn't you so testify?
A. Well, I don't remember my testimony from one trial to another.
Q. Well, you have testified at this trial that you have no recollection with reference to his teeth. Now, have you not as good recollection in regard to the teeth as you have with reference to the scar? A. No, sir.
Q. But you have testified heretofore in each trial of this case that you did remember his teeth, and that he had no absent tooth in 1877; wouldn't you be as apt to remember that as to remember about this scar, or to remember this conversation with Mrs. Hillmon twenty years ago. What is your opinion about it as to the strength of your memory?
A. Well, under the circumstances, I would remember the scar longer than I would anything else.
Q. Do you think Mr. Nichols, that you could have testified in this case in 1895, that you had a distinct recollec-
1389 tion that he had no absent tooth, and that you would not remember now of so testifying?
A. I don't remember now.
Q. You don't remember now, so that you admit that you might have testified with reference to this tooth, that there was no absent tooth, in 1895, and now have forgotten the fact?
A. I have answered the question.
Q. And yet you think you can testify correctly to a conversation that you had with Mrs. Hillmon walking along the street twenty years ago? A. I think I can, yes, sir.
Q. Now, didn't you further testify upon that occasion that "The next time you saw Hillmon was in 1877? A. Yes, sir.
Q. Where? A. In Jefferson county.
Q. Did you ever see him again? A. No, sir.
Q. How long, and under what circumstances did he remain there in 1877? A. He was on a visit there.
Q. How long were you in company with him?
A. About two hours; or maybe three.
Q. Did you still notice that he had the black tooth?
A. Yes, sir.

Q. You never saw him any more? A. I did not."
[—] Did you not so testify?
A. I testified that I did not see him any more.
Q. Did you not testify that you particularly noticed that he had no absent tooth, and that the black tooth was still in his jaw when you saw him in 1877 at your house?
A. I don't remember.
Q. Don't you remember, Mr. Nichols, that when you were cross-examined, you were repeatedly questioned about the matter as to whether there was any absent tooth from his jaw in 1877, time and time again on cross-examination, and that upon each occasion you said that you distinctly remembered that there was no absent tooth in his mouth in 1877?
A. There was so many [—] repeatedly asked that I can't keep track of all of them.
Q. Yes, but you endeavored, did you not, upon that
1390 occasion, to answer truthfully all the questions that were put to you? A. Well, yes, sir.
Q. Now, you have teseified to a conversation with Mrs. Hillmon that you had with Mrs. Hillmon walking along the street, I think in 1882; that was at the first trial of the Hillmon case, of this suit, was it not? A. Yes, sir.
Q. You were here at that time as a witness? A. Yes, sir.
Q. For the insurance companies?
A. I was here under two subpoenas; I didn't know who was going to use me; I hadn't been put on the witness stand.
Q. You remember the conversation that you had with Mrs. Hillmon on that occasion? A. Yes, sir.
Q. I will get you to state whether, in that conversation, when you said there was a scar upon Mr. Hillmon's hand, if Mrs. Hillmon did not reply if there was any scar on his hand, it was so small nobody could see it with a magnifying glass; is not that what she said? A. I think it was.
Q. Didn't you, in that conversation, when she asked you with reference to his teeth, tell her that you were certain he had no tooth out and that you would so testify?
A. I don't know as I did.
Q. What is your best recollection?
A. My best recollection is I think we didn't [mentioned] teeth at that time or in that conversation.
Q. Didn't you when she was up in Jefferson county? She was looking around there among the neighbors to get testimony in her case; you understood that, didn't you?
A. I understood that.
Q. That that was her purpose there? A. Yes, sir.
Q. And she had a conversation with you and asked you to describe her husband? A. Yes, sir.

Q. And told you that she wanted to get witnesses to describe him? A. Yes, sir.
Q. That is what she told you? A. Yes, sir.
Q. Didn't you tell her upon that occasion that you could describe him and that he had no tooth out?
A. I don't think the identity of the tooth was mentioned at that time.
1391 Q. Didn't you tell her that if anybody said John W. Hillmon had an absent tooth it was false?
A. No, I did not.
Q. And didn't you tell her the same thing in Leavenworth?
A. No, sir.
Q. And that you would be a good witness for her because you knew he had no tooth out; is not that true?
A. No, sir, that is not.

And in answer to redirect interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. I understood you to say, Mr. Nichols, in your cross-examination that Mr. Hillmon had the shell between his thumb and finger when he was putting it into the gun; do you mean to be understood that at the time of the explosion, that Mr. Hillmon was holding the cartridge between his thumb and finger?

The plaintiff objects to the question as leading.

The Court overruled the objection, to which ruling of the court the plaintiff at the time duly excepted.

A. No, sir.
Q. What was he doing at the time of the explosion?
A. He was forcing it into the chamber of the gun with a stick he carried in his hand; he had taken it in his thumb and finger, like that was the cartridge, to insert it in the breech block so it would enter the chamber; but it had become swelled to such an extent that it would not enter the chamber like shells had ought to if it had been loaded right, and he endeavored to force it in with this stick that he carried in his hand.
Q. What would be the effect upon the gun after the gun had been fired a few times; what would be the effect upon the gun?
1392 A. Why, the shell exploded before the breech block—
Q. You don't understand; I asked you after the gun had been fired a few times, what effect it has on the gun? Does the gun become foul and dirty? A. Yes, sir.
Q. When a gun becomes foul and dirty, would that have any effect upon the insertion of the cartridge?

A. It hadn't ought to if the cartridge hadn't been swelled from loading.

Q. Now, you spoke about testifying here before that his thumb apparently was torn off from the hand; when did it have that appearance?

A. Right away after the explosion; when it was all bloody. Before we could definitely find the extent of the wound for blood.

Q. In other words, it made a serious accident, did it?

The plaintiff objects to the question as leading. Objection sustained, the defendants and each of them at the time duly excepting.

And in answer to recross-interrgatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. You say that you noticed this scar particularly when he came back there to Jefferson County? A. Yes, sir.

Q. And all the scar that you saw was around the thumb?

A. I didn't say so.

Q. Did you see any scar on the fingers? A. No, sir.

Q. There was no scar on his fingers? A. No, sir.

Q. Nor in the palm of his hand? A. No, sir.

Q. You now say on redirect examination, as I understand you, that he did not have the shell between the thumb and finger? A. At the time of the explosion, understand me.

Q. At the time of the explosion?

A. Yes, he did have it in his thumb and finger before it entered the breech block.

Q. When it exploded, his fingers were not near it; neither his thumb nor finger? A. I didn't say any such thing,

Q. He had this cartridge in the gun and was poking
1393 it with a stick as I understand it? A. Yes, sir.

Q. That is right, is it? A. That is right.

Q. He had the stick then in his thumb and fingers?

A. Well, I can't say positive how he held the stick; he was punching the cartridge with the stick with the right hand, and he held that stick in his right hand; that is all I can tell you; he was holding the stick he had the stick in his right hand and was poking the cartridge with it, forcing it into the chamber of the gun.

By Mr. Green:

Q. Do you know where he got that stick?

A. He carried that stick for the purpose. He always loaded his cartridges heavy.

The witness was here excused, and afterwards recalled when in answer to further cross-interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, he testified as follows, to wit:

Q. I want to ask you a few questions in relation to the explosion of this shell. The gun that Mr. Hillmon had at that time, was it a breech-loading gun or a muzzle-loading gun?
A. A breech-loading gun.
Q. Was it a rifle? A. Yes, sir.
Q. It was one of this kind that break down on a hinge?
A. No, sir.
Q. At the butt? A. Yes, it loads at the breech.
Q. It broke at the breech, didn't it?
A. There was several ways of a gun being breech loaders.
Q. How was this?
A. There was a breech block to this gun about four and a half inches long, and when you throwed the trigger guard down, the breech block dropped down and broke the gun and where the breech block dropped down was on a level or horizontal with the hole in the barrel so the shell could slide along on top of the breech block and be inserted into the barrel of the gun.
1394 Q. I understand that Mr. Hillmon had taken a ctraridge between his thumb and finger and inserted it into the breech of the gun, or into the breech block; is that right?
A. Yes, sir. Into the block.
Q. And he had a stick: How was he holding his gun; in his left hand? A. Yes, sir.
Q. And the breech block would be— Was he standing or sitting?
A. He was—I don't know. I think he was standing up.
Q. He was standing up? A. Yes, sir.
Q. So that he would have had his gun in his hand like that, (illustrating) something like that, in front of him?
A. Yes, in front of him.
Q. He picked the cartridge out of his belt?
A. No, I think the cartridges were in a box beside of him.
Q. He picked a cartridge out of the box and inserted it in the breech block? A. Yes, sir.
Q. Then he took the stick as I understand it, and was poking the cartridge into the bore?
A. Into the chamber of the gun.
Q. Or into the chamber? A. Yes, sir.
Q. How long a stick was that that he had?
A. Oh, I couldn't say positive; six or eight inches long.

Q. So that his hand would be about six inches from the butt of the cartridge? A. Yes, sir.

Q. Probably not as much as that because he had to have hold of the stick, didn't he? You say the stick, he carried for that special purpose? A. Yes, sir.

Q. How far would you say his hand was from the shell when it exploded?

A. I don't know; I would not attempt to say.

Q. He was looking at it was he?

A. I don't suppose a man shuts his eyes when he loads a gun.

Q. I am not asking you what you suppose; do you remember his attitude?

A. I couldn't say whether he was looking at it or not; he was loading the gun in the position I have already de-
1395 scribed.

Q. Holding the gun in his left hand, and the stick in his right, and standing up is that correct?

A. I think that is correct.

Q. You say that this cartridge was loaded with 120 grains of powder? A. I think about 120 grains.

By Mr. Green:

Q. 110 or 120 grains of powder? A. 120.

Q. That was the number of grains you remember the cartridge was loaded with? A. Yes, sir.

Q. Have you one of those brass cartridges?

A. I have not here; I had one on a former trial but I did not fetch it along with me this time.

Witness excused.

1396 Mrs. Maggie J. Nixon, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to Direct Interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. Please state your name? A. Maggie J. Nixon.

Q. Where do you reside, Mrs. Nixon?

A. In Cloud county, Kansas.

Q. Do you know George A. Nichols? A. Yes, sir.

Q. And W. W. Nichols? A. Yes, sir.

Q. What relation are you to them? A. I am their sister.

Q. Did you at any time live in Jefferson county?

A. Yes, sir.

Q. Whereabouts in Jefferson county did you reside?

A. Near Valley Falls.

Q. What time did you leave Jefferson county?

A. About 1875, I think.

Q. Were you acquainted with a family by the name of Hillmon there? A. Yes, sir.
Q. How long were you acquainted with them?
A. Well, I became acquainted with some of the members of the family in the fall of 1865.
Q. You were then living in Jefferson county at that time?
A. Yes, sir.
Q. Had you always lived in Jefferson county or had you removed there from some other place?
A. Moved there from Illinois.
Q. Did you know John Wesley Hillmon? A. I did.
Q. Did you know the other members of the family?
A. I did.
Q. Where did you meet John W. Hillmon?
A. At my father's house.
Q. At any other places than your father's house?
A. Yes, sir, I met him at various places.
Q. Did you go to school with him at any time?
A. No, sir, I did not.
Q. Do you remember when you last saw John W. Hillmon?
A. I last saw him when he visited at my brother's house in Washington county.
Q. In what year was that, do you remember? [A.] 1877, was it not? A. Yes, sir.
1397 Q. How did you come to meet him there?
A. We went there visiting on the Sabbath and found him there, not knowing that he was there.
Q. Now, did you meet him frequently while you were residing in Jefferson county? A. Yes, I met him frequently.
Q. Did you go to school with him at any time?
A. No, sir, I never attended school with him.
Q. Did you ever notice the condition of his teeth while he was living there about Jefferson county? A. Yes, sir.
Q. You may state to the jury what the condition of his teeth was at that time if you remember.
A. His teeth were turned dark and were partially decayed.
Q. About what time was this?
A. They were in that condition when I first seen him.
Q. When did you last see him in Jefferson county, if you remember. A. I could not give the date.
Q. Could you give about the year?
A. Well, it was after my brother's marriage; my brother and his sister.
Q. Do you remember when they were married?
A. March 1870, if I remember right.
Q. Did you observe his teeth at all when you met him there at your brother's house in 1877?

A. Yes, I noticed his teeth.

Q. What was the condition of his teeth at that time?

A. There was at least one broken off, and the rest of his front teeth or the teeth which showed when he talked were dark.

Q. Now, while you lived in Jefferson county, you may state whether you ever heard him make any complaints in regard to his teeth; if so, what did he complain of?

A. I have often heard him say he had the toothache.

Q. In which jaw was it that you observed that this tooth was missing? A. In his upper jaw.

Q. Now, you may state if you know the plaintiff, Mrs. Sallie E. Hillmon, now Mrs. Smith. A. I met the lady once.

1398 Q. Where did you meet her?

A. At the Continental Hotel in this city.

Q. Do you remember when that was? A. In June, 1882.

Q. What were you doing in Leavenworth at that time?

A. Came here as a witness on this trial.

Q. Now, was this before or after you had testified that you met her at the Continental Hotel? A. It was before.

Q. Where, in the Continental Hotel, if you remember, did you meet her? A. In our room.

Q. You are speaking of our room; whom do you mean?

A. Well, my brother and his wife and I occupied the same room.

Q. Who was present at the time you met here if you remember?

A. My brother G. A. Nichols and his wife, my brother W. W. Nichols, S. D. Nixon and myself.

Q. Whom did she come there with, if any one?

A. W. W. Nichols brought her there.

Q. Now, did you have any conversation with her at that time?

A. Well, I myself did not have much conversation with her; the conversation was in a measure general.

Q. Was there any conversation had there at that time in reference to this trial, or any matter connected with it?

A. Yes, the trial was spoken of.

Q. Did she state the purpose of her coming there?

A. She said she came to ascertain what our evidence in this case would be.

Q. Now, what was said to her in reply to that?

A. I don't know that I can tell exactly what was said if I tried to.

Q. Who was this addressed to, if you remember?

A. Well, I can't say that it was addressed to any one in particular; says "You folks."

Q. Now, what, if any statement did any of the parties make to her in regard to what they would testify to upon the trial?
A. Why, we spoke of his description.
Q. Well, what description was given.

1399 The plaintiff objects to the question unless the person is indicated who gave the description. Objection overruled, the plaintiff excepts.

Q. What was said, if you remember?
A. What was said by whom?
Q. As to what your evidence would be or the evidence of any of you upon the trial?
A. Why, we spoke of his appearance in general, spoke of his hair and his eyes; his teeth also were mentioned.
Q. Now, who spoke about his teeth if you remember?
A. I could not say who spoke first about them?
Q. Did more than one give a description of him, do you remember? A. I think we all spoke of how we regarded him.
Q. What did she say in regard to that matter?
A. She said her husband's teeth were good.
Q. What further was said?
A. Mrs. Nichols said "If your husband's teeth were good, then your husband is not my brother."
Q. What did she say finally in regard to the evidence that you would give?
A. She said, "If that is the evidence you are going to give, I will go back, she says, and dismiss the case and turn him over to the authorities."
Q. How long did she remain there after she had said that?
A. Not long; only a few minutes.
Q. Did you hear any further conversation between her and any of the other members of the party there?
A. No, sir, I heard no further conversation; at least none that I recollect.
Q. Did you observe the condition of Mrs. Nichols at that time? A. Yes, sir. She was very much affected.

The plaintiff moves to strike out the answer of the witness as a conclusion. Motion sustained, the defendants and each of them at the time duly excepting.

Q. What did she do, if anything?
By Mr. Atwood: Who?
Q. Mrs. Nichols.

1400 The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. What she did?

By the Court: You may show what she said.

Q. What reply, if any, did Mrs. Nichols make to that?
A. I don't think she made any reply.

And in answer to cross-interrogatories propounded to her by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. You first knew John W. Hillmon when, Mrs. Nixon?
A. I first met him in the fall of 1865.
[—] And did you know him more or less from that time on until he went away in 1870? A. I did.
Q. Did you live in the same neighborhood where he did?
A. I did.
Q. When did you first notice that his teeth were bad?
A. From the very beginning; the first time I met him.
Q. They were discolored in front? A. Yes, sir.
Q. All of them?
A. I can't say that all of them were; that was my impression; that would be a person's impression taking just a casual glance at his mouth in conversation.
Q. It is your recollection we want; not your impression, what is your recollection as to the state of his teeth in front at that time?
A. I have stated the appearance of his teeth; they were discolored.
Q. Then they were discolored if they appeared discolored, were they not? A. I presume they were.
Q. Well, weren't they; is not the matter beyond presumption? A. I have stated it.
Q. You said you presumed so, and I now ask you what the fact is, if you will kindly tell me?
A. I have stated that his teeth were discolored in front.
Q. Now, then, that was a fact in 1865. Were any
1401 of them gone at that time?
A. Not that I am aware of.
Q. Well, what is your recollection about it?
A. No sir, I think not.
Q. When did you notice any of his teeth gone or crumbled; I mean gone in part or gone altogether?
A. I don't recollect that I noticed any part of his teeth entirely gone or any part of his teeth gone until I met him at my brother's.
Q. That was in 1877? A. Yes sir.
Q. Now, then, in 1870, when he went away, he had no tooth that was broken off in any degree?
A. If he did, I didn't notice it.
Q. You didn't notice it? A. No sir.

Q. How frequently did you see him those three or four years, the five or six years from the time you met him in 1865 until he went away?

A. He came frequently there to our house.

Q. How far apart did you live?

A. The part of the time he was at his father's house he was, I think, about two miles from my father's house.

Q. What is your present age, Mrs. Nixon? A. 48.

Q. Were you married at the time that you knew Mr. Hillmon prior to the time he went away? A. No sir.

Q. You can't tell, I suppose, how often you met him; you simply know that you did meet him, and that his teeth were discolored when he went away in 1870? A. Yes sir.

Q. Then you did not see him again until 1877?

A. No sir.

Q. At whose house was it that you met him?

A. In 1877 I met him at my brother's house.

Q. Which one? A. Qeorge A. Nichols.

Q. There were two Nichols on the stand this morning, which was G. A.? The first one, the first witness?

A. I believe so, yes sir. Yes, G. A. Nichols was the first one.

Q. He is the one whose wife is here and testified?

A. Yes sir.

Q. The other one is W. W. Nichols? A. Yes sir.

1402 Q. It was at the house of G. A. that you met him?

A. Yes sir.

Q. How long were you in his company when you met him at your brother's house?

A. The greater part of the day.

Q. Was anything said about his having visited W. W. Nichols in his home in Jefferson county, or at his home in Jefferson county? A. Not that I remember.

Q. What sort of a beard did he have at that time, if any?

A. He wore a mustache and small goatee.

Q. How about the weight of the mustache, that is, the thickness or thinness of it; was it a heavy mustache or the reverse of heavy?

A. Well, I should not have called it very heavy; still it was not a thin mustache; rather medium I should say.

Q. Did not conceal his teeth at all?

A. Not altogether, no sir.

Q. When he was speaking or laughing you could see the defect in his teeth without any difficulty at all?

A. Very plainly.

Q. Very plain. Do you know of anything that transpired between his visit there, and his visit to W. W. Nichols that would prevent the teeth from being plainly seen at W. W. Nichols?

A. I think he visited at W. W. Nichols before he was there; I think he did.

Q. His beard wasn't in any such shape when you saw it as to conceal this defective tooth when you saw him there at Washington county? A. No sir.

Q. Did his beard have the appearance of being recently cut off or anything of that kind; the mustache?

A. Well, I don't know that I observed him so particularly closely as to notice whether his mustache had been trimmed or not.

Q. Now, in 1882, that was the first time that you ever saw Mrs. Hillmon? A. Yes sir.

Q. And this assemblage that she came into at the Continental Hotel, consisting of yourself, your husband—

A. No sir.

Q. Yourself and your two brothers? A. Yes sir.

1403 Q. And the wife of one of your brother's?

A. Yes sir.

Q. And another kinsman of yours? A. My uncle.

Q. And at that time, you heard these statements that you have given to the jury? A. Yes sir.

Q. How big was that room, Mrs. Nixon, approximately?

A. It was a hotel bed-room, containing two beds. I will take that back; there was only one bed in it. I couldn't give the size of it; it was not a large bed-room.

Q. Mr. W. W. Nichols was in there, the gentleman who last testified just before lunch?

A. He was either in the room or standing just in the doorway.

Q. Was there anything, so far as you could observe, that would prevent him hearing all or anything that you heard in that room?

A. He might have been interested in something else.

Q. Did you observe who was talking at the time that Mrs. Hillmon made these statements, that you say she made, besides herself, if anybody?

A. I don't recollect that anybody else was talking just at that time, not just when she made that statement.

Q. Was there anybody else present besides this group you have named of your relatives?

A. No, I believe there was a very small child of my brother's present.

Q. No grown person present? A. No sir.

Q. Did you observe that W. W. Nichols was so absorbed in something else that he would not have heard what was said in the room? A. No sir.

Q. You were paying attention to what Mrs. Hillmon said?

A. Partially.

Q. And to what the others said? A. Yes sir.
Q. Who was speaking when Mrs. Hillmon came into the room? A. I could not tell you.
Q. Did you go on and speak of his teeth, of his hair, mustache and other personal peculiarities?
A. Well, I can't say that I gave any especial description of the gentleman.
1404 Q. Did you say anything?
A. I took part in the conversation.
Q. Do you remember what you said?
A. I don't remember exactly what I said.
Q. Do you remember who it was that described the teeth?
A. I did describe the teeth.
Q. Did each of you describe the teeth in turn?
A. No, sir, we did not, but when one party had described them, we all agreed that that was correct.
Q. You are the person who described the teeth on that occasion? A. I don't know that I am.
Q. I understood you to say so?
A. I don't think I said so, I don't recollect.
Q. You don't remember who did the talking?
A. I don't recollect who done the talking.
Q. You think it was some other person in the group?
A. I don't remember that it was myself, and I don't remember who it was.
Q. You don't remember who it was? A. No, sir.
Q. You are positive it was said, all right?
A. I am positive it was said.
Q. Was Mrs. Hillmon introduced to each of yon when she came in? A. I think she was.
Q. She was introduced specially and particularly to you?
A. I think she was; I would not be certain but I think brother Will introduced her to me.
Q. Did you shake hands with her all around?
A. I could not say.
Q. Don't remember that? A. Don't remember that.
Q. How long was that conversation being carried on?
A. I presume she was there probably half an hour; maybe not so long.
Q. What would be your recollection; that would be quite a leeway; was it an half an hour or considerably less, or approximately half an hour?
A. It might be half an hour; I suppose it was, as near as I can say.
1405 Q. It was about that, you think? A. Yes, sir.
Q. Now, then, when Mrs. Hillmon said that if you were going to testify to that effect, that she would turn Hillmon over to the authorities, did you take her seriously or think i: was serious?

The defendants object to the question as not proper cross-examination. Objection overruled, to which ruling the defendants and each of them at the time duly excepted.

A. Well, I certainly didn't think she was joking.
Q. You thought it was serious?
A. It was intended seriously, I suppose.
Q. That is where you and W. W. differ?

The defendants object to the statement and it was stricken out.

Q. Did she leave the room immediately after that statement was made? A. Very shortly afterwards.
Q. You never heard of the suit being dismissed, did you?
A. No, sir, I did not.
Q. Right here, it is a very live suit ain't it?
A. Seems to be.
Q. And you never heard of his being turned over to the authorities, did you? A. No.

And in answer to redirect interrogatories propounded to her by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. You may look at Exhibit D and state if you recognize that as the picture of any one you have known?
A. I could not say whose picture it was.
Q. Look at the picture marked 11, and state if you recognize that as the picture of any person you have known?
A. That is a picture of J. W. Hillmon.
Q. Look at Exhibit No. 10, and see if you recognize that as the picture of any one whom you have known, and if so, state of whom?
1406 A. It looks like Mr. Hillmon but I wouldn't say it was his picture.
By a Juror: We did not hear what the lady said about the first picture.
Q. What did you say about the first picture shown you?
A. I did not recognize it.
Witness excused.

1407 Thomas Jefferson Schleppy, a witness produced by the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Green.

Q. You may state your name, if you please?
A. Thomas J. Schleppy.
Q. Where do you reside? A. North of Valley Falls.
Q. About how far?

A. About three and a half or four miles.
Q. What is your business? A. Farming.
Q. How long have you lived in Jefferson County?
A. I have lived there off and on since 1861.
Q. Where were you living from 1865 on?
A. I lived there from 1865 until 1869?
Q. Were you living there from 1861 until 1869?
A. Yes, sir.
Q. Did you know a family by the name of Hillmon?
A. Yes, sir.
Q. What was the father's name? A. Benjamin.
Q. How far did they reside from where you were living?
A. About two miles.
A. What relation, if any, was Benjamin Hillmon to you?
A. He was an uncle by marriage?
Q. That family consisted of how many children? A. Five.
Q. What were their names, please?
A. The oldest one was Henry, the next one was John W., the next was Mary E., the next was William G., and Martha.

Q. Did you visit at your uncle's house? A. Yes, sir.

1408 Q. Did you see John W. Hilmon? A. Yes, sir.

Q. How often did you see John W. Hillmon during the time that you lived there up until you left in 1869?

A. Well, in 1861 we lived there for a month or so with the family, and then we moved to town after that, and I would see him probably every two or three weeks, until in 1864, I guess it was, he went to the army.

Q. How long was he gone at that time, do you remember?

A. I do not recollect exactly how long, I think it was in 1865, or some place, when he came back.

Q. Then from that time on did he stay there as long as you were living there?

A. No. He was gone part of the time off on the plains; I don't know where.

Q. When he was there, or there abouts, did you see him?

A. Yes, sir, I saw him pretty often.

Q. Now when did you last see him?

A. Either 1869 or 1870; spring or summer of 1870.

Q. Where did you see him at that time?

A. Well the last place I recollect of seeing him, he was boarding at Carey's; that is, after his father was dead he boarded at Carey's a while, and bought cattle around through the country.

Q. As I undestand, after 1869 or the spring of 1870, you never saw him afterwards? A. No, sir.

Q. Haven't seen him since? A. No, sir.

Q. Now you may give a description of John W. Hillmon. Describe his person?

A. He was tall like, square-shouldered, walked straight.

Q. Do you remember the color of his hair?

A. Brown hair, dark eyes, dark brown eyes.

Q. What was the shape of his nose?

A. His nose was rather a large nose, a little Roman nose, little higher in the center.

Q. In regard to his teeth: Do you remember in regard to those?

A. Well, ever since the time I can recollect he had a colored tooth, and the last time I saw him, in 1869 or 1870, it was clear out or else down to the gum. I could not say. I think it was clear out.

Q. What was the condition of his other teeth, if you remember?

A. So far as I know his other teeth might have been colored. I do not know. I could not say whether they was or not.

Q. Did he ever complain of his teeth?

A. I have heard him talk of having the tooth-ache. Yes, sir. I have heard him complain.

Q. What did he complain of?

A. Complained of the tooth-ache.

Q. When was this, if you remember?

A. Along in 1865 and 1866, along there.

Q. Now do you remember whether or not he had any scars? A. Yes sir, he had a scar on his head.

Q. Whereabouts?

A. It was something near where I have a scar, right up on the left-hand side of the back of his head.

Q. Was that plainly noticeable?

A. It was when you could see it; when his hair was cut short.

Q. Do you know how he received that scar?

A. No, I do not.

Q. When do you remember of seeing it?

A. 1862 or 1863.

Q. Did you see it after that?

A. I do not remember now whether I have or not.

Q. Did you learn how he received that scar?

A. Nothing but hearsay.

Q. I will ask how he received it?

The plaintiff objects to the question as calling for hearsay evidence. Objection sustained; the defendants, and each of them duly excepting.

Q. Look at the picture "Exhibit 11," and state if you recognize that as the picture of any one whom you have known and, if so, state who it is?

A. John W. Hillmon.

Q. Look at the picture marked "Exhibit D," and state if you can identify that as the picture of any one whom you have known?

A. No, I would not say that that was his picture. That don't look like him.

By the Court: My memory is to the effect that "Exhibit D," has not been offered in evidence by Mr. Green.

It goes in evidence as an exhibit to a deposition. It has been identified as a picture of Hillmon.

By the Witness: I would call that Hillmon, but it is not, I would not say it was as good a picture as the first one.

Q. That is, as "Exhibit 11"? A. Yes, sir.

Cross-examination

By Mr. Atwood:

Q. You say that one of these pictures is a picture of Hillmon and the other is not?

A. No, I did not say it was not. It may be, but it is
1411 not a good picture; that is a good picture of him.

Q. Whose picture is that, Mr. Schleppy, if you know? (showing "Exhibit No. 22 to the witness).

A. It is a picture of John W. Hillmon, but it ain't as good a picture as—

Q. You say that is a picture, in your judgment, of John W. Hillmon? A. I believe it is.

Q. Now what would you say you think that was?

A. I say it favors him some It may be a picture of him.

Q. Now put them side by side and see, would you say that one is not a copy of the other?

A. I should say it may be, but it ain't as good a one as the other.

Q. Didn't you say, when this was submitted to you, it was a picture of John W. Hillmon, I ask what your opinion is?

A. It may be.

Q. I mean, what do you think about it; that is, your opinion? A. Yes, sir.

Q. Your opinion of that is that it is a picture of Hillmon too, and that also? A. Yes, sir.

Q. Now will you explain to the jury, Mr. Schleppy, why you should, with hesitancy, have said that was a picture of John W. Hillmon but not a good one?

A. I did not say it was not. I said it was a picture, but not a good one.

Q. In 1870 you say you saw him for the last time; is that right? A. Saw Mr. Hilmon in 1869 or 1870.

Q. Where were you residing, for the purpose of refreshing your recollection? A. North of Valley Falls.

Q. Had you been for some years residing there?

A. I had been there since 1861, on that place, right
1412 straight along there up until the time Hillmon went away.

Q. Now can you fix the date any more definitely than 1869 or 1870?

A. He was there when I went up to Doniphan County.

Q. When did you go? A. I went, I guess, in 1870.

Q. Then probably it was 1869 that you saw Hillmon?

A. 1870, I guess it was. It was sometime in the summer of 1870.

Q. That you went to Doniphan? A. Yes sir.

Q. Was [—] the preceding summer or spring that you saw Hillmon, preceding the time you went to Doniphan, or was it the same year? A. I think it was 1870.

Q. You say that at that time one tooth was broken off or gone, was it?

A. It was clear down to the gums, yes sir.

Q. Which tooth was that?

A. It was in the upper jaw, I think.

Q. On the right hand side?

A. I would not say positive which side.

Q. Of course no man can say positively after so many years.

A. But my recollection, one of the front teeth, not the center front tooth but the next one to it.

Q. One of these that showed when the man spoke or laughed? A. Yes sir.

Q. It was to the right side of the center of the jaw?

A. I would not say positive.

Q. I understood you to say that that was your recollection about it? Am I right?

A. I said I would not say positive.

Q. You have been asked about it and I am trying simply to ask you what your recollection is, to see whether it was on the right or the left of the center.

1413 A. It might have been to the right side.

Q. It might have been upon both sides? A. No sir.

Q. I am asking what your recollection would be, your best recollection? A. It was on the right side.

Q. How about the others; that is, what we call the incisor teeth, the front teeth, the flat teeth you know?

A. The big teeth?

Q. The flat teeth, the flat smooth ones in front, how were they for decay? A. They were all right at that time.

Q. Now this is—

A. I would not say positive that they was.

Q. Of course, but wait until I get done with the question. What else do you want to say? I am listening.

A. Ask a question.
Q. Did you get through? A. Yes sir.
Q. Can I say something now?

By Mr. Green: I object to counsel treating the witness that way. The witness only wants an opportunity to answer the question.

By the Court: Go on.

Q. Now this tooth that you spoke of was plainly visible; that is a fact? A. Yes sir.
Q. So that one, in talking with him or seeing him laugh, could hardly avoid seeing the condition of his teeth, is that a fact? A. Yes sir.

1414 Q. And your recoollection is, that in 1870, the last time you saw him, twenty-nine years ago, if your recollection serves you, that this tooth you have described was gone, but that the others were all right? A. Yes sir.

Redirect Examination

By Mr. Green:
Q. Do you remember whether he wore a mustache in 1870?
A. Yes sir.
Q. How heavy a mustache did he have at that time?
A. Light mustache, not heavy.
Q. How was it as to the color?
A. It was lighter than his hair.

Witness excused.

1415 Samuel D. Nixon, a witness produced by the defendants, being first duly sworn testified as follows:

Direct Examination

By Mr. Green:
Q. State your name please?
A. My name is Samuel D. Nixon.
Q. Where do you reside, Mr. Nixon?
A. In Washington County, this state.
Q. Did you ever live in Jefferson County? A. Yes sir.
Q. About what year did you live there?
A. I believe it was in either 1864 or 1865. I don't remember dates very well.
Q. Did you know John W. Hillmon?
A. At that time I just knew him; that was all, I knew him when I saw him.
Q. Do you know the plaintiff, Mrs. Sallie E. Hillmon?
A. No sir, I can't say that I do.
Q. Did you ever meet her? A. Yes sir.
Q. Where? A. At the Continental Hotel in Leavenworth.
Q. When? A. I believe it was in 1882.
Q. What was going on here at that time, if you remember?

A. This same trial was going on I believe.
Q. Who was present when you met her?
A. There was Mr. G. A. Nichols and his wife, Mrs. J. H. Nixon, W. W. Nicholls and myself, is my best recollection.
Q. Did she come to the room where you were?
A. Yes sir.

Q. Whom did she come with? A. W. W. Nicholls.

1416 Q. Now did you have any conversation with her after she came there? A. I did not, no sir.

Q. Did you hear any conversation between her and the others who were there at that time? A. I did.
Q. Now, who was conversing, if you remember?
A. Well I could not say who her conversation, that is, Mrs. Hillmon's conversation was directed to, which one nor whether it was all of us.
Q. What was the subject-matter of the conversation?
A. Well, I can't give the exact words, but it was something like this.
Q. What were they talking about was the question?
A. They were talking about the suit that was going on, and the case.
Q. What did she say her business was there, if anything?
A. I do not know that I can recollect. I don't remember how the conversation commenced exactly.
Q. Do you remember any of the conversation? If so, state it?
A. Mrs. Hillmon, in answer to the conversation or the question that was asked her, I don't know what it was, but her answer was, that if that is what you are going to swear to I shall go and withdraw the case and turn him over to the authorities, as near as I can recollect.
Q. To whom was this addressed?
A. It seemed to be addressed to Mrs. G. A. Nicholls.
Q. Do you remember what she said before that, Mr. Nicholls? A. I don't believe I do.
Q. What had you been talking about before that?
A. They were talking about his teeth, or something like that.
Q. What was said about them, if you remember?

The plaintiffs object to the question for the reason

1417 that the witness has already answered the same. Objection overruled, and the plaintiff excepts.

A. Something about him having decayed teeth, and one tooth was out. I don't remember what Mrs. Hillmon's reply to that was.
Q. Do you remember who said that, Mr. Nixon?
A. I think it was Mrs. G. A. Nicholls.

Q. Was that before or after she made this remark that you have sspoken of about turning him over to the atuhorities?

A. I believe it was after; that is my best recollection.

Q. Which was after, that this tooth question was talked about? A. I don't understand you.

Q. Which part of the conversation took place first, that in regard to the decayed tooth, or that in regard to turning him over to the authorities?

A. In regard to turning him over to the authorities, I believe, is my recollection, that that was spoken of first. I would not be certain.

Q. Now Mr. Nixon, can you give the conversation in the order it occurred?

The plaintiff objects to the question as cross-examination. Objection overruled, and the plaintiff excepts.

[Q.] What was the question?

Q. I ask you if you can give the order of the conversation as it came up? A. I don't believe I could do it.

Witness excused.

1418 Frederick D. Morse, a witness produced by the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name Doctor? A. Frederick D. Morse.

Q. Where do you reside? A. Lawrence, Kansas.

Q. What is your business? A. Physician and surgeon.

Q. How long have you been practicing medicine?

A. Thirty-two years.

Q. What college, if any, did you graduate from?

A. Rush Medical College of Chicago.

Q. How long have you been a practicing physician in Lawrence? A. Thirty-one years.

Q. Do you remember the circumstance of a dead body being brought to Lawrence in the spring of 1879? A. I do.

Q. Did you see that body? A. I did not.

Q. Where was your office at that time?

A. On the corner of Massachusetts and Henry streets.

Q. Do you know where the body was located?

A. I think it was—

The plaintiff objects to the question as calling for hearsay evidence. Objection overruled; the plaintiff excepts.

A. I think at Smith's undertaking rooms.

Q. Where was that in reference to your office?
A. It was on the opposite side of Massachusetts street, a little south.
Q. Do you know Dr. J. H. Stuart? A. I do.
1419 Q. Where was he living at that time, if you know?
A. He was living on Tennessee street in the city of Lawrence.
Q. Where did he have an office?
A. He had an office in the same building that I had one
Q. You may state if at that time you were asked to examine a portion of that body?

The plaintiff objects to the question because it calls for the conclusion of the witness and is leading. Objection overruled; the plaintiff excepts.

A. I was called to examine a piece of flesh said to have come from a body.

The plaintiff moves to strike out the answer as hearsay.

By the Court:
Q. Is it the piece that Dr. Stuart exhibited to you?
A. Yes, sir.

The court overruled the motion, to which ruling the plaintiff duly excepted.

Q. Now what, if anything, did this piece of flesh that you examined there in Dr. Stuart's office contain?
A. There was a vaccination mark on it, a scar.
Q. About how large was this piece of flesh that you were called upon to examine?
A. As near aas I can recollect it was about two inches or two and a half inches by three.
Q. Who asked you, if any one, to examine it?
A. Dr. Stuart.
Q. When was that, as to the time this dead body was there at Lawrence, if you know?
A. It was about the time that they held the coroner's inquest, if I remember rightly, as near as I remember.
Q. Now you state that you found on that piece of
1420 flesh, a vaccine sore? A. Yes, sir.
Q. How did you determine that it was a vaccine sore?
[Q.] From the looks of the crust that was on it, a scab.
Q. Are you able to tell from the appearance of a scab which you may find upon a piece of flesh of that kind, whether it was a vaccine sore or from some injury or bruise?
A. We can.
Q. How do you determine it Doctor?

A. From the looks of the scab and the surrounding tissue.

Q. Now Doctor is this matter of vaccination a difficult one? A. No, sir.

Q. Who can do it?

A. Most any one can do it if they have the virus.

Q. Now the virus, where can you obtain that from in order that you may vaccinate a person?

A. You can obtain it from a person who has a vaccine sore, at a certain stage, or you can take it from the scab, or you can get it from the place where they procure it from the bovine virus.

Q. How is it done? How is this vaccination made?

A. Why it can be done by simply a little scratch on the surface of the body, enough to bring the blood, and then rubbing some of the virus in, or putting a piece of the scab in and retaining it there.

Q. Now does this vaccine sore have certain stages?

A. It does.

Q. How long after the virus is inserted in the arm do you find any effect of the virus.

A. From twenty-four to forty-eight hours.

Q. What is the first effect that you notice?

A. Usually a little red point.

Q. What does that develop into?

1421 A. It developes into a papule containing a little watery substance, elevated above the surface, and then afterwards into a pustule.

Q. Now about how long after the insertion of the virus, if the virus takes effect, does this first appear, this papule you speak of, usually? A. About five days.

Q. About how long before the pustule forms?

A. About eight days.

Q. Then what is the next stage of that vaccine sore?

A. The inflammation extends around the sore and lasts for three or four days, then the sore gradually dries up and forms a crust and remains there for a certain length of time, and falls off.

Q. Now how does the crust that you find on a vaccine sore differ from that which you find occasioned by a wound.

A. It is generally of a regular size, unless it has been interefered with, and it is elevated above the surface and, after the crust forms, it shows no matter about it.

Q. Is there any difference in the texture of the scab thus formed? A. Usually more solid than one made from a wound.

Q. Any difference in the appearance and color?

A. It is usually brown, rather dark brown, and at first is pretty firmly joined to the tissues beneath.

Q. Now about how long after the virus has taken, after the papule has formed for instance, is it before the scab has dried up so that it falls off?

A. About twenty-one days.

Q. Is that from the time of the insertion of the virus?

A. From the insertion of the virus?

Q. You say the 21st or 23rd? A. The 21st.

Q. Now from the appearance of a normal vaccine sore, you say that you can tell about how long it has been since the party was vaccinated?

1422 A. Generally you can.

Q. Now did you examine this vaccine sore that you found upon this piece of flesh? A. I did.

Q. How long did you determine it had been since the person from whose arm this was taken, or from whose body this was taken, had been vaccinated?

A. I judged it to be about fourteen days.

Q. How did you determine this?

A. Because it was so thoroughly united to the flesh we could not separate it from the flesh without cutting it. It had dried up so that there was no matter there. There was none of the virus there in a liquid state. It had all dried up and it was united with the tissues beneath so thoroughly that it could not be separated unless you cut it with a sharp instrument. There was no sign of its loosening up.

Q. What was the condition of the surrounding flesh?

A. The tissues around, perhaps for half an inch or such a matter as that, were reddened and apparently swollen.

Cross-examination

By Mr. Hutchings:

Q. You are an employee of the defendant companies, are you not; The Mutual Life Insurance Company?

A. I examine for them sometimes. A. Yes, sir.

Q. You have for many years. A. Yes, sir.

Q. You are their regular medical examiner at Lawrence, Kansas?

A. I am for the New York Life Insurance Company and for the Connecticut Life.

Q. You have been for the Mutual Life have you not?

A. Not their regular examiner. I have examined when their regular examiner was not there,

1423 Q. You are testifying as an expert, and receive a special fee for it, do you not? A. I suppose so.

Q. How much do you receive in addition to your ordinary fees? A. There is no set price given.

Q. What have you received heretofore?

A. I don't remember. I think one time I did not receive anything but the regular fees, and one time I think I received $15; I think so.

Q. Now you say a piece of flesh about two and a half by three inches in dimension? A. Yes, sir.

Q. You do not know where the flesh came from except from hearsay? A. Except by hearsay. No, sir.

Q. How many sores were there on this flesh?

A. I do not remember of but one.

Q. Would you undertake to say there were not two sores?

A. I would not undertake, no sir. My remembrance was that there was only one.

Q. Only one sore? A. Yes, sir.

Q. Now did you see any appearances of this piece of flesh having been burned with iron? A. No, sir.

Q. When you examined it? A. No, sir.

Q. You say that a professional man ought to be able to distinguish a vaccine mark by its characteristics?

A. Yes, sir.

Q. There would not be any reasonable probability of making a mark on a piece of skin with a red hot iron, that would resemble a vaccination sore would there?

1424 A. No, sir. I think not.

Q. If you should see a vaccination mark on a body you would not have any trouble in distinguishing it from a mark made by a red hot iron? A. I think not.

Q. You say that the age of a vaccine sore can generally be determined by an inspection of it in its different stages?

A. Yes, sir.

Q. Sometimes it can. A. It varies sometimes.

Q. And sometimes it cannot.

A. Cannot be told exactly. No, sir.

Q. When is it that it cannot be told?

A. I think it would be difficult to tell just what it was from the 14th to the 21st day, or when it was just ready to fall off. I think it would be difficult to tell then.

Q. It would be in the latter stages of the sore?

A. Yes, sir.

Q. Then it would be more difficult to determine its age?

A. I think so.

Q. Now you are speaking of vaccine sores so far as your experience is concerned upon live human beings?

A. Yes, sir.

Q. You never saw a piece of flesh with a vaccine mark cut out of a dead body? A. No, sir. I think not.

Q. You never did examine a vaccine sore upon a dead body? A. Not that I remember of now.

Q. Did you examine this sore under a glass?

A. I do not remember that we did.

Q. You were making this examination at that time,
1425 I presume, at the instance of the companies?

A. No, sir. Simply for Dr. Stuart. He asked me to.

Q. Dr. Stuart requested you to? A. Yes, sir.

Q. You did not make any notes of the examination at that time? A. No, sir.

Q. You depend entirely upon your memory for what you say? A. Yes, sir.

Q. Now, if you can tell a vaccine sore by inspection, and determine approximately its age during the stages of incubation up to say the 14th day, you would discover, in such examination, whether the skin was on the sore would you not; that is, what you call the scarf skin or cuticle? You did not see very much of it there?

A. I cannot say positively that the scarf skin was there. It is very difficult to determine after the crust has formed.

Q. Now, as to that part of the sore, if you did see it, you did not see any skin there, did you?

A. No, sir. No. Simply crust.

Q. Dr. Stuart was there at the time? A. Yes, sir.

Q. If the skin had extended from the surroundings of the sore over the top of it, you would have seen it wouldn't you?

A. Yes, sir, I think so.

Q. You had as good an opportunity to see it as Dr. Stuart?

A. Yes, sir.

Q. Now, the incubation of a vaccine sore, the period of incubation, cannot be positively and accurately told? Only approximately? A. Approximately, yes, sir.

Q. That you learn from experience and what is stated in the books? A. Yes, sir.

Q. I will get you to state, doctor, whether or not it is well established in your profession, that a vaccine sore may
1426 be prolonged, that is, the period of incubation may be prolonged, by the weather, the health of the person, or some [sceptic] poison coming in contact with it, or injuries to the sore during the period of incubation?

A. I presume it is, yes, sir.

Q. It may be? A. Yes, sir.

Redirect Examination by Mr. Green.

Q. Would it be prolonged after this point you speak of, the papule being formed, after the first blister is formed?

A. Yes, if there was an injury to it, it might be prolonged then. It might be prolonged if poison got into it. If the surface was broken so that germs could get in there they might develop a kind of poison and prolong it somewhat.

Q. But the sore would show what for itself, would it not?

The plaintiff objects to the question as leading.

A. Your question was what?

Q. Would the sore show, or would the crust formed over the sore show whether or not the true vaccine sore had been injured? A. I think it would. Yes, sir.

Q. What would be the condition there?

A. It might be larger. It might be irregular. It would not be what you would call a normal scab.

Q. And what would be the condition of the substance of the scab?

A. Well, it would depend upon the amount of the injury.

Q. Well, if it was injured so that it would cause the blood to flow, what would then be the condition of the substance of the scab of a normal vaccine scab?

A. It would probably be larger and the crust would probably be thicker and of softer texture. I do not think it would be quite as solid.

Q. What would you say as to the sore or the scab that you found upon this piece of flesh being a normal vaccine
1427 scab?

A. That is what I judge it to be; a normal scab.

Q. And you judge that from what?

A. From the appearance of it and from the solidity of the scab, and the intimacy with which it was joined to the tissue beneath.

Q. How was it joined to the tissues beneath?

A. It simply seemed to be grown together so that we could not separate it, as I said, without using a sharp instrument.

Q. Now, what would be the condition of this sore at the time this scab would fall off?

A. The scab would be loosened from the tissue beneath.

Q. And by what process would that be brought about?

A. By a process of separation. It produces a condition of separating the foreign substance and the surface of the skin and throws it off gradually, exfoliates it; gradually develops a change of the tissue of the skin beneath it, and the crust falls off.

Q. When this vaccine sore arrives at perfection, you might say, would this scab fall off itself? A. Yes, sir, usually.

Q. Now, would a normal sore show any interference of foreign agencies, [sceptic] or otherwise? A. I think it would.

Q. So that you could discern it from the sore? A. Yes, sir.

Q. Now you are asked, Doctor, if you ever saw a vaccine sore on a dead body before? A. Yes, sir.

Q. Would there be anything in the fact that the body had died which would change the character or condition of the sore before decomposition had set in?

A. I do not see why there would be.

Q. Have you ever examined any since?

A. I do not remember that I have.

1428 Q. Now, you were in the employ of either the Mutual Life or the Connecticut Mutual at the time that you examined this sore there at Dr. Stuart's office? A. No, sir.

Q. When were you first employed by the Connecticut Mutual, if you remember?

A. I think I examined for them sometime in 1869, possibly 1870; 1869 or 1870. I do not know but I did a little in the fall of 1868. After that I did not do anything more for them for a number of years.

Q. Do you remember how long you were in attendance upon the court at the time you received the magnificent sum or $15 for your services? A. I think about five days.

Q. At what stage of a vaccine sore could you take the virus from the arm of another person and vaccinate another person with it?

A. The lymph is usually taken at the eighth day. You make a little hole in the scab and take the lymph from it, because that is considered the best time.

Q. Is that the way that vaccinating was usually performed heretofore? A. Yes, sir.

Q. In the earlier days? A. Yes, sir.

Q. Had this sore, from your observation, developed normally, without any foreign interference? A. I think so.

Q. It did not show any signs of any foreign interference?

The plaintiff objects to the question as leading. Objection overruled. The plaintiff excepts.

A. Nor, sir. As I testified at first. I called it a normal sore. By a normal sore, I mean one that had not been interfered with.

Q. Who was present at the time you made that examination, Dr. Morse?

A. I do not remember anybody but Dr. Stuart be-

1429 ing present at the time I went. There may have somebody else come in but I don't remember.

Q. Do you remember, while you were there, of other doctors coming in?

A. There may have been, but I can't recollect it.

Recross-examination

By Mr. Hutchings:

Q. If there was any other piece of flesh with a sore on it, you did not see it on that occasion? You only saw that one piece? A. I only remember one sore and one piece of flesh.

Q. Your recollection is pretty good upon that subject, is it not? A. I think so.

Q. Now you speak of this sore being firmly attached to the underlying tissues, I think that was the expression?
A. Yes, sir.
Q. By underlying tissues, you mean the true skin?
A. The true skin and the sub-cutaneous tissues underneath the fibrous portion of the skin, not to the muscles. It did not include any muscular tissue.
Q. Now after the death of a human body, the tissues, or the flesh, or whatever you call the underlying tissues are changed very materially are they not They lose their elasticity? A. Lose their elasticity. Lose the blood.
Q. Lose the circulation? A. Yes, sir.
Q. And they become pale? A. Usually.
Q. It goes through a process, after death, of hardening, doesn't it, first, called the rigor mortis?
A. That is muscular tissue, not the sub-cutaneous.
Q. The muscular tissue underlies the sub-cutaneous?
A. Yes, sir.
Q. That affects the exterior [membrains], the exterior surface? A. Yes, sir.
Q. That tissue that lies outside of the muscular is
1430 affected and displaced or stretched, and loses its elasticity on account of this rigor mortis?
A. It loses its elasticity. Yes, sir.
Q. The flesh has lost its elasticity entirely?
A. Yes, sir.
Q. If you press your finger upon it you do not make a pale spot? A. No, sir.
Q. And if you remove your finger, the blush does not reappear? A. No, sir.
Q. By pressing your finger upon it you do not indent it, but it is firm and dead? A. You may indent it.
Q. But that would be simply a mechanical pressure?
A. Yes, sir.
Q. So that there is a wide difference between these underlying tissues in dead flesh and live flesh, is there not?
A. Yes, sir.
Q. In your examination of vaccine sores before that time and up to the present time, except this instance, you have been examining live, palpitating flesh haven't you? A. Yes, sir.
Q. But in this case it was dead, senseless flesh?
A. Yes, sir.
Q. Now so far as your experience is concerned, you do not know what effect death would have upon a vaccine sore?
A. I do not remember of ever noticing it.
Q. From experience? A. Not that experience.
Q. As a matter of fact, I will get you to state whether, in the learning of your profession, there is any book or treatise upon that subject? A. I do not remember of any.

1431 Q. Then you neither have, upon the question as to whether a sore upon dead flesh would be the same as a sore upon the live flesh, you neither have exprience nor knowledge from the books? A. No, sir.

Redirect Examination

By Mr. Green:

Q. You have had the experience of this one sore have you not? A. Yes, sir.

By Mr. Hutchings: Q. By your experience of this one sore you simply mean this, don't you Doctor, that you saw this sore?

A. I examined it.

Q. And you made certain conclusions? A. Yes, sir.

Q. But these conclusions were neither based upon any experience of examination of sores upon cadavers, or upon any treatise, or upon any book upon the subject?

A. No sir, just my own judgment.

Q. Just merely your own judgment? A. Yes, sir.

By Mr. Green: Q. Would, in your judgment, death affect a vaccine sore so as to change it that you could not tell at what stage it had arrived at at death?

The plaintiff objects to the question for the reason that the that the witness has said that he has no knowledge upon the subject, either from experience or from books; he is therefore incompetent to express an opinion upon the subject.

The Court overruled the motion, to which ruling the plaintiff duly excepted.

A. I do not think it would make any difference with the vaccine sore at that time, that this was in the vaccination.

Witness excused.

1432 The defendants and each of them next offered in evidence the testimony of Dr. Charles V. Mottram, given upon the trial in 1896.

It is admitted that Dr. Mottram is not within the jurisdiction of the Court.

Said testimony was thereupon read to the court and jury and is in words and figures as follows, to wit:

Chas. V. Mottram, called by defendants, being duly sworn testified as follows:

Direct Examination

By Mr. Green:

Q. State your name Dr? A. Charles V. Mottram.

Q. Where do you reside? A. Lawrence, Kansas.

Q. How long have you resided there? A. Since 1872.

Q. What is your profession?

A. Physician and surgeon.

Q. How long have you practiced medicine and surgery?
A. 45 or 50 over 50 years.
Q. Did you reside in Lawrence in the years 1878 and 9?
A. Yes, sir.
Q. Did you know a person by the name of John W. Hillmon? A. I did.
Q. Where did you become acquainted with him?
A. I saw him first at the restaurant of Capt. Johnson, which was located somewhere near the present Journal office on Massachusetts street?
Q. About what time was that?
A. It was in the autumn of that year, and my impression is it was in October; but I can't pretend to locate or fix the definite time of the year, but I state it was in the autumn.
Q. Did you see him after that? A. I did.
Q. Where?
A. I saw him there very often; also saw him after he left there; I might say parenthetically, that he boarded there off and on for weeks after I got acquainted with him, and
1433 then he was married, and then after he was married he went to Mrs. Judson's with his wife, and boarded with Mrs. Judson, on Mississippi street, and in going to Mrs. Judson's would pass my office; or on their way I frequently met them, or saw them on their way to Mrs. Judson's, whether by my office or not.
Q. Did you see him after the fall of 1878?
A. No, not to know him; I might have seen him in the winter or spring probably.
Q. In the spring of 1879?
A. Oh yes, I think I saw him occasionally up to the time of his taking this insurance; I saw him up to the time he completed this insurance arrangement and went away; after that I didn't see him.
Q. Do you remember Dr., of a dead body being brought to Lawrence in the fore part of the month of April, 1879?
A. I do.
Q. Did you see that dead body? A. I did.
Q. Where did you see it?
A. I saw it at the rooms of Smith, the undertaker—the undertaking rooms.
Q. Do you remember who was present at the time you saw the body?
A. I think I can name those present at the time—Dr. Miller, Dr. Stewart, Dr. Fuller, and there was a gentleman or two besides that I can't recollect; it might have been Mr. Wiseman or Selig—It seems to me there was another gentleman, who, I am not positive about their name; I remember the physicians.

Q. Who was Dr. Miller?

A. He was a physician of Lawrence at that time, since dead, in full practice at that time.

Q. Who was Dr. Fuller?

A. He was also a regular practitioner, an elderly practitioner—one of the first Lawrence physicians; an elderly man who lived there at that time; since dead.

Q. Then the other physician was Dr. Stewart?

A. Dr. Stewart.

1434 Q. What was he doing there at that time?

A. Assisting in the examination of the body—the examination of the cadaver.

Q. Do you know whether it was under authority at that time?

A. I do not know as to that, I supposed it was but I had no means at that time of knowing what the authority was; it was carefully investigated.

Q. Do you remember how long the body had been there when you saw it Dr.?

A. Yes sir. It came there on April 3rd, and I was called on April 4th to help make the post mortem examination.

Q. What state of preservation did you find this body in at that time?

A. A very perfect—very good; the weather was cool and the body was remarkably well preserved.

Q. To what extent had mortification set in?

A. There was no mortification.

Q. Any mortification in the bowels? A. No sir.

Q. What portion begins to decay first?

A. The bowels most always begin first; since they are the first means of waste. In this body, the most apparent was in the eye—the aqueous matter of the eye is usually absorbed—that is the watery portion of the eye; and the bowels would indicate blueness. In this case it was more like an orange color, which I would look for in incipient decomposition, but not corruption. It was sound however, and perfect.

Q. What examination was given or had at that time?

A. We examined the lungs, heart, liver, stomach, second stomach and [colan] and looked a little at the spine.

Q. Did you find any wounds on the body?

A. No wounds.

Q. Were there any wounds about the body?

A. No nothing.

Q. Any on the head?

A. O yes! On the body I thought you were speaking of. Yes sir, there was a gun shot wound through the head.

1435 Q. Did you measure that body Dr.? A. Yes sir.

Q. Do you remember how much the body measured?

A. Yes sir.

Q. How much? A. Five feet, eleven and 5-8 inches.
Q. Do you remember the weight of that body?
A. 147 pounds without clothing on.
Q. This measurement,—was the body stripped at the time the measurement was made? A. It was, before.
Q. In what condition did you find the internal organs?
A. They were for the most part in a pretty healthy condition. The lungs which we first examined, were found good, except some adhesions that had resulted from some previous pneumonia, or pleurisy, and otherwise the lungs were in pretty good shape. We found the stomach empty—entirely empty; flabby and empty save a little mucus. Examined the second stomach and it was empty. Examined the [colan] to see if there had been anything eaten for two or three days, and we found the man had not had anything to eat.

Objected to—overruled.

Q. What was the build of this man?
A. He was a tall, lank, flabby long legs, long fingers, prominent nose man, flesh was flabby, and he was pale, and I would say, returning to the examination of the liver, we found the liver was deranged, and the stomach also, which would account for his not having any ability to dispose of food, if any was taken.
Q. Did you examine the features of that man at that time closely? A. Yes sir.
Q. Now you may state whether that was the body of John W. Hillmon whom you had known in the fall and winter of 1878? A. Most emphatically no! It was not.
Q. Did you notice the clothes of this body?
A. Yes sir.
1436 Q. How did they seem to fit the body?
A. The toes, you say?
Q. The clothes? A. They didn't fit him at all.
Q. Wherein were they an unfit?
A. The coat was short and the pants short; they were shorter on the body than these are on me (pulling pants up)—three or four inches short; and the coat was short—didn't fit him.
Q. Did you examine this body for any scars, Dr.?
A. Yes sir, particularly.
Q. Did you find any? A. Didn't find one.
Q. Did you examine the head?
A. Yes sir. Examined the face and head.
Q. Did you find any marks upon him?
A. Found a bullet hole through the head.
Q. Find any identifying mark?
A. No sir, not on the head.
Q. On any portion of the body?

A. Found moles,—two moles.

Q. Where did you find them?

A. One of them was on the backbone; on a line,—put a line, drawn across the bottom of the shoulder blades; it was on a line drawn across the bottom of the shoulder blades, direct on the spine; and to the right of that, and below on the hip was a small one. That was the conspicuous one, on the back—the prominent appearing mole.

Q. Did you find any vaccination marks upon this body?

A. Yes sir.

Q. What did you find there?

A. There was a half vaccination.

Q. What do you mean by half of a vaccination?

A. Well, I mean that,—perhaps I should state that I saw Dr. Stewart before he went into the room, and he had removed one of the vaccination sores, and cut into another—there was half of a vaccination scab on the arm.

Q. Now, did you,—have you had any experience, Dr., in vaccination?

1437 A. Yes sir, a good deal.

Q. Were you in the army Dr.?

A. I was four years.

Q. What, if any hospitals, did you have charge of in the army?

A. The smallpox hospital in Ft. Hudson, and one on Dauphine Island.

Q. Have you had experience while practicing your profession, outside of the hospitals, Dr.? A. Yes sir.

Q. To any considerable extent?

A. Yes sir, I have been vaccinating all my life, and I haven't failed to make what examinations I had an opportunity to make of persons I had vaccinated during the time they had vaccination marks upon them.

Q. So you had charge of these hospitals—was it as a private citizen?

A. It was as surgeon in charge of the hospital. I might say further, that I was on board the Constitution when it sailed from New Port, Massachusetts with Butler's soldiers. There was three thousand soldiers, besides the crew; and after we had been out one day, smallpox broke out. I was senior surgeon on board the boat, and called in same case and whilst it existed, coming from all these exploits, and I took it off way out of the reach of Ship Island, and took charge of these with small pox, and saw them all through.

Q. Now is this operation of vaccination a difficult one to perform Dr.?

A. O no sir, it is very simple, and any old lady can do it as well as I could—you just scrape the skin a little, and put some of the virus in, and it is done.

Q. May a person be successfully vaccinated by taking vaccine from the arm of a person who has already been vaccinated, and vaccinating him?

A. Certainly, certainly—that's the way it was generally done—used to be always done that way generally.

1438 Q. About how long would a person have to be vaccinated before the virus can be taken from the arm and successfully inserted in the arm of another person?

A. About a week or about 8 days—About eight days there would be the lymph would contain enough vesiculous fluid known as virus then to cause a healthy vaccine sore. Sometimes a little earlier—can't rely upon it only to be absolutely certain, before.

Q. Did you examine this portion of the sore you found upon the arm of this body?

A. I examined the piece Dr. Stewart took off and the piece left on.

Q. Now Dr. can you tell by the appearance of a vaccine sore, about the time which elapsed between the vaccination, and the time you examined it?

A. Very nearly, very nearly.

Q. Now from the examination you made of this portion of the sore upon the arm, and the portion which was shown you and the sore which was shown you by Dr. Stewart, you may state how long in your judgment it had been, prior to the death of this individual, before he had been vaccinated?

A. I should say 14 or 15 days—14 to 15 days.

Cross-examination

By Mr. Hutchings:

Q. You say most emphatically that was not the body of John W. Hillmon? A. I do.

Q. You were well acquainted with John W. Hillmon?

A. Saw him for a time I said about every day.

Q. Were you well acquainted with him?

A. I don't know whether you can tell that well or not.

Q. Won't you answer the question?

A. No sir, I will not, because I can't answer it better than I have.

1439 Q. That's all the answer you will give to that question? A. Yes sir.

Q. Didn't you testify on the last trial of this case that you were not well acquainted with John W. Hillmon, and never spoke to him in your life? A. No sir.

Q. Didn't you testify at the last trial of this case?

A. I did not I don't believe.

Q. You were sworn and examined as a witness on the trial of this case, and testified in this court room before Judge Thomas? A. Yes sir.

Q. At that time didn't you testify as follows: "Question, You say you knew John W. Hillmon?" and didn't you answer "Yes sir, I knew him but I told you I was not well acquainted with him, but I knew him because he was pointed out to me."

A. I did, and saw him every day afterwards.

Plaintiffs move to strike last part of answer—overruled.

A. I want to say that now.

Q. You say you testified at the last trial of this case, that you knew him, and you said "I was not well acquainted with him, but I knew him because he was pointed out to me?"

A. By that I meant to say I knew him.

Q. Was not the question put, "Did you ever speak to John W. Hillmon in your life?" and didn't you answer "Not to my knowledge?"

A. Might have said that—I mean to say that I saw him every day—saw him as I saw anybody.

Q. Did you ever talk with Mr. Hillmon?

A. I might, and might not.

Q. And you only knew him because he was pointed out to you?

A. I was not introduced to him.

1440 Q. Never introduced to him?

A. Not to my knowledge.

Q. Never had any conversation with him?

A. Might have, and might not.

Q. You never saw him with his hat off? A. I think so.

Q. Who requested you to go to Smith & Bailey's undertaking establishment?

A. It was either Mr. Green or an insurance man who represented the company at that time.

Q. Which of them? A. I couldn't tell you.

Q. Didn't you testify before that it was Mr. Green?

A. I think I did.

Q. When did he speak to you about going down?

A. Guess that day the corpse came; about the 3rd.

Q. And you were down there when the body was measured?

A. I was.

Q. Did you assist in measuring it? A. No sir.

Q. What did you measure it with?

A. A ten-foot pole.

Q. How did you make the measurement?

A. A man,—whatever the undertaker's name was, Mr. Smith—we had one man at the foot, and another at the head—put a piece at the head, and a little square at the foot, and then measured from one to another with a ten-foot pole.

Q. Did you measure the pole? A. No sir.

Q. Did you know how long the pole was? A. No sir.
Q. Didn't you know anything except what they said about the pole? A. No sir, nothing,—
Q. You didn't handle the pole at all?
A. Not to my knowledge.
Q. Don't know whether it was ten-foot long, or 9 feet 6?
A. No.
Q. Don't know anything about this measurement except what was reported there? A. That's all.
1441 Q. Have you not heretofore stated, that you set a block at the head, and another block at the foot, and measured the pole with a tape line?
A. I don't remember what I said.
Q. Do you remember what the facts were?
A. I don't remember—
Q. Have you so testified?
A. I might have, but I don't remember now; but I know that we measured him.
Q. Do you know that you measured any other way than I have stated? A. I don't know—
Q. You saw this sore in Dr. Stewart's office? A. Yes, sir.
Q. You saw this flesh there and examined it?
A. I did.
Q. It was covered—for the purpose of ascertaining, to be sure; it was covered with a skin? A. All except the sore.
Q. Didn't you testify at a previous trial that it was covered with skin? A. No, I didn't mean to.
Q. Then the original skin or cuticle was still on top that sore? A. O no, I didn't say so.
Q. You didn't?
A. No man with any sense would so testify.
Q. Did you hear Dr. Stewart testify? A. Yes, sir.
Q. You think, then, that Dr. Stewart,—

By the Court. Well, well, we'll not go into that.

Q. What did you say, no man with sense would say it was covered with skin?
A. I mean to say no true skin would cover a vaccine sore.
Q. What did cover any of that sore?
A. It didn't have any at all because it was all,—it was a scab, and then come the true skin.
Q. Did you not testify on a previous trial that the sore was covered with the original skin that had settled down and adhered to it?
A. That might have been, I don't remember.
1442 Q. I ask you if you didn't testify that the covering of the vesicle which you said was caused by the action

of the vaccine matter, had settled down and adhered firmly, and was still covering the sore?

A. I don't think I said all that.

Q. Now was this sore higher or lower than the surrounding tissue?

[Q.] It was lower in the middle than the surrounding tissue. Every vaccine sore is after the 8th day.

Q. Well, I didn't ask you about every one.

A. This is the case with every one.

Q. You are certain of this—this being raised above. Then it was settled below the surrounding surface?

A. The outer edge would be higher than the middle—than the center.

Q. The question is, was the sore lower than the surrounding tissue? A. O, no.

Q. Didn't you so state at a previous trial of this action?

A. I didn't so mean if I did. I meant to say that the center of the sore; the depression of the sore itself would be lower than the skin, that the outer side would be higher than the center.

Q. Tell the jury whether the center is lower or higher?

A. The center of the sore would be lower than the surrounding tissue, but the sore itself, the sore as it would raise up, like a body that would raise up, and the center of that,—

Objection by plaintiff—

By the Court: That's all right Dr.

A. I was only making an explanation.

Q. Again, was not this sore covered with the original cuticle, and did not that extend from the sore, continuous with the surrounding parts?

A. Judge, will I be allowed now to make an ex-
1443 planation?

By the Court: Can you answer it yes or no?

A. No, perhaps, no, if he means to know that the cellulous tissue,—

By the Court: They wish you to answer it yes, or not. They don't want it any other way, so you can stop.

A. They need not be afraid of what I will answer as correct.

Q. Did you make any experiments there to find whether the skin was continuous over that sore, running out into the surrounding parts?

A. I think some of the physicians attempted to pick up the scab?

Q. Who? A. Dr. Miller and Dr. Fuller.

Q. Was the scab cut through while you were there?

A. No, sir.

Q. Could you see on the outside?

A. That's all—and the others attempted to remove it—it was cut through.

Q. What was cut through?

A. One of the sores was cut through. I saw both of them; one was this one with the scab on it in the center.

Q. Didn't you testify at the previous trials of this case that you never saw below the surface of the sore—didn't you state that at the last trial of this case?

A. I don't recollect about being asked to testify if it was cut through the sore; I couldn't help but see below it, and my testimony would show that I stated that the sore was cut through.

Q. I want to ask you from the questions at a prior trial—were you not asked this question: "Now when you saw this sore in Dr. Stewart's office you say the scarf skin or epidermis which had been the covering of this vesicle, had settled down, and was firmly adhered to the tissues beneath?" and didn't you answer, "I did so state," and then was not this question put to you: "Was that true?" and you answered "No, sir." Then this question was put to you "What had become of this scarf skin which constituted the top of the vesicle?"

1444 Did you not say, "It was there yet with the tissue or true skin." Do you remember whether you so stated?

A. I do not know—I want to state as I said then, and as I say now,—

Q. The object of this examination was to ascertain the facts—what you said?

A. The object as I understand is to know whether there is such a thing as a scarf skin separate from the scab; I will say there ain't.

By the Court: Answer yes or no, or you don't remember.

A. I will say I don't know what I said at that time.

Q. Were you not asked, "It was intact was it?" and did you not answer "It was there with the virus beneath it and the true skin?" A. I might have.

Q. Were you not then asked, "It all adhered together?" and did you not answer, "It was part of the scab, which ultimately detached itself?" A. I say so now.

Q. And were you not asked afterwards to testify about raising up this skin, and you said you couldn't prize it up with a knife? A. That's what I say now.

Q. That's what you said then? "Couldn't prize it up with a knife—It, the indurated pus adhered to the cuticle and I couldn't lift it up."

A. I might have said so.

Q. Were you not then asked,—I don't care to go into it in length,—"Was not the covering or scarf skin which was the top of the vesicle and settled down, was continuous with the skin surrounding the sore?" and you answered, "Yes, sir."

A. It would be continuous, and I couldn't separate it.

1445 Q. I asked you a while ago if it was not continuous?

A. Yes, sir, you couldn't separate it; it was part of the scab.

Q. And you endeavored to seperate it?

A. Yes, sir, and couldn't do it.

Q. And were you not then asked "Was the sore part lower or higher than the surrounding,—than the surrounding skin?" and you answered "Lower." A. The center lower?

Q. Did you not answer in that way—"Was the center part higher or lower" and you answered "Lower."

A. I can explain that.

Q. Did you so answer?

A. I can so explain it now—

By the Court: What do you remember—what you answered them at the other trial?

A. What I meant to say was this, that the center,—

By the Court: Answer yes or no, or that you don't remember.

A. I don't remember just exactly, but I know what I meant.

Q. Was any sliver cut off while you were there?

A. Not to my recollection.

Q. Did you examine this body at Bailey & Smith's very carefully? A. Yes, sir.

Q. You had a magnifying glass? A. Yes, sir.

Q. See any scars on it? A. No, sir.

Q. Take the clothes off and examine the limbs?

A. Yes, sir.

Q. Did you examine the back part of the legs?

A. Yes, sir.

Q. There was no scars on the legs of that body?

A. Not to be found.

Q. If there had been you would have noticed them?

A. Yes, sir, most assuredly.

Q. And you are as emphatic about as anything—that there were no scars on the legs of that body?

A. Saw none.

1446 Q. About these clothes. Did you notice the coat was slit down the back?

A. No, I did not notice; it was too short — too small in every way.

Q. Is it not a fact Dr., that the coat was ripped clear down the back and put onto the body in that way and hardly on the

A. That is not a fact; no, sir, that is not a fact; they put it on.

Q. Were you there when the clothes were taken off and put back on? A. I was.

Q. And you say it was not slit in the back?

A. It might have been ripped on the back, but not slit.

Q. Was it not ripped from the collar here (indicating)?

A. I think not.

Q. The arms were too short? A. Much too short.

Q. How did the sleeves lay?

A. I raised the cadaver and put the coat on.

Q. Put the coat on? How did you,—

A. Suppose I was on my back, and you put a coat on me.

Q. Was his coat any more too short than your coat—just about as much too short as your coat is?

A. Four inches at least shorter.

Q. As my hand hangs down there, my coat sleeve comes down on my hand; now as they are stretched out this way; was his coat any shorter than mine (indicating)?

A. It would be like pulling mine up that way (indicating) it would be much shorter.

Q. The body was lying on its back?

A. No, we raised the body up to put the coat on.

Q. Do you remember the color of the coat?

A. No, I can't tell.

Q. Do you know whether the body was afterwards buried in the same coat? A. I don't know.

1447 Q. Didn't you insist,—?

A. I can't say of my own knowledge—I know the coat was taken off and we weighed the body without the clothes. The clothing was on and these things I observed, and then we took it off, and whether,—I suppose it was buried with that coat on, but I don't know.

Q. In what length of time is a scab of a vaccination sore shed after the virus is inserted, ordinarily?

A. 21,—about 20 or 21 days.

Q. It frequently runs longer? A. Not much longer.

Q. Didn't you testify at the last trial that it sometimes runs four or five weeks?

A. No, sir, I don't think I did. It sometimes runs a little longer, but not that long—sometimes runs a little longer.

Q. You testified at the previous trial it was from 20 to 25 days? A. I might have, but that's very rare.

Q. And you also stated in some cases it was four or five weeks?

A. No, sir, I don't recollect any such statement as that. Somebody has written that to suit,—

Q. Referring to the character of virus used in vaccination, will animal virus usually prolong the time of shedding the scab?

A. We were taught so, but latterly I have had some experience and have decided for myself that it is not true. Since the last trial here I have tried it from the cow—took it right from the heifer and vaccinated with it, and have taken it from persons from whom the virus had been taken 3 or 4 times, and it did not.

Q. Then you can?

A. I am inclined to think that we had to do this that way.

Q. That was after you had all this experience with
1448 the smallpox?

A. Yes, sir; it is my opinion, and it is received as such; but since that I have tried this; it does not lengthen it materially.

Q. Did you at the previous trial of this case,—Do you remember testifying as follows: in relation to the length of time that the scabs were sometimes retained after vaccination, before they were cast off, were you not asked this question: "Now is it not a fact that in a great many cases the scab stays on 3 or 4 weeks?" and did you not answer "It may do so sometimes."

A. That is,—three times seven is 21.

Q. Four times seven are 28.

A. That would be very rare.

Q. The question is whether you testified at the previous trial? A. I wouldn't say.

Q. What do you say now?

A. I say it is possible it might, but it would be very rare.

Q. You say now it is possible, but rare that the vaccination scab would be carried four or five weeks before it would be cast off?

By the Court: Was that three or four?

A. Perhaps what you want to know briefly, it is cast off about the 20th day; it might stay on a little longer, but not very often—some times it might 3 or 4 or 5 days longer.

Q. And some times I guess it extends five weeks?

A. I might have said so, but I don't believe it.

Witness excused.

1449 Isaac Johnson, a witness produced by the defendants, being first duly sworn, testified as follows:

Direct Examination by Mr. Barker.

Q. State your name in full? A. Isaac Johnson.

Q. Where do you live? A. Lawrence, Kansas.

Q. In what business are you engaged and what position do you hold in Douglas County, Kansas?

A. Jailer of Douglas County.
Q. Are you also Deputy Sheriff? A. Also.
Q. How long have you held the position of Jailer of Douglas County and Deputy Sheriff?
A. Altogether nearly six years.
Q. How long have you resided in the City of Lawrence?
A. Thirty-seven years.
Q. Were you residing in the City of Lawrence in 1878 and 1879? A. Yes, sir.
Q. Do you remember in what business you were engaged, or what you were doing at that time?
A. I was driving a grocery wagon and worked in a grocery store?
Q. For whom were you working?
A. George Fuller Ford.
Q. In what capacity? A. Driving a grocery wagon.
Q. How long did you work for him?
A. Something over five years.
Q. During that time, say 1878, did you become acquainted with one John W. Hillmon? A. Yes, sir, I knew Hillmon.
Q. Where did you see him?
1450 A. I have seen him pass the store and have seen him in the store.
Q. Did you see him on the streets of Lawrence?
A. Yes, sir.
Q. During the fall and winter of 1878?
A. During the fall and winter of 1878, yes, sir.
Q. [During] you know whether or not he transacted some business at your store; I mean by "your store," the store of George Ford?
A. He bought some groceries there soon after he was married.
Q. Do you remember seeing him afterward times enough so you became resaonably well acquainted?
A. I never was introduced to him but I knew him. Well, seen him at the store.
Q. Could you recollect about the last time that you saw him, or could you remember in regard to that?
A. It was either in the winter of 1878, late in the winter of 1878, or early in the winter of 1879, along in January, 1879.
Q. That was the last time? A. Yes, sir.
Q. Where did you see him at that time?
A. I saw him along passing the store.
Q. Whereabouts was the store of George Ford?
A. It was in the building of Ridenour-Baker, known as the old Ridenour-Baker building.
Q. On what street was that situated?
A. On Massachusetts street.

Q. Was Massachusetts street the principal street in Lawrence then, as it is now? A. Yes, sir.

Q. Do you know where the undertaking establishment of Bailey & Smith was at that time? A. Yes, sir.

1451 Q. Do you know where the undertaking establishment of Bailey & Smith was in the spring of 1879?

A. Yes, sir.

Q. Where was it, with reference to the store of George Ford?

A. It was two doors south on the same side of the street.

Q. About how far would that bring it from Mr. Ford's store?

A. I think the buildings were twenty-five foot buildings; about fifty feet I think.

Q. Do you remember the circumstance of a dead body being brought to Bailey & Smith's in April, 1879?

A. Yes, sir.

Q. Did you see that body? A. I did.

Q. Did you go in to view the remains more than once?

A. Only once.

Q. Do you remember who was with you?

A. There were several went in.

Q. I will ask you if you remember who went in with you when you went in to see the remains?

A. I think Mr. W. W. Smith was there and I think a fellow by the name of E. E. Moll.

Q. Where were these remains when you saw them?

A. Back in the undertaking place where they kept the hearse.

Q. You may state whether they were Hillmon's remains, John W. Hillmon whom you had seen there the last of 1878 or early in 1879 in Lawrence, Kansas?

A. To the best of my knowledge I should say they were not the body of Hillmon.

Q. As a means of identification, do you know the plaintiff in this case, Mrs. Hillmon? A. Yes, sir.

Q. The same man who was married to Mrs. Hillmon?

1452 Cross-Examination

By Mr. Atwood:

Q. Did you know any other Hillmon there at that time, in 1878? A. I did not.

Q. Never knew another man by that name?

A. No, sir.

Q. You say you had been introduced to him, or had not?

A. Had not.

Q. Had not been? A. Yes, sir.

Q. Then you did not have any talk with him?

A. I don't remember ever talking with him.
Q. Don't think you ever spoke to him in your life?
A. I don't think so. I might have.
Q. Do you know who it was that pointed him out and told you who he was?
A. He was not pointed out at all. I just knew him by being in the store. He bought thinge there at the store.
Q. Who in the store told you who he was?
A. I was driving the grocery wagon and they told me things were for Mr. Hillmon.
Q. And you delivered them in that way? A. Yes, sir.
Q. How many times did you deliver things at his house?
A. Not very many times.
Q. Well, approximate as near as you can, Mr. Johnson?
A. I would not be positive.
Q. I understand you can't be positive, but your best remembrance, whether it was once or twice, or less or more, or how?
A. Well, it was several times any how.
Q. Does that mean, in your parlance, two or three times?
A. It means three or four times.
Q. Something like that? A. Yes, sir.
1453 Q. Now at whose house did you deliver? Where was the house?
A. Well, it was in the 600 block on Massachusetts, up over or near the place called Hart's grocery; upstairs.
Q. That is where you delivered these groceries, was it, upstairs on Massachusetts Street?
A. Right over Hart's, or right next somewhere.
Q. Hart had a drug store?
A. A grocery, a kind of grocery store and lunch counter.
Q. It was not a block containing private houses?
A. It was upstairs.
Q. Of course it was private enough, but instead of being an ordinary dwelling house it was a block? A. Yes sir.
Q. That is right? A. Yes sir.
Q. More than one of those blocks here on Shawnee Street and persons living upstairs, and having rooms up there?
A. Yes sir.
Q. That was in the fall or winter of 1878?
A. It was in the early winter of 1878, no the last part of the winter, just before 1879.
Q. Will you please repeat that?
A. Just before 1879, along in there.
Q. Shortly before you heard of the body being there and that it was claimed that Hillmon was killed etc?
A. Yes sir.
Q. That was on Massachusetts, I think you said; between what streets? Where was it?
A. Between Pinkney and Winthrop.

Q. On Masssachusetts Street?
1454 A. Yes sir.
Q. In Lawrence, Kansas? A. Yes sir.
Q. Which side of the street?
A. On the east side of the street.
Q. That runs north and south?
A. Massachusetts Street runs north and south.
Q. And it was upstairs?
A. Upstairs in any event, but it might not have been directly over the store but near it.
Q. Mr. Hart's store was either beneath it or next to it?
A. Yes, sir.

Redirect Examination

By Mr. Barker:

Q. Could you tell in what portion of the year that was, whether it was in the summer or 1878 or the fall of 1878, that you delivered groceries at the place you have mentioned?

The plaintiff objects to the question as cross-examination. Objection overruled. Plaintiff excepts.

A. It was either in the winter of 1878 or the fore part of the winter of 1879.

By Mr. Barker: I want to inquire more definitely how early in the season?

By the Court: Ask him if he can state more definitely?

Q. Can you tell more definitely how early in the season it was, of 1878, that you delivered groceries at this number stated to-wit: over Hart's grocery store?

A. I think it was along towards the last of November or along in December.

Q. Do you think it was the last of November or the first of December 1878 that he lived there?
1455 A. Yes, sir.
Q. Did you know the mother of Mrs. Hillmon, Mrs. Quinn?

A. I did not know her.

Q. When you delivered groceries there over Hart's, did you see the plaintiff there; I mean by the plaintiff, Mrs. Hillmon?

A. I did.
Q. You saw her there? A. Yes, sir.
Q. Were you acquainted with her at that time?
A. No. Only when I saw him.
Q. You knew her by sight? A. Yes, sir.
Q. Did you see Mr. Hillmon when you delivered groceries?
A. I don't remember of seeing him.
Q. Don't remember of seeing him over Hart's?
A. No, sir.

Q. As I understood the matter, there would be an order left at the store.

Objection.

Q. How did you come to deliver groceries? How did you tell them?

A. There would be an order on the book and they would put the things up and put them on the floor to take out in the wagon, and I would go and look on the floor and deliver them.

Q. It was under these circumstances that you took groceries to this particular place? A. Yes, sir.

Q. But as I understand, you saw Mr. Hillmon at other places, but you are not positive of having seen him there?

The plaintiff objects to the question as leading. No answer.

1456 By Mr. Atwood:

Q. It was after the marriage, I believe you said, Mr. Johnson? A. Yes sir.

1457 Henry Clay, a witness produced by the defendants, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Barker:

Q. State your name? A. Henry Clay.

Q. Where do you reside? A. In Lawrence.

Q. How long have you lived in Lawrence?

A. About seventeen years.

Q. Were you acquainted with one Levi Baldwin?

A. Yes sir.

Q. Do you remember about when you became acquainted with him? A. I do.

Q. I will ask you if you ever worked for him? A. I did.

Q. Where did he live when you worked for him?

A. He lived west of Tonganoxie about five miles.

Q. How long did you work for him?

A. I worked for him about three months and a half.

Q. What did you do; that is, in what capacity were you employed?

A. Fixing up fences, feeding cattle, and doing farm work.

Q. Worked on the farm? A. Yes sir.

Q. Did you ever know one John W. Hillmon? A. I did.

Q. Did you know him when you were working at Levi Baldwin's? A. Yes sir.

Q. Did you know him before that time? A. I did.

Q. Where were you living when you knew him before that time?

A. I was working for E. A. Smith, out on the California road.

1458 Q. Where would that be with reference to the city of Lawrence? A. That would be west of Lawrence?

Q. In Douglas County?

A. In Douglas County, yes, sir.

Q. At the time you were working for E. A. Smith, where was John W. Hillmon working?

A. He was working for Baldwin's father out there.

Q. Baldwin's father; what Baldwin do you mean?

A. I mean Levi Baldwin.

Q. Was that the same farm that was at one time occupied by Levi Baldwin? A. Yes, sir.

Q. How long did you work there at Smith's and he work at Baldwin's?

A. I worked at Smith's nine months. I put up hay at Baldwin's.

Q. At the time you were working putting up hay at Baldwin's, where was John W. Hillmon?

A. He was working for Baldwin.

Q. Now do you remember the circumstance of a dead body being brought to Lawrence in the spring of 1879? A. I do.

Q. At the time that body was brought to Lawrence, where were you, and what were you doing?

A. I was at Baldwin's at that time.

Q. At what Baldwin's?

A. At Levi Baldwin's west of Tonganoxie, five miles west of Tonganoxie.

Q. Was you at that time working for Levi Baldwin?

A. Yes, sir.

Q. Had you seen John W. Hillmon at Levi Baldwin's the fall or winter before this body was brought to Lawrence?

A. Yes, sir.

1459 Q. Will you state, as definitely as you can, when you last saw Hillmon at Levi Baldwin's?

A. I last saw John W. Hillmon at Levi Baldwin's in 1879, the winter or the fall of 1879.

Q. Fall of 1879? A. Yes, sir. In October.

Q. Fall of 1879 or fall of 1878?

A. Well, the fall of 1878.

Q. That is, before the body was brought to Lawrence?

A. It was before the body was fetched to Lawrence. Yes, sir.

Q. What was he doing out there?

A. He was working for Baldwin on the range.

Q. At that time you were well acquainted with John W. Hillmon? A. I was.

Q. Now I will ask you if you knew in 1878, the fall or winter before this body was brought to Lawrence, Kansas, in regard to the condition of John W. Hillmon's teeth? A. I do.

Q. You may state, in a general way, what was the condition of his teeth, whether good or bad?

A. Yes, sir. The front teeth, or some of them, was decayed. One of them were right out, were broke off.

Q. Do you know about the time that John W. Hillmon went away? A. I do. Yes, sir.

Q. How did you know in regard to that?

A. I were in town that day.

Q. With whom did you go in town?

A. I was in town with him that day.

Q. You were in town with whom?

A. With Mr. Baldwin that day. I drove the team in town.

Q. The day that John W. Hillmon went away?

A. Yes, sir.

1460 Q. Now you have stated you were in town while these remains were in Lawrence? A. Yes, sir.

Q. Do you know where they were? A. Yes, sir.

Q. Where were they?

A. They were at the rear end of Ford's building.

Q. That is Bailey & Smith's?

A. Yes, Bailey & Smith's; at that time it was called the Ford building, and it was at the rear of the building where they kept their hearse.

Q. You said that you went in there to see those remains?

A. Yes, sir.

Q. Were those remains which you saw there at that time, the remains of John W. Hillmon?

A. No, sir. They were not.

Q. How did it happen that you came to town or went to Lawrence on that day?

A. I got a letter from my mother. My mother was sick.

Q. Where did you go to on that day before you went to Lawrence? A. I went to Tonganoxie.

Q. Was that your post-office then? A. Yes, sir.

Q. You say you received a letter? A. Yes, sir.

Q. Then what did you do?

A. Then I reported to Mr. Baldwin that I wanted to go down to Tonganoxie to do some business and he said it were all right, and when I got to Tonganoxie I got into the wagon with a young man and came to Lawrence?

Q. Was that the same day on which you looked at those remains?

A. Yes, sir. That was the day I looked at the re-

1461 mains; the day I came in.

Cross-Examination

By Mr. Atwood:

Q. What Baldwin was it, Mr. Clay, that you were working for at that time; I mean at the time the body was brought there?

A. That was old man Baldwin, father of Levi Baldwin.

Q. Do you know his name?

A. His name; I have forgot the old man's name: I was not working with Hillmon himself. I was putting up hay on shares; that is, for Smith and Baldwin; working on the farms.

Q. When did you first know John W. Hillmon?

A. That was in 1874.

Q. Where was it that you met him?

A. I met him on Baldwin's place, was the first acquaintance I had with him.

Q. What was he doing there?

A. He was working for Baldwin, doing farm work.

Q. And you were also working for Mr. Baldwin?

A. I was working for Smith, putting up hay on shares.

Q. Is Smith's place close to Baldwin's place?

A. No, sir. It is three miles away.

Q. You were working on Smith's place and Hillmon was working on the Baldwin place in 1874? A. Yes, sir.

Q. How long did he work there at that time, if you know?

A. I was there three months haying, and he was there all the time I was there.

Q. When did you next see him?

A. I next seed him after I left there. I left Smith's in 1875 and went to Ben Acker's and stayed until 1876.

Q. What time did you go, in the spring of 1875 to Ackers?

1462 A. In the fall of 1875.

Q. Where was Hillmon then?

A. I don't know where he was, after he was at Baldwin's or at that time.

Q. What I am asking you is, he was working for Baldwin and you were working for Smiths, that was in 1874?

A. Yes sir.

Q. When was the next time you saw him?

A. The next time I saw him was in 1876.

Q. Where was it?

A. It was west of Tonganoxie about five miles.

Q. At whose place, on Baldwin's?

A. Levi Baldwin's, yes sir.

Q. And what were you doing there? Were you working for Mr. Baldwin?

A. I was working for Baldwin at that time— I was not working for Baldwin just at that time. I was working for Hollingsworths.

Q. You worked at Baldwin's place? A. Yes sir.

Q. What was Hillmon doing?

A. On the range; on the cattle range taking care of cattle and preparing fences.

Q. On the Baldwin range? A. Yes sir.

Q. At what time in 1876 was that?

A. It was along near the fall, in September.

Q. Then when next did you see him?

A. I next seed him in 1878.

Q. Let me ask you this question: How long did he work at Baldwin's place after September, 1876, if you know?

A. He was working there for quite a while. I do not know just how long. I left there then myself.

1463 Q. What time did you leave?

A. I left there—

Q. Later in the fall?

A. Yes sir. I left there along in December, the latter part of December.

Q. And he was there all the time you were there?

A. Yes sir.

Q. Then, when next did you see him?

A. I next seed him back there in 1878, seed him in 1878.

Q. That is, what time of year?

A. That was along in the spring.

Q. Did you see him more than once in 1878, do you remember? A. Why I seed him frequently, yes sir.

Q. I did not catch your answer?

A. Yes sir, I seed him very frequently.

Q. In 1876 you were working there, I think you said?

A. I was working for Ben Ackers. I went in 1875. I went to Ben Ackers in 1875, you understand.

Q. Let me see if I get it right. I will put it in another way. When you saw Hillmon the last of the summer or the first of the fall of 1876, where were you working?

A. I was at Hollingsworths.

Q. What time did you go to Hollingsworths to work that year?

A. I went to Hollingsworths along in June.

Q. And worked there from sometime in the month of June down into sometime in December? A. Yes sir.

Q. And in what time was it that Hillmon came to Baldwin's to work, if you know, during that time? I speak of from that June until that December?

A. I could not tell you that.

1464 Q. What time did you first see him there?

A. I seed him there along about the time that I went to Baldwin's, along in September.

Q. Do you remember what you went there for? Is there anything that fixes it in your mind?

A. I went there to work. He hired me in Tonganoxie.

Q. From Ackers you to Baldwin's place?

A. Oh no. I went to Hollingsworths.

Q. From Hollingsworths then, you went to Baldwin's place? A. Yes sir.

Q. But Hillmon had been working for Baldwin some time when you came there?

A. I don't know how long he had been working there. I didn't ask that question.

Q. Nothing was said about that?

A. No sir.

Q. Was that early in September?

A. Yes sir. It was in that month.

Q. What was the work you were doing?

A. I was preparing fences. I went there to cut corn and to get up the winter's feed.

Q. When you went there Hillmon was there?

A. Yes sir.

Re-Direct Examination

By Mr. Barker.

Q. How far was Hollingsworths from Levi Baldwin?

A. It was just five miles.

Q. How far was he from Tonganoxie, Mr. Baldwin?

A. He was five miles.

Q. It was five miles from Hollingsworths to Levi Baldwin's? A. Yes sir.

Q. Hollingsworth's was also in Leavenworth County? Yes sir.

1465 Q. Now at the time you saw those remains in Lawrence, how long had you been working for Levi Baldwin?

A. I had been working for him then about two months and a half, near three months and a half?

Re-Cross Examination

By Mr. Atwood.

Q. Working for Levi Baldwin? A. Yes sir.

Q. You will have to set me straight. I understood you to say that you were working for old man Baldwin?

A. No sir. You understood me to say I went from Hollingsworth's to Levi Baldwin's and remained there until Hillmon left.

Q. Now the question I got into my head you were working for old man Baldwin at the time the body came there?
A. No sir. That was wrong. You got that wrong.
Q. You were working for Levi Baldwin at that time?
A. Yes sir.
Q. And when you spoke of saying to Mr. Baldwin that you wanted to do your business in town, you had reference to Levi Baldwin?
Q. That is what I meant exactly.
Q. Did you go there the same day the body came there?
A. I don't know. The body was there when I got there.
Q. You heard talk around there about the time the body came in? A. Yes sir.
Q. Heard talk that the body had come in the same day that you saw it?
A. No, no. I don't know whether it had or not. It might have been a day before I got there.
Q. It was the day that it came in or the day after?
A. Yes sir.

Witness excused.

1466 The defendants and each of them next offered in evidence the testimony of William T. Faxon, given upon the trial of 1885.

It is admitted by the parties that Mr. Faxon is dead.

Said testimony was thereupon read in evidence and is in words and figures as follows, to-wit:

Wm. T. Faxon called for the defense and after being duly sworn testified as follows:

Direct Examination

By Mr. Barker:
Q. State you name. A. Wm. T. Faxon.
Q. Where do you live? A. In Lawrence.
Q. How long have you lived there?
A. About thirty years.
Q. Were you living in Lawrence in 1879? A. Yes, sir.
Q. Did you know Sallie E. Quinn? A. Yes, sir.
Q. Do you remember of her working in your family?
A. Yes, sir.
Q. When was that, if you remember—state what year?
A. I think it was in 1878.
Q. About how long did she work there?
A. I think she might have worked three to five months. I don't recollect the time.
Q. Do you know John W. Hillmon?
A. I knew him at that time.

Q. Do you remember of his being at your house during the time that Mrs. Hillmon was there? A. I do.

Q. Do you remember of hearing a conversation between Mrs. Hillmon and anybody in regard to the condition of Mr. Hillmon's teeth when Miss Quinn was working there?

A. I do, yes.

Q. Between whom was it?

[—] Between Miss Quinn and my wife.

1467 Q. It was not the Mrs. Paxon who testified?

A. No, my wife was sick and she died.

Q. It was between Mrs. Hillmon and your deceased wife?

A. Yes, sir.

Q. State when that was as near as you can recollect?

A. That was in the fall, at the time when Hillmon came home. That was the first time I ever saw him to know him.

Q. State what that conversation was that you heard between your wife and Mrs. Hillmon?

A. I went home and there was a horse and carriage hitched to the yard fence. My house is on the corner. I went in and went in the back way; came in the front room, where my wife was and as I went in Mrs. Hillmon—Mrs. Hillmon that is now —she was coming in and the gentleman had gone out. There was nobody there but Mrs. Hillmon, my wife, and myself. Mrs. Hillmon came in and she asked my wife how she liked her fellow. My wife said, very well, but it was a pity that he had lost that tooth. I made the remark that he could get a new set for fifty dollars. Why I made that remark and why I shall always think of it—

By Mr. Riggs: You needn't state.

Q. When your wife told Mrs. Hillmon that it was a pity that he had lost that tooth, what did Mrs. Hillmon say?

A. Mrs. Hillmon said he could have one put in.

Q. Then you made some remark?

A. Then I made this remark.

Q. Was there any circumstance there which fixed this matter in your mind?

A. My wife was having a set of teeth from Dr. Wheeler at that time, and sometimes Dr. Wheeler would come to my house and when she was well enough she would go to his office.

Q. Your wife was having a set of teeth made at that

1468 time, was she?

A. Yes, sir. This conversation had already taken place at that time. That was what I said. My wife asked me at the time if I was willing to pay the fifty dollars for the teeth, and I was always sorry since that I said anything about the teeth, and I am sorry to-day that I did.

Q. That was the first time you saw Mr. Hillmon?

A. Yes, that was why I recollect anything about it.

Q. So far as you are concerned you just knew Mr. Hillmon, that is all?

A. I saw Mr. Hillmon several times and have talked with him.

Cross-Examination

By Mr. Riggs:

Q. When did this conversation occur?

A. I think it was in the fall.

Q. What year? A. 1878, I think.

Q. The reason you remembered it was because you were sorry?

A. Yes, sir; I am sorry to-day for saying what I did to my wife.

Q. That is the only reason you have for remembering it?

A. That is the only reason. I have always thought of it?

Q. Did you ever give that reason before?

A. I don't know as I was ever asked for it.

Q. Don't you know that you didn't?

A. I don't think I did.

Q. That was a perfectly indifferent matter to you—about Hillmon having a tooth out? A. Yes, sir.

Q. You remember indifferent conversations of that kind, do you, after a lapse of five or six years' time?

A. I have a pretty good memory.

Q. You remember all sorts of indifferent matters of
1469 that kind?

A. I can remember most of that conversation.

Q. You can remember, I say, all sorts of indifferent conversations of that kind over a lapse of seven or eight years?

A. I don't know whether I could or not; I know I recollect that.

Q. Was any body present besides your wife, Mrs. Hillmon and yourself. A. Nobody that I know of.

Witness dismissed.

1470 The defendants and each of them next offered in evidence the testimony of George Lewis, given upon the trial of 1885.

It is admitted by the parties that Mr. Lewis is dead.

Said testimony was thereupon read in evidence, and is in words and figures as follows, to-wit:

George Lewis, called for the defense, and after being duly sworn, testified as follows:

Direct Examination

By Mr. Barker:

Q. State your name? A. George Lewis.

Q. Where do you live, Mr. Lewis?

A. In Valley Falls.

Q. How long have you lived there?
A. Thirteen years on the 4th of last April.
Q. What business have you been engaged in there?
A. Barbering.
Q. During all that time? A. Yes, sir.
Q. Were you acquainted with one John W. Hillmon?
A. Yes, sir.
Q. When did you first become acquainted with him?
A. In 1872.
Q. Where did you become acquainted with him?
A. In Valley Falls.
Q. How long did you know him?
A. I believe he left in 1873.
Q. You were acquainted with him then about a year?
A. Yes, sir.
Q. Have you seen him since that time? A. I have not.
Q. Do you remember cutting his hair? A. I do.
A. More than once? A. Several times.

Q. You may state whether or not you observed any scar upon his head?

A. Yes, he had a scar upon his head.

1471 Q. Whereabouts was it?

A. I could not say exactly whether it was on this side (indicating) or whether it was on the back of his head.

Q. How large a scar was it?
A. I do not suppose it was over an inch and a half.
Q. State whether or not it was visible when you were cutting his hair? A. Yes sir, it was.
Q. Do you know from anything he told you how that scar came there?

By Mr. Wheat: We object as incompetent and hearsay.

Q. Did you ever have any conversation with him about that scar? A. Yes sir.
Q. You may state if you also shaved him? A. Yes sir.
Q. Frequently? A. Yes sir.
Q. You may state whether or not you observed any peculiarity or defect in his teeth?
A. I don't know as I would want to say. It seems to me, though, that he had two teeth that were decayed or defective in some way.
Q. Do you remember where they were?
A. Indeed I don't.
Q. Were they upper or lower teeth?
A. I think they were upper teeth.
Q. If I understand you you have not seen him since '73?
A. No.

Q. Do you know where he was living then?

1472 A. He was living north of town somewhere, but I was never at his place.

Cross Examination.

By Mr. Wheat:

Q. How long had he been living there?

A. I couldn't tell.

Q. State as near as you can?

A. I couldn't tell you that, for I don't know that I ever asked.

Q. How long did you know of his having lived there?

A. I got acquainted with him in 1872 and he left in 1873.

Q. Was he there all the time?

A. He was, and in town.

Q. How often did you see him?

A. Sometimes once or twice a week.

Q. Would it average once a week all the time?

A. I don't know whether it would or not.

Q. What time in 1872 did you commence seeing him?

A. I think the first time I saw him—I got there on the 4th f April, Wednesday night, and went to work Thursday morn-ng—I think it was the latter part of April when I got ac-uainted with him, and knew who he was.

Q. April, 1872? A. Yes sir.

Q. And you saw him continuously from that time to what me in 1873?

A. Every once in a while, just the same as farmers coming o town.

Q. To what time in 1873? A. I couldn't tell you.

Q. Give it to me as near as you can.

A. I don't believe I would want to, from the simple fact at I do not know what time in 1873 he did leave.

Q. Can you tell me anything about what time in 1873 it was? A. No. It was some time in 1873.

73 Q. Can't you give this jury your best judgment as to whether it was spring, summer, or fall?

A. I would not want to say either one. I paid no attention it. There were men leaving every day and coming every y.

Q. Give your best judgment, or haven't you any?

A. I have judgment, of course.

Q. That is what I want.

A. I think he left in the latter part of summer.

Q. Of 1873? A. Yes sir.

Q. What was his business while he was there?

A. He claimed to be farming. I never saw him do a min-'s work in my life.

Q. You saw him, did you not—saw his hands lots of times?
A. Yes, I saw his hands lots of times.
Q. What appearance did they present as to what he was doing with them?
A. They looked like he was working with them.
Q. The balance of his person—how did that accord with farm labor?
A. It looked like he was out of doors a good deal of the time.
Q. He looked like a man who was working pretty hard?
A. I could not say as to that.
Q. What kind of clothes did he wear during that period?
A. He wore ordinary clothes. I can't tell the color.
Q. With reference to the appearance of them, whether they appeared like a man's who was laboring in them on a farm?
A. He didn't come to town in what we would call laboring clothes.
Q. Such as farm laborers wear? A. Yes sir.
Q. With reference to the wear and tear on these clothes?
A. I have seen him with overalls on.
Q. When overalls were not on?
1474 A. His clothes looked like he wore them sometimes.
Q. I mean did they look like they were sustaining the wear and tear of farm labor? A. Yes sir.
Q. They presented the appearance of being used in farm labor? A. Yes sir.
Q. They didn't present the appearance of being used by a horseman, did they?
A. Yes; he rode a great deal; I know that myself—back and forth to town.
Q. How far was it?
A. Indeed I don't know the place where he lived. I know he always said he lived north. I don't know how far the place was.
Q. Could you not approximate?
A. No, I could not. It was somewhere between five and twelve miles, I should think.
Q. Then did the clothes present the appearance of having been worn a good deal in riding?
A. That depends upon what he had on. Sometimes they would and sometimes they would not. Sometimes he had on a pair of spurs.
Q. Did he usually have spurs on? A. No, not usually.
Q. Did he ever come to town in a farm wagon?
A. I don't know whether I ever seen him riding in a wagon or not.
Q. What did you say your name was?
A. George Lewis.

Q. How long did you say you lived there in Valley Falls?
A. Thirteen years the fourth day of last April.
Q. You stated it was two teeth; what was the matter of two teeth? A. I said I thought they were defective.
Q. Which two teeth? A. I couldn't tell you.
Q. Can you tell whether in the upper or lower jaw?
A. I think it was the upper jaw.
Q. Can you state which side? A. I could not.
Q. Can you tell whether front or back teeth?
A. They were front teeth. I see them when I blackened his mustache.
Q. Were they the two very front teeth or on one side?
A. I couldn't say.
1475 Q. Were those two teeth together or separate?
A. I think they were together.
Q. About how black were they?
A. They looked to me like if I was a dentist I would strike for a job of filling them.
Q. Decayed some? A. Yes, sir.
Q. Were they decayed, each one of them, enough to look very black?
A. Not so very black. They were decayed some.
Q. Was it not three teeth,—two on one side of the mouth and one on the other?
A. I couldn't say anything about three.
Q. Can you say it was not so,—not two on one side and one on the other?
A. No, I couldn't say there was not. I can only state that there was two teeth that was decayed.
Q. And then on the under jaw was not there a black tooth also? A. I don't remember.
Q. Don't you remember a black tooth in the lower jaw?
A. I do not.
Q. Do you remember anything about one of these lead colored fillings being in one of the under teeth?
A. No, sir, I don't.
Q. You don't remember anything of that sort?
A. No, sir.
Q. Mr. Lewis, how many Hillmons were there there?
A. I never saw, as I know of, or knew any but two.
Q. That was Hank and what was the other one's name?
A. John Wesley.
Q. Which was the older?
1476 A. I couldn't tell you that. I think John Wesley was, but I don't know. I have seen cases where the daughter looked like she might be older than the mother, and I would not say.
Q. In this case you think John was older than Hank?

A. That is just merely my opinion.
Q. Do you know where Hank is now? A. I do not.
Q. Do you know when he left there?
A. No, I don't believe I do.
Q. You know he has left?
A. He was going. I don't know whether he left or not.
Q. You haven't seen him for some time?
A. I haven't seen him for some time.
Q. And they had some uncles of the same name?
A. Uncles?
Q. Of the same name? A. I don't know.
Q. Some that lived up in Nebraska formerly?
A. I don't know that at all.
Q. You don't know where this Hank Hillmon is now?
A. No, sir, I do not.
Q. You don't know where he went to? A. No, sir.
Q. Are you as sure that there was as many as two black teeth in this man's mouth?
A. I will tell you I am pretty certain of it. It was quite a while ago, and I think a man is foolish to swear to anything of the kind positively. I am sure of the scar. It was on the back part of his head.
Q. Please locate that scar? Describe that scar.
A. It just looked like a scar he had [gor] from some lick on the head.
Q. How long was it?
A. An inch or an inch and a half. I have cut his hair and he would always tell me not to show that scar.
Q. How wide? A. I don't exactly know.
Q. Was this wide enough to affect the thickness of
1477 the hair?
A. Yes, sir, if I would cut it as as short around it would show.
Q. Did it look as though the wound had been a wound from a sharp or a dull instrument, with regard to the width of it?
A. It looked to me like it might have been some not exactly sharp instrument or dull one; I couldn't tell.
Q. How would the width of this scar compare with the width of the cut of an ordinary pen-knife?
A. It is wider than that.
Q. And so you cut the hair so that the scar would not show? A. Yes, sir.
Q. On how many occasions did you cut that hair?
A. O, I couldn't tell you. I have cut it quite often. Sometimes he would have it cut oftener than others. I probably cut it four or five times?
Q. What was the first time you cut it? A. In 1872.
Q. You remember cutting it four or five times?

A. Yes, sir, I do, because every time he would come in town he would come and see me.

Q. Tell the nearest time that you can to the first time you cut it?

A. I cut it between the fourth of April and the first of June

Q. Why do you know that?

A. I got acquainted with him during that time and I know I worked on him.

Q. Do you remember cutting his hair? A. Yes, sir.

Q. Do you remember the circumstance of the first time you cut his hair?

A. No, not particularly, only the time of the year and when I got acquainted with him.

Q. Who was in the shop?

1478 [Q. Who was in the shop?]

A. I was working then for Mr. .....

Q. Do you remember what kind of a day it was?

A. No, I don't. That is a little too far back for me to remember the day.

Q. Have you cut a good many heads that had scars on them? A. Yes, sir.

Q. How many in your lifetime? A. I couldn't say.

Q. A hundred?

A. I would not say that I had cut a hundred or a thousand.

Q What would be your best judgment?

A. How many I have cut with scars on the heads?

Q. Yes. A. I couldn't tell you.

Q. Can you make an estimate of the proportion of the number of heads of hair you must have cut with scars on the head?

A. No, I don't know as I can.

Q. Is it a common thing to find scars on men's heads?

A. Yes, quite common.

Q. Quite common? A. Well, not quite common.

Q. You cut a man's hair every few days who has a scar on the head?

A. Yes, sir. I will bet there is not a week goes by without I cut one or more.

Q. There was nothing peculiar about this scar, was there?

A. Nothing very peculiar. Just a scar as I told you.

Q. What other person's hair did you ever cut that had a scar on the head? A. I have cut lots of them.

Q. I want you to please be kind enough to name one of them? A. Frank McCoglin.

Q Where does he live?

A. I think he is an engineer on the Santa Fe road.

1479 Q. Where is the scar—on the top of his head?

A. On the top of his head.

Q. Name some other person who has a scar on the head.
A. Frank Cregg.
Q. Where does he live?
A. At Valley Falls, about five or six miles west of town.
Q. What sort of a scar is it?
A. It is a scar right here (indicating). He was kicked by a mule—not by a mule either; I think he was throwed off a reaper or a mule. He has a scar there.
Q. Another person?
[—] Harris Shafer, our county attorney.
Q. What sort of a scar?
A. I don't know which side of the head it is on, but he has quite a big one. He always combs his [head] down over it.
Q. This last scar is not in the hair?
A. No, sir, it is right at the edge of the hair.
Q. Name another person?
A. O, my goodness! I don't know as I can name all of them. I could name all of them if I could think of them, but I don't know that I can.
Q. Can you think of any more?
A. I probably could.
Q. I would like to have you.
A. O, I can't think of none of the boys now.
Q. That ends those, then, that you can name. One was below the hair and the man had the hair cut to comb over it; another was hurt by being thrown off a machine, and the other man was a railroad engineer? A. Yes, sir.
Q. This scar of Hillmon's if I understand you was all in the hair? A. Yes, sir.

1480 Redirect Examination

By Mr. Barker:
Q. You stated that you blackened Hillmon's mustache?
A. Yes, sir.
Q. About how long did you blacken his mustache?
A. I could not say. At one time there he was quite a hand to keep his mustache black, but as to that I could not say.
Q. In regard to his dress—the clothes he wore. Was your attention called to him by anything else he wore?
A. Yes, he used once in a while to come to town with a great big navy or Remington, or whatever you would call it?
Q. You mean that he wore a pistol sometimes?
A. Yes, sir.
Q. Your attention was called to him by that? A. Yes, sir.

Witness dismissed.

1481 William J. Buchan, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name and residence?
A. W. J. Buchan, Kansas City, Kansas.
Q. What is your profession? A. Lawyer.
Q. How long have you resided in Wyandotte county, Kansas? A. Wyandotte has been my home since 1867.
Q. Were you living there in 1878 and 1879? A. Yes, sir.
Q. Were you engaged in the practice of your profession?
A. I was.
Q. Were you acquainted with one John H. Brown?
A. Yes, sir.
Q. Were you acquainted with his family, that is, with his father? A. I was acquainted with the whole Brown family.
Q. You knew his brother Reuben Brown? A. Yes, sir.
Q. Do you remember of seeing John H. Brown sometime in the spring of 1879? A. Yes, sir.
Q. State to the jury about the first time you say at that time, that is, in the spring or summer of 1879 and where you saw him, and under what circumstances?
A. I think it was in the month of July; however, I won't be positive. I saw him at Lexington, Missouri.
Q. How did you happen to see him on that occasion and at that place?
A. His brother Reuben Brown came to my office in Wyandotte and said that he wanted me to go with him to Lexington to see John, that John wanted to see me.
Q. Had you had any conversation or correspondenc with Reuben Brown in regard to that matter before, the matter of your seeing John Brown?
A. I think I had written to Reuben once to know where he was some time before that.
Q. And Reuben came to the office?
A. Reuben came to my office in Wyandotte.
1482 Q. Where did you and he go then?
A. We went to Lexington, Missouri.
Q. Anybody with you on that occasion?
A. Nobody but Reuben.
Q. Now, did you see John H. Brown at that time?
A. Why, we first saw him as the train got into the depot at Lexington; he met us at the train.
Q. At Lexington? A. At Lexington, yes.
Q. Now, when before that time, had you seen John Brown, if you remember; John H. Brown?

A. I hadn't seen John before that for some years, possibly a couple of years. They lived just north of Wyandotte but he had been away for some time and I don't think I had seen him for possibly a year or two.

Q. Did you have a conversation with him at that time?

A. I did.

Q. At Lexington? A. Yes, sir.

Q. At that time did you know or had you heard or read about there having been a coroner's inquest at Lawrence over the body of a man?

A. In a general way as I got it from the newspapers, I had.

Q. Were you at Lawrence during the time of that inquest?

A. No, sir.

Q. Did you have any personal knowledge of the inquest or of what took place there but what was derived from the newspaper accounts and what you had heard?

A. Entirely from newspaper accounts, and some conversation with John Brown's father I think is all I knew about it.

Q. Now, you may state what took place between you and John H. Brown at that time, stating the conversation as it occurred?

A. John met us at the train at Lexington, about twelve o'clock, possibly a little after and we went directly up to the hotel to dinner; I don't recollect any conversation that we had on the way up except as to why he hadn't met us at Orrick some time previous to that.

Q. Now, in that connection, you may state what he said in regard to why he hadn't met you at Orrick?

A. He said—I asked him why he hadn't met his father and me at Orrick quite a while before this and he said he was a little afraid. He was a little afraid that somebody
1483 would arrest him and he didn't show up there. We then went directly to the hotel and sat down to dinner, had our dinner, and John and Reub and myself then walked out from the hotel quite a little ways and sat down upon a rock overlooking the bluff. I says, the substance of it was: "Well, John, what is there about this business; what is it about this affair at Lawrence?" He replied, "Well, Bill, it is bad business, it is a bad affair, and I sent for you, I want to turn state's evidence; they are hunting me; that wasn't Hillmon that was killed down there; it was another man; Hillmon has got away and they are hunting me and I am left here in trouble and I want to get out of it; I want to turn state's evidence; I want you to see the attorneys for the insurance companies, Mr. Barker of Lawrence, and see if they will let up on hunting me if I will go on the witness stand and tell the truth about this whole affair." That is the substance of

it. He then went on—I asked him something about it. I said to him they couldn't prosecute him at Lawrence for a crime alleged to have been committed in Barber county; that he would have to be taken to Barber county and tried before a jury of that county, and then I asked him something about the coroner's jury down there; he said they were his friends. I said, you are innocent and they would not convict you down there; it is not necessary to do that, but he said he had worried over this thing and he wanted it cleared up. He wanted it off his mind, wanted to get out of it, and wanted I should go up to Lawrence and hunt up somebody connected with the insurance companies and tell them that if they would cease their attempts to prosecute him and follow him, in case any suits were brought to recover on those policies, that he would go upon the witness stand and tell the truth, and the truth was that it was not the body of Hillmon that was brought to Lawrence.

Q. Now, up to that time had you ever urged, or said anything to him about turning state's evidence?

A. Nothing.

1484 A. I don't remember as to what was said; I explained to him—Had I said anything to him about it?

Q. Yes.

Q. No sir, I hadn't said anything more than I had merely asked what the affair was, the trouble he was in; he was very anxious to talk about it and to get it off of his mind.

Q. Did he tell you, go into the details of the transaction, how it had taken place; did he state what he claimed to be the facts with reference to the transaction?

A. He recited to me the whole story, the whole transaction, of the trip from Wichita and back, two trips I think they went from Wichita out there and back.

Q. Did he tell you whose body it was that was brought to Lawrence?

A. I asked him particularly about that, tried to find out whose it was and he either didn't know, or didn't want to tell me; I don't know. He said it was, I think he said that it was a man by the name of Berkley, Joe Berkley, I think they called him; as to where he was from, I learned what we could about it; he said he had at one time been about Fort Scott, but didn't seem to be positive as to the man's name.

The plaintiff asks that the answer of the witness be stricken out where the witness says, "He didn't seem," etc. Motion sustained, the defendants and each of them at the time duly excepting.

A. At that time, did he tell you, did Brown tell you who had killed the man whose body was brought to Lawrence?

A. Yes sir.
Q. You may state.

The plaintiff objects to the counsel's method of examination.

By the Court: The better way is to let him state the entire conversation, and if he omits anything the counsel may call his attention specially to it.

Q. You may go on and state the conversation, so much of it as you remember.

A. He said that he and Baldwin, who was a brother-in-law of Hillmon, and Hillmon, had put up this job on the insurance companies, he said, to get Hillmon's life insured for an
1485 amount of money, and that the intention was to go off in the southwest somewhere and find a body, a dead man whom they could pass off as the body of John Hillmon; that Hillmon was to have, to get out policies, that Baldwin was to furnish the money to pay the premium, and that in pursuance of that scheme they left Lawrence and went to Wichita and in the winter they started out with that intention, and made a trip from Wichita down southwest and ran up to Hutchinson, I think, and Sun City he mentioned, in hopes of finding somebody frozen to death on the plains as they passed over, but they failed in that and finally returned to Wichita; that Hillmon went back to Lawrence, and he remained in Wichita; Hillmon went to Lawrence to get more money; they were out of money; that Hillmon was gone some time there, and when he came back, then they organized and got ready for another trip and went off southwest; that after they had left Wichita, the first day out they met and overtook this person on the road and they asked him to get in and ride with them and he did and he was with them during this entire trip from that time. He said that when Hillmon was at Lawrence he had been vaccinated and that as they were riding along in the wagon Hillmon told this fellow he ought to be vaccinated and he vaccinated him, taking the virus from his own arm, and vaccinated this man; that after a few days out this vaccination or something made this man sick; he was sick and stupid and dull, stayed in the wagon most of the time, would not get out of the wagon; he said that Hillmon had during the trip traded coats with him, and I think he said gave him a suit of underclothes and they finally got down about Medicine Lodge, telling me that this man was in the wagon all the time sick, and they went out from there to some place where they camped and that he was taking care of the horses and Hillmon was unloading the wagon, I believe, that this man Berkley, or whoever he was, was sitting in front of the fire with his face in his hands and he heard the report of a gun. He looked

around and he saw Hillmon pulling this man around
1486 out of the fire; he had fallen over in the fire; that Hillmon said to him, "It is all right now; you go off over here to that house, quite a ways off, and have them come over and I am going north," and he took a valise, I think this man's valise, if I recollect right, put some things into it, took a memorandum out of his pocket and put it in the pocket of this man that was shot, and took this grip and started north to the railroad. He says, "My name will be Marshall, and you will hear from me from time to time." He told Hillmon that he thought he had better not hear from him at all. He got on his horse and rode off to some of the neighbors there and told him he had shot his partner Hillmon, and he was over there dead, and wanted them to come over, which they did, had a coroner's inquest, and he said that that was Hillmon, he had shot him, and the body was buried. That, in a general way is what he told me.

Q. Now, at that time did you have any talk, what talk, if any, did you have with Reuben Brown in regard to John's turning state's evidence?

A. None whatever. Reuben stood—that is, we were all there close together. I don't recollect that Reuben said anything; he simply stood there and listened to the conversation between John and myself.

Q. But the question was in regard to your asking Reuben Brown to urge John to turn state's evidence?

A. No, I did nothing of the kind; the fact is I was inclined to think John ought not to do that unless there was a reason, that he should not be governed by his fear of being arrested; I explained to him, as I said before, that he could not be taken—if he was taken, if they brought him back to Lawrence, he could not be tried there.

Q. Do you remember anything about letting John have some money, whether there was any such transaction, if so, state what there was to it?

A. I don't recollect that I did; I don't think I gave him any money; I am quite sure I did not; I don't think I did; I don't recollect it now.

1487 Q. Will you look at this paper which is marked Exhibit B, and state when and where if at all, you ever saw that paper.

A. This is the paper, the note, that John gave me to give Mrs. Hillmon; or for his father to take to Mrs. Hillmon at Lawrence.

Q. When and where did you—

A. I might say, if I am permitted, the final outcome of the interview was it was arranged that John's father and myself should go to Lawrence and find the attorneys for the in-

surance company and say to them that if they would cease their prosecution of him, that in case any suits were brought to recover the money on these policies he would go upon the witness stand and tell the truth, and he wanted to see Mrs. Hillmon; he said he—

Q. Who wanted to see Mrs. Hillmon?

A. John. I asked him whether he had seen her; whether he hadn't seen her over at Lawrence, and had a talk with her; he said he had no conversation with her there at all; he had stayed during the coroner's inquest there, he was in a room off of the court room, and Mrs. Hillmon passed through and he said to her, "Where is John," and she made some remark back to him, I don't now recollect.

Q. Now, I want to call your attention again to this exhibit.

A. Well, this paper—after we had gone down to the train, we had gone into the cars, and John was talking about seeing Mrs. Hillmon. He says, "I will write a note and I would like to have father or you take it up when you go up there." He went out and went across the way, across the street to some little room there, saloon or a little hotel or something, and came back with this paper. He says, "You take that to Mrs. Hillmon at Lawrence."

Q. Well, now, were you present when he wrote it?

A. No sir.

Q. Did you give him the paper on which it was written?

A. No sir.

Q. Did you dictate the contents of the letter to him?

A. I did not; it was not written in my presence at all.

Q. Did you talk with him anything about what there should be put in the paper?

A. Not a thing, sir; not a word.

1488 Q. Where was this Exhibit B, this letter given to you; this paper to which I have just called your attention?

A. John brought it into the car and gave it to me.

Q. Where was Reuben at that time?

A. Reuben was sitting right there, possibly in the same seat with me.

Q. Did you and Reuben return from Lexington at the same time? A. We did.

Q. Do you remember what time you left Lexington?

A. No, I should think along about the middle of the afternoon; we got to Kansas City before dark.

Q. Did Reuben Brown go to your office after you returned from Lexington?

A. No, I think Reuben left me at the union depot and went off home to Parkville.

Q. Well, now, you may state what was the next thing you did with reference to this matter that you remember.

A. Within a day or two from that time, John's father and I went to Lawrence in pursuance of this agreement and I think I hunted up Mr. Barker who was connected with the insurance company and old Mr. Brown went to see Mrs. Hillmon and brought back word that Mrs. Hillmon would meet us at—

By Mr. Atwood: Who brought this word?

A. Mr. Brown, the old gentleman—Would meet us at the office of Mr. Borgolthaus; old man Brown brought back word that Mrs. Hillmon would meet us that afternoon at the office of Mr. Borgolthaus her lawyer.

Q. Did you see Mrs. Hillmon on that occasion at her house?

A. No sir.

Q. Did you go to her house on that occasion?

A. No sir.

Q. Go on and state what took place there.

A. We met her in the afternoon at the office of Mr. Borgolthaus.

Q. Was Mr. Brown, the old gentleman with you at Mr. Borgolthaus' office?

A. I think he was; I think we both went there; there was very little conversation had there; Mrs. Hillmon said that if John wanted to see her, he would find her at the office; that if John wanted to see her, he could come to Lawrence. That was about the purport of what took place; I don't re-
1489 member; there was very little talk about it there.

Q. And you and Mr. Brown went back to Wyandotte? A. Yes, went back to Wyandotte.

Q. Did you and Brown go up together and return together?

A. Yes.

Q. I mean by Mr. Brown, the father of John Brown?

A. Yes sir, Robert.

Q. Now, when did you next hear or do anything in regard to this matter after you were at Lawrence at Mr. Borgolthaus' office?

A. You mean with reference to John Brown or the whole transaction?

Q. You may state the whole transaction.

A. I don't think anything further was done about it for quite a while. I didn't learn that there was anybody in Lawrence authorized to talk for the insurance companies and we sort of dropped the matter and went back home; I don't recollect then of seeing John until possibly August or September, quite a while afterwards.

Q. Where did you see him on that occasion?
A. I saw him at or near Parkville.
Q. At whose place? A. His brother Reuben's.
Q. Who went with you on that occasion?
A. A Mr. Ward.
Q. Who was Ward?
A. Mr. Ward was an old acquaintance, officed in the same building with me, a deputy sheriff; he had a team and I got him to drive me over there.
Q. Now, where did you find John Brown on that occasion?
A. I found John at the sawmill near Reuben's house loading lumber.
Q. Did you have a conversation with him there?
A. Yes sir.
Q. Do you remember about the first conversation that you had with him on your arrival there?
A. Well, the first conversation I had with him was at the saw mill there; I told him I had come over to see him about that Hillmon matter, the insurance matter, that I had been informed by some of the people representing the insurance companies—came to see me and said that he was about to sign proofs of death or had signed them, or something, and they thought it was very funny after what I had told
1490 them in Lawrence and that I said I would go and see him to know what he meant, and I had come to find out about it, what he meant, and what he had done, and intended to do. He said to me, "Yes, I did sign some paper." He said they had told him if he signed that paper that would be the last of it, that Mrs. Hillmon would get the money and it would be all over.
Q. Did he tell you at whose instance he had signed, or who had got him to sign that paper?
A. Yes, I think I am a little ahead on that. I saw John once before that; I recollect it now. I had met him at Parkville in company with Baldwin.
Q. Do you know which Baldwin, Alva or Levi?
A. Levi. I saw him about the train; Baldwin was there and took the train as I got off. John was there, and I asked him what he was doing there, and he told me what he had come for, he said that Baldwin was there wanting him to sign some papers and he had refused to do it.
Q. Can you fix the date of that?
A. That was prior to the time I saw him at Reuben's house, not a great while; sometime prior to that. He said he had refused to sign those papers, and he didn't intend to; he proposed if anything came of this thing to tell the truth. I turned and went back home then. I had a very short con-

versation. Then the next time I saw him was at the house after I had been told that he had signed some papers.

Q. Now, I want to draw your attention to the conversation that took place at Reuben Brown's house near the saw-mill, the time that you and Mr. Ward went over there.

A. That is the conversation on I was relating a minute ago; and he said that he had signed some papers; that Baldwin, and I think he said Mr. Riggs, Mr. Samuel Riggs had come to see him, and got him to go down to Kansas City and sign some papers with the belief or understanding that that would end the whole matter and she would get the money. He said they had told him, Baldwin or some of them, Levi Baldwin had told him that the insurance companies had thought it was a man by the name of Nichols who had
1491 been killed and he knew where Nichols was and if they ever did anything about it he would produce Nichols and show them he was alive, that it was not him at all and they were off the scent.

Q. Where did that conversation take place?

A. At the saw mill near Reuben's house.

Q. Who was present at that conversation, if you remember?

A. Nobody was present; Mr. Ward was sitting in the buggy off somewhere waiting for me.

Q. Did you have any further conversation with him?

A. We then went to Reuben's house for dinner and there I met Reuben. John and Reuben had some talk and then Reuben and John and myself had some talk.

Q. Did you hear the talk between Reuben and John?

A. No, I did not, that is, not the first one, not all of it. Afterwards we were together, the three of us, and had some talk. I repeated practically what I had said to John and then Reuben said to John——

Q. You may state as near as you can what you said to John in Reuben's presence after you had this talk down by the saw mill?

A. I said to Reuben that I had been telling John I had come over to see him to see about this affair; the attorneys for the insurance companies had come to me and said that John had made some statement or signed some papers which was contrary to what he had told me to say to them and that I thought it was very queer and I wanted to know about it; I wanted to know what he was going to do; which was the true story; that I either wanted to quit the whole thing or know what he was going to do; wanted to have him determine what he would do. He said he told the truth when down at Lexington, that was the facts about it and he had no intention of telling anything else; that he signed this paper under the belief that

this was the end of the thing. I told him that was only the beginning of trouble; that with the papers they would
1492 bring suits; that the matter would be in court and then he would have to appear and go on the witness stand, and I wanted to know what he was going to do.

Q. What, if anything, did you say to Reuben Brown in regard to urging John to turn state's evidence on that occasion?

A. I didn't say anything at all about it. I said to him after he had said that was the fact and if he had to go into court he would tell the truth, I says, "John, there is all sorts of stories about this thing and if that is what you propose to do I want you to put it in writing," and said that to Reuben.

Q. What did he say in regard to that?

A. Reuben said that was the thing to do, to put the statement in writing and stand by it and that he had better do it.

Q. Now, have you stated the substance of the conversation that took place between John H. Brown, you and Reuben Brown at Parkville? A. I think so.

Q. I mean Reuben Brown's farm? A. Yes, sir.

Q. Where was Mr. Ward during this time; was he present and hear any part of this conversation.

A. No; he was about the place somewhere visiting with Reuben's family; he was an old acquaintance of the family; I don't think he was—I know he was not present at any of the conversations or within hearing distance.

Q. Was there anything said on that occasion by you or in your presence about Mr. Ward being there to arrest him?

A. No, sir.

Q. Did you tell Reuben Brown at that time or any other time for that matter, that Ward was there for the purpose of arresting John H. Brown?

A. Reuben knew Ward longer than I had; they were old acquaintances.

Q. Now, you have stated the conversation; now, you may state what you did?

A. After we concluded to put this statement in writing, we went up on the porch and Reuben and John brought a table out on the porch and pen and ink. Reuben went away then with Ward and looked around the farm and John sat
1493 down and told me that story practically as he had told me at Lexington and I put it in writing. He told the story and I put it in writing practically using my own language, and facts and details just as he had stated them to me.

Q. When that statement was written, what was done with reference to reading it over and talking it over, or talking it over with John at the time it was being made?

A. It was talked over and read over and discussed; that is, it was read over afterwards.

Q. After it was completed?

A. After it was completed. John simply sat down and told me the lates and time and what was done, recited the story to me and I put it in writing.

Q. And you say that after it was written——

A. We read it all over and I said we had better go to a justice of the peace if he didn't object, and go down town. John got on his horse and we went down to Parkville.

Q. Do you know who went with you on that occasion?

A. Ward went down with us; that was on our way home.

Q. Do you remember whether Reuben went along or not?

A. No, Reuben didn't go; John went on horseback, Reuben didn't go at all.

Q. John went over?

A. John went over. John and I went to the office of a justice of the peace by the name of McDonald. He said he wanted to swear to an affidavit and he swore to it there.

Q. Then, what did you do?

A. Why, I had this conversation; John said then he thought if he saw Mrs. Hillmon, he could get up these policies, get them to be surrendered and that he thought that he would just go at that.

Q. Do you remember where he made that statement?

A. I think he talked about it up at the house; I am not so positive about that. That was the conclusion of it, if he could get to see Mrs. Hillmon some way, that he knew if he saw her he could get a surrender of these policies and that, he was sure, would end it, and he gave me some authorization or some paper right there in the justice of the peace office, I think.

Q. Will you look at Exhibit number 18 at this pres-
1494 ent trial and state what that is and when you first saw it and by whom it is signed?

A. That is the paper John gave me in the justice of the peace's office in Parkville; I wrote it and he signed it.

Q. That was signed at Parkville? A. Parkville.

Q. Missouri?

A. Missouri—Parkville, September 4th, 1879.

Q. Does it bear the date in your judgment of the day on which it was signed?

A. It was dated the day it was signed, the same day the affidavit was made, September 4th, it was written in the office of the justice there and signed by John there and given to me.

Q. Whose signature is there to that paper?

A. That is the signature of John H. Brown.

Q. What was done with it after it was signed?

A. I took it.

Q. After this paper was signed and the other paper was signed, what did you do? A. Went home.

Q. Do you remember of having any further conversation with him in regard to this transaction after the signing of this paper in McDonald's office. I mean, by this paper, Exhibit number 16?

A. Why, we did. We talked a while there around town, half an hour possibly, or a little while, and went on down the road towards Kansas City on the way home, and John went along with us until the road turned off and he went up to the house.

Q. And you and Mr. Ward returned to Kansas City or Wyandotte? A. Yes, sir.

Q. Leaving John?

A. Leaving, John turned up the road towards his house.

Q. What was the next thing that was done in regard to this matter after this affidavit was signed and this authorization signed by Brown; what was the next thing that you did, if you remember?

A. A short time after that I went to Lawrence and had an interview with yourself and Mr. Green, I think, and Mr. Munn, representing the insurance companies, some agent or general agent or something.

Q. Where was that interview, was it in my office or
1495 Mr. Green's office?

A. I think it was in Mr. Green's office.

Q. Do you remember my being present?

A. Yes, sir.

Q. You may state now what took place there on that occasion?

A. Well, I don't know that I could in detail. I had this paper and I had that affidavit and I said that I was authorized by Brown to negotiate with them to get up these policies; that he would get the surrender of these policies provided they would give him immunity from disturbance, from arrest.

Q. Before you go into that matter, I want you to look at Exhibit number 15 at this trial and state when, where and under what circumstances you first saw that exhibit?

A. This is a paper that was given to me at that time in Mr. Green's office in Lawrence by Mr. Munn, dated the 6th of September, 1879.

Q. Is that the time of your being at the office there?

A. Yes, sir, I think it is.

Q. You may state briefly what occurred there at the office on that occasion?

A. I had this affidavit with me and, as I recollect it, I started to read it and my recollection is after Mr. Munn had read that affidavit he began to say, "Brown ought to be prosecuted for murder," etc. I felt somewhat outraged, and I took the paper away and put it in my pocket and said, "If you pro-

pose to prosecute John Brown, you cannot do it with any evidence I can furnish and we will end this interview." I think I left the room and went over to the hotel, and I think you came over to the hotel saying that—censured Munn for making a statement of that kind, that there was nothing of that kind would be done and I think that is when that paper was drawn and given to me after I had assurances—

Q. What, if anything, was said at that occasion about your getting up these policies?

A. I said that I was authorized by John Brown to say he thought he could get up these policies and would attempt to.

Q. Do you remember whether or not you showed
1496 Mr. Munn or Mr. Green this paper which is marked Exhibit 18?

A. Yes, I showed them I had authority from John Brown to act on that matter and I wanted something from them on the other side.

Q. What did they give you then, do you remember?

A. They gave me this paper that is signed by Munn.

Q. Will you look at Exhibit number 26 and state when and where you first saw that, if you remember?

A. I don't recollect about that whether I got it at this time or not. It was a paper I got from Mr. Munn.

Q. Now, you may state what took place; you have stated what took place at Lawrence. Did you return to Kansas City?

A. Yes, I was at Lawrence, I think I was there a couple of times.

Q. You were there on both the 5th and 6th, do you think?

A. I think I was there two days. I think I returned at night. I am not sure about that, but think I came back home.

Q. When did you next see John Brown?

A. I was there a couple of times.

Q. After seeing John Brown at Parkville, Missouri, on or about September 4th, 1879, when and where did you next see him?

A. The next time I saw him was at my office in Wyandotte sometime after that, I don't know when; quite a while possibly.

Q. What was his business there then?

A. He came to my office and said he was going up to Tonganoxie, he was on his way to Tonganoxie to meet Mrs. Hillmon; he was to meet her at Baldwin's house and he was going up there to get these policies and bring them back.

Q. How was he traveling at that time, if you know?

A. On horseback.

Q. He left your office, did he? A. He left my office.

Q. When did you next see him. That is to say, did you see him after his return from Baldwin's?

A. Yes, sir, he stopped at my office on his way home from Tonganoxie.

Q. Do you remember when that was?

1497 A. A couple of days after that. He stopped at the office and said that he had been there, he had seen Mrs. Hillmon and that he wanted me—I was to meet them, Baldwin and Mrs. Hillmon, at Leavenworth on a date fixed, I think Monday; I think possible on Saturday he came back—that they were to be over there with the policies, had given the policies to Mr. Wheat of Leavenworth and that the policies were there and they were going over there and they were going to get the policies and surrender them and I was to meet them up there. Pursuant to that on the day fixed, I came to Leavenworth here and found John here, I think when I came. He had come up on the other side of the river.

Q. Do you remember of John coming over with you on that occasion or whether you found John here?

A. No, I found him here; I think he was here when I got here, if I remember. Mrs. Hillmon and Baldwin had not arrived. We waited around a while and then went down to the train coming from Tonganoxie and met Mrs. Hillmon. John wanted to know where Levi was and she said that Levi had got mad and backed out and said she had ought not to do this, but she had made up her mind to do it and she had come herself.

Q. That is what John said or Mrs. Hillmon?

A. Mrs. Hillmon said in answer to John's question.

Q. Where did that conversation take place, as near as you can remember? A. Down at the depot here.

Q. That was before or after you and Mrs. Hillmon and John Brown went to the Planters house?

A. That was just before her arrival here from Tonganoxie.

Q. Then you may state what you did?

A. We went up to the Planters hotel in this city.

Q. Do you remember in what room?

A. In a room off of the office. The office was then on the second floor and it was in, I think, the traveling men's room, just off of the office towards the river.

Q. Now, do you recollect the conversation, can you give the substance of the conversation that took place be-

1498 tween you and Mrs. Hillmen on that occasion?

A. They wanted me to—they talked something about giving me an order to go to Mr. Wheat and get the policies.

Q. How long after that order was given were the releases signed?

A. I was trying to state the conversation on the subject which was about my going up there. I said, "no, they will not give the policies to me." Mrs. Hillmon says, "Well, John, let us go," and wanted to go, but John backed out, said he didn't want to go, and then Mrs. Hollmon says, "If you will go with me, Mr. Buchan, I will go up and get those policies."

Q. Did she go with you to Mr. Wheat's office?

A. Yes, sir, she went with me.

Q. What I now want to direct your attention to is to state the substance of all that was said that you recollect of the conversation which took place between you and Mrs. Hillmon and between you and John Brown in the presence of Mrs. Hillmon from the time you went to the Planters House until those order and releases which have been offered in evidence, were signed?

A. These releases and the order were not written until after Mrs. Hillmon and I had come back from Wheat's office. I am sure of that.

Q. You think the first paper written was the order for the policies?

A. I don't recollect about that. As I recollect it now, these papers were all written after we had failed to get policies from Mr. Wheat.

Q. You mean the releases? A. The releases, yes.

Q. What I want to get at is what you said, what inducements, if any, you held out to her or what you said to her to get her to sign that order?

A. Oh, I didn't hold out any inducements; he was to come with her and get the policies and she had complained about Baldwin not coming over; that he had given the policies to Wheat and he was the one that ought to have come and got them; but, as he didn't come, if John Brown would go with her she would go and get them.

1499 What if anything, was said by you about having taken her best witness away from her; about having taken her best and only witness and she could not recover?

A. No conversation of that kind took place; nothing of that kind; there was no talk of that kind, it was a question of how to get those policies, nothing about that.

Q. Well, now, what, if anything, was said by you to her about the companies having millions and they would spend it to defeat the policies and that they never intended to pay?

A. Nothing of the kind; there was no hesitancy on her part about going and getting them; the only thing was the manner of getting them, or who would go with her; she was ready to go herself at any time; she had determined that before; there was no hesitancy on her part; there was no argument needed or used to induce her to come here, but the question was sim-

ply who would go with her to Mr. Wheat to get those policies.

Q. You have spoken about a certain order. Look at Exhibit 17 and state whether or not that is the paper to which you refer?

A. That is the paper which was given to me, I think, after we had returned from Mr. Wheat's office about the time these other papers were signed. This is the order Mrs. Hillmon gave me on Clough & Wheat for these insurance policies at the Planters House in this city.

Q. In whose handwriting is it? A. It is my handwriting.

Q. Whose signature is it? A. Mrs. Sallie E. Hillmon's.

Q. Is it witnessed? A. No, it is not witnessed.

Q. Now, in connection with this paper, I will ask you what was done after the signing of this order?

A. It was given to me.

Q. What did you do?

A. Then she—I wrote up the releases of the policies.

Q. What did you do after you got the order; did you go to Clough & Wheat's office?

A. I think, I am not certain as to whether that order was given before or after; my impression is it was given after [after]we had failed to get them; she did then sign the
1500 releases and also gave the order for the policies: That is my recollection now. I don't recollect of any paper having been written before we went there; I don't now.

Q. Did you go down to Clough & Wheat's office with her?

A. I went down with her.

Q. Do you remember what time it was in the day you went down there? A. No, I don't.

Q. It was the same day? A. It was the same day.

Q. This all occurred in one day?

A. All occurred on one day.

Q. You and Mrs. Hillmon went to Clough & Wheat's. Whom did you see there? A. Saw Mr. Wheat.

Q. Was there a conversation between Mrs. Hillmon, yourself and Mr. Wheat in regard to the policies?

A. Mrs. Hillmon said that she had come to get those insurance policies; that Baldwin left there. Wheat started to get them, started towards the safe, at least, stopped on the way and he says, "I don't know about this. I believe this is a kind of a fraud on me; I believe we have got a lien on those policies and I don't believe I will give them up."

Q. Then he didn't [gove] them up?

A. He didn't give them up.

Q. What did you and Mrs. Hillmon do?

A. Mrs. Hillmon and I came away, went to the hotel and as I recollect it now, then Mrs. Hillmon signed the releases of the insurance and also signed that order for me on Clough & Wheat for the policies. Now, that is my recollection of it now.

Q. Look at Exhibit number 17 and state whose signature that is and when and where it was signed?

A. That is a release for one of these policies, signed by Mrs. Sallie E. Hillmon, signed at the Planters House down here and her signature is witnessed by me and John H. Brown.

Q. The same John H. Brown concerning whom you have been testifying?

A. Yes, sir. That release was made and signed there at the Planters hotel on the day it was dated.

1501 Q. Look at Exhibit number 16 and state what that is and whose signature?

A. That is the same for another policy; there were three or four of those policies.

Q. By whom is it signed?

A. Signed by Mrs. Sallie E. Hillmon, and witnessed by myself and John H. Brown.

Q. Did you see her sign it? A. I did.

Q. Did you see John H. Brown sign as a witness?

A I did, it was all done right there.

Q. Look at Exhibit I and state if the signature thereto is the signature of the plaintiff and if you saw her sign it?

By Mr. Atwood: Is that the New York Life?

By Mr. Barker: Yes, sir.

By. Mr. Atwood: We object to it as immaterial; the New York Life is out of the case.

The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. That is signed by Mrs. Hillmon and witnessed by myself and John H. Brown, signed at the same time.

Q. Now, after these releases were signed and after this order was made, where did you go?

A. The train came along and Mrs. Hillmon and I went to Wyandotte and John Brown went over to Parkville on the other side.

Q. Now, have you stated all the inducements or representations or arguments, if any, that were used to induce Mrs. Hillmon to sign these papers?

A. There were no arguments or inducements of any kind to get Mrs. Hillmon to sign these papers for me at that time. She came over there for the purpose of getting these policies by appointment with me made by herself and John Brown to come here to get those papers; they were here, given to Mr. Wheat by Mr. Baldwin; there was no time during that conversation that Mrs. Hillmon wanted to do otherwise. I don't recollect anything of the kind. It was purely a voluntary matter.

1502 Q. Will you look at Exhibit number 24 and state if the plaintiff's signature is affixed to that paper?

A. Yes, sir, that is Mrs. Hillmon's signature. That was not signed here, however.

Q. Will you look at the date of it and state whether or not it was signed at the time it purports to bear date?

A. It bears date September 25th. This was signed in my office, I presume, on that day.

Q. You may state the circumstances under which Exhibit number 24 was signed.

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and because it is no part of the transaction under consideration.

The Court overruled the objection to which ruling of the Court the plaintiff at the time duly excepted.

Q. I will ask you to state the circumstances under which this Exhibit number 24 was signed?

A. After I returned home I learned that some mistake had been made in one of the releases or something, I don't remember what it was but I remember the circumstances, and I wrote to Mrs. Hillmon, then at Ottawa, and she came to my office then a third time and this release was signed there. I explained to her what it was and that was signed in my office in Wyandotte, I presume on the date fixed here; that would be about right, September 25th.

Q. Who was present at the time that was signed?

A. I don't—remember anybody but Mrs. Hillmon and myself.

Q. Did you have a conversation with her at that time explaining to her why this was necessary?

A. I explained to her, I have forgotten now what the reason was; I had either left the number out or there was some one of them was not satisfactory, was not right, and I wrote to her to come up from Ottawa and she came and I explained to her what the reason then was, I don't recollect, and she signed it.

1503 Q. Was there anything said; any further conversation?

A. I don't recollect what the conversation was; I talked to her--

Q. For the purpose of refreshing your recollection, I desire to exhibit to you another exhibit, which I ask to have marked Exhibit J. Look at Exhibit J and state in whose handwriting that is, by whom it was signed, where it was signed and the date of it?

A. This was written by me at the Planters house. I think I did not have the number of the policy, of one of the policies, and she authorized me to insert that in the release. That was signed by Mrs. Hillmon at Leavenworth.

Q. Can you explain how it happened that Exhibit number 24 was signed on the 25th?

The plaintiff objects to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which ruling of the Court the plaintiff at the time duly excepted.

A. It seems by the note that I didn't have the number of the policy or one of them. Of course, it is indistinct to me now. I recognize that letter as having been written here to make some correction which she authorized me to do. She had then gone to Ottawa and came up to my office. That is as I recollect it now.

Q. You supplied that omission? A. Yes, sir.

By Mr. Barker: We now offer in evidence Exhibit J.

There being no objection, the said exhibit was read in evidence and is in words and figures as follows, to wit:

EX. J. Nov. '99. W. C. H. Judge.

Leavenworth, Kansas, ..., 18..

W. J. Buchan: I hereby authorize you to procure the numbers and dates of the policies on my husband's life and insert the same in the blanks left in my satisfaction of claim signed to-day.

Sept. 15, 1879. S. E. HILLMON.

1504 By Mr. Barker: We now offer in evidence Exhibit number 24 identified by the witness.

By Mr. Atwood: We think it is proper for your honor to say that this is not to affect the others at all, but is simply admitted as a part of this general transaction and that it does not affect the cases now pending.

By the Court: It will be admitted as a part of the transaction the witness has testified to. It is not contended by defendants that the New York Life Insurance Company dropped out of this transaction pursuant to that paper.

By Mr. Barker: It is not.

Said paper was, thereupon, read to the jury and is in words and figures as follows, to wit:

1505 EXHIBIT No. 24. Oct. 99. W. C. H. Judge.

"Wyandotte, Ks., Sept. 25th, 1879.

In consideration of one dollar to me in hand paid the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the New York Life Insurance Company of New York

by reason of policy number 134418 dated on the 30th day of November 1878, and policy number 134548 dated on the 10th day of December 1878, and for five thousand dollars each, issued on the life of my husband John W. Hillmon, and I hereby enter satisfaction in full and order the dismissal and discontinuance of any and all suits or proceedings commenced or that may hereafter be begun by any person or persons in my behalf for the collection of the same.

SALLIE E. HILLMON.

Attest: W. J. BUCHAN."

1506 Q. Now, do you remember of seeing Mrs. Hillmon and John Brown in your office shortly after you returned from Leavenworth on the 15th of September, 1879; that is, I mean shortly after that date, September 15th, 1879?

A. Yes, sir.

Q. When were they in your office?

A. Well, it was a very short time after we returned from Leavenworth on the 15th of September.

Q. After this transaction of September 15th?

A. Yes, sir, within the next day or two.

Q. You may state what took place there?

A. Possibly one or two days afterwards. John came over before Mrs. Hillmon had gone away. They were in the office there quite a while; they were there most of the day in the little room off from my main office talking together.

Q. Could you hear and did you hear the subject of conversation between Brown and Mrs. Hillmon?

A. Very little of it.

Q. Now, you may state what took place in your presence between Mrs. Hillmon and Mr. Brown in regard to any paper being destroyed or anything of that sort?

A. I don't recollect the conversation; it seemed to be the general talk about this thing being closed up; it was all over; that this would settle it and while we had not got the policies, still this would settle the whole matter. I had the statement that John had made and I says, "I guess this is all over and I will tear this up." John says, "Yes." And on my own motion I tore it up and threw it into the stove. I used my stove as a waste basket. There was a lot of other stuff in there. I don't recollect the conversation, but that was in the line of it. I don't recollect any other thing, but I remember that.

Q. Was that the last time you had a conversation with Mrs. Hillmon and John Brown together?

A. Yes, sir, I think it was.

Q. Did you see them together after that that you remember of?

A. No, I don't recollect seeing them together unless at the time of one of the trials of this case.

1507 Q. I mean outside of this case?

A. I don't think so; John was there a very short time and he went home and I don't think I saw him again.

Q. Who first spoke to you about looking after and protecting John Brown's interests and defending him?

A. John's father, Robert Brown.

Q. Do you remember when that was?

A. It was quite early in the spring, possibly the last of March or the first of April.

Q. Do you remember of making a trip with him to see John? A. Yes.

Q. Do you remember when that was?

A. It was during a term of our court, either the last of March or in April along early in the spring. Anyway, he came to me in the court house and Old Robbie said that he wanted me to go with him and Colonel Walker from Lawrence over to Orrick on the north Missouri road to see John; that he had agreed with the colonel that if he would not arrest him or molest him, he would let him have a talk with John and he wanted me to go along as a sort of guaranty that he would not interfere with John.

Q. Did you go with the old gentleman and Colonel Walker?

A. I went down to Orrick on the north Missouri road.

Q. Did you see him?

A. We did not see John; he would not come; we remained there until the train came up to see him, but came home, having failed to see him.

Q. How was it in reference to point of time; before you went to Lexington?

A. Yes, this transaction was before I had seen John at all.

Q. You have spoken about securing these releases and this order and going to Mr. Wheat's office for the policies. These releases were turned over to some representative of the company, were they? A. Yes.

Q. And the order for them. Do you remember to whom they were delivered by you? A. I presume it was Mr. Munn, either Mr. Munn or Mr. Green.

Q. Have you any distinct recollection in regard to which one?

1508 A. No I don't; I understand they were turned over to whoever represented the insurance companies.

Q. Now, I will ask you if for your services in securing these releases, these satisfactions, you were paid by the insurance companies? A. I was.

Q. Do you remember the amount that you received in that respect?

A. Why, I think I received five hundred dollars fee and some expense money, I don't know what it was.

Q. At the time you were securing these releases and getting up these policies, did John Brown know what you were doing?

A. He did.

Q. Did he make any objection or take any exception as to what you were doing? A. None whatever.

Q. I want to ask you if you at any time told John Brown—threatened John Brown with arrest, if you threatened to have John Brown arrested if he did not sign this confession, if he didn't sign or make this confession?

The plaintiff objects to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection to which ruling of the Court the plaintiff at the time duly excepted.

A. No sir, I did not in any way.

Q. You have stated you saw Mrs. Hillmon after these releases were all signed, did you not?

A. Yes, sir; I did, anyway.

Q. Did you see her more than once?

A. Yes, sir, she was at my house for a week or two.

Q. I will ask you if she at that time or any other time, ever complained or criticized you for getting her to sign these releases?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and calling for the conclusion of the witness. Objection overruled, the plaintiff duly excepting.

A. She never did, even after suit was brought—Objection. Never at any time I saw her.

1509 Q. I will ask you if you ever had any conversation with her in regard to these suits, or the bringing of them, and what, if anything, she said to you on that subject?

A. Yes, she came to my office in Wyandotte there after the suits had been brought or were about to be brought, at least, after something was being done with them, and wanted to employ me on her side of the case.

Q. To employ you as an attorney?

A. As an attorney, yes.

By Mr. Hutchings: If he had any further communications with her, we object to his disclosing it.

By the Court: It may stand, as far as the fact is concerned that the witness testified that she attempted to employ him. That is all he has testified to so far.

Q. Do you remember when that was?

A. Why, I think it was after the suits had been begun, quite a while. It was after this thing that I had looked after was all up.

Q. Look at the paper purporting to be dated January 3rd, 1880, and state in whose handwriting that paper is and by whom it is signed.

A. It is in Mrs. Hillmon's handwriting and signed by her.

Q. State whether you received that paper, and if so, how?

A. I received it by mail.

Q. Do you remember from what place?

A. I think she wrote me that from Tonganoxie; yes, from Tonganoxie; it is dated Tonganoxie.

Q. When did you receive it with reference to the date?

A. Well, about that time, January 3rd, 1880.

Q. Will you look at the letter marked Ottawa, Kansas, September 20th, 1879, and state in whose handwriting that letter is, and by whom it is signed, and when it was received by you if at all.

A. It was written to me by Mrs. Hillmon, from Ottawa, signed by her.

Q. Is that letter in her handwriting? A. Yes sir.

Q. Did you receive it? A. I did.

Q. By mail? A. By mail

Q. What time with reference to the date of the letter?

A. In the usual course of mail; in a day or so.

1510 The letter in question is marked by the court Exhibit H.

By Mr. Barker: We offer in evidence Exhibit H and in connection with it we will offer in evidence Exhibit J.

By the Court: That has been offered.

Mr. Barker here reads in evidence the said Exhibit J, which is in words and figures as follows, to wit: (See third page following.

1511 Mr. Barker here reads in evidence Exhibit H, identified by the witness W. J. Buchan, which is in words and figures as follows, to wit:

"EX. H. Nov. 99. W. C. H. Judge.

"W. J. Buchan Esqr.

Dear Sir: On behalf of the Mutual Life, New York, Connecticut Mutual Life I hereby authorize & employ you to procure the surrender of the policies of insurance on the life of John W. Hillmon. H. B. MUNN."

Kansas City, Sept. 5, 1879."

1512 Q. I will ask you if you remember when and where you received this paper, the paper dated Kansas City.
A. I remember about the paper very distinctly, but whether I got it—I presume I got it at Kansas City, it was dated there about that time.

And in answer to cross interrogatories, propounded to him by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Mr. Buchan, you were the attorney of John Brown?
A. Yes.
Q. When did that employment begin?
A. I presume it began the first time that his father came to me in Wyandotte and asked me to go with him and Colonel Walker out to see John.
Q. That was in the spring of 1879?
A. In the spring of 1879.
Q. How long did that employment continue?
A. Well, I presume it continued during all of this transaction.
Q. You were also an attorney for the insurance companies?
A. I received my pay from the insurance company.
Q. Answer my question, yes or no, were you attorney for the insurance company?
A. Not at that time, no sir.
Q. Did you ever become an attorney of these companies?
A. I become—I presume I did.
Q. Answer the question, yes or no. You know, Mr. Buchan, whether you were ever their attorney.
A. Well, I stated the fact.
Q. Please answer the question, yes or no, you knew whether you were attorney for either company?
A. I presume I was in this transaction. I was in this transaction.
Q. When did that employment begin?
A. It began after I went over to John Brown's.
Q. Will you please name it as near as you can?
A. I presume it began on September 4th, 1879, the day that John Brown gave me this order.
1513 Q. How long did your employment continue?
A. Until this thing was closed up, this particular matter.
Q. Were you ever the attorney of Mrs. Sallie E. Hillmon?
A. No.
Q. You have seen this, Mr. Buchan? (showing witness a paper.) A. Yes sir.
Q. You know its contents? A. Yes sir.

Q. Its contents are as follows, are they not? "W. J. Buchan: I hereby authorize you to procure the numbers and dates of the policies on my husband's life and insert the same in the blanks left in my satisfaction of claim signed to-day, September 15th, 1879. S. E. HILLMON."

A. Yes sir.

Q. In what capacity were you acting at the time that you were authorized by Mrs. Hillmon to insert in her behalf those numbers?

A. Well, I don't know, I could not say, Mr. Atwood, I was authorized by her—

Q. You need not make any speeches, Mr. Buchan. If you will kindly answer my question and reserve them until they are called for by your own counsel, I will be infinitely obliged. Mr. Buchan did you ever act as Mrs. Hillmon's attorney in any manner?

A. No sir, I don't think I did, sir.

Q. Did you ever have any business with her in the way of collections or anything of that kind during the early part of 1880 or the latter part of 1879?

A. I acted as Mrs. Hillmon's friend in several matters.

By Mr. Atwood: I ask that that be stricken out as not responsive to the question.

The Court sustained the motion to which ruling of the Court the defendants and each of them at the time duly excepted.

Q. Is that your letter, Mr. Buchan? That is signed by you and written in your hand? A. Yes sir.

1514 By Mr. Atwood: I now offer this letter in evidence. Said letter is in words and figures as follows, to wit:

"Wyandotte, Kansas, March 4th, 1880.

"Mrs. Hilmon: I enclose herewith your notes as per request just received from you. Have sent them to-day.

Yours, "W. J. BUCHAN."

Q. You were not acting as her attorney at the time you wrote that, is that a fact? A. No sir.

Q. Now then, when—

A. I can explain all about that if you want me to.

Q. Your explanation may come from the other side. When did you first see Robert Brown, in this connection I mean?

A. I think it was in March, the last of March or the first of April, 1879.

Q. Do you know whether or not it was after the inquest that was held at Lawrence? A. I think it was.

Q. Where did you see him?

A. At the court house in Wyandotte.

Q. How long after that did you go to Lawrence?

A. I don't think that I went to Lawrence after that—you mean on this business?

A. Yes, or on any business after your interview with Robert Brown.

A. I don't recollect that I was in Lawrence at any time until after I had seen John Brown in Lexington.

Q. Without reference to John Brown at Lexington, will you kindly tell me, as your recollection serves you, when you first went to Lawrence after seeing Robert Brown?

A. No, I have no recollection of being at Lawrence; although I might have been there; it is a long time ago and I have no recollection of being at Lawrence until after I had seen John Brown at Lexington.

By Mr. Atwood. I ask that the answer be stricken out.

A. I have no recollection of being there at that time; although I might have been.

Q. You did go to Lawrence sometime?

A. I went to Lawrence, I remember, after having seen John at Lexington.

1515 By Mr. Atwood: I ask that the answer be stricken out.

By the Court: The latter part of the answer should be stricken out as not responsive to the question. The question was whether you did go to Lawrence some time?

A. Yes, sir.

Q. Now, as near as you can, state the month that you went there. A. I can't even state that I did go there.

Q. I understood you to just say you had been there?

A. I just said that I didn't recollect having been there until after I had seen John at Lexington; although I might have been.

By the Court: Mr. Buchan, can't you answer the question? You said you were at Lawrence at some time. He asked you if you can fix the date?

A. I say the only time I can fix is after having been to Lexington.

Q. That is not it, I mean fix the date; that means the day, month and year. If you can't fix it, tell me so.

A. I can only fix it by the paper.

Q. Can you name the month you were there first after the interview with Robert Brown? A. No.

Q. You can't? A. It was after these papers were signed.

Q. You say that it was after these papers were signed?

A. I remember that.

Q. That was in the month of September?
A. That was in September.
Q. Then you do remember you were there in September?
A. I was there before that, yes.
Q. Name the month that preceded that visit?
A. I think it must have been in July, 1879. I am fixing that by the date——
Q. I am not asking you to fix the date, if you will just kindly confine yourself to the question. You say you think you went there in July, 1879? A. Yes, sir.
Q. Did you see Mr. Barker there on that occasion?
A. Yes, sir.
Q. Did you see Mr. J. W. Green on that occasion?
A. I don't think I did at the time I refer to in July.
1516 Q. I am simply asking you as to the July visit. Were you there more than once in July, 1879, what is your best recollection?
A. I have no recollection as to the dates. My recollection is only as to the instances or what occurred. The dates I have no recollection of.
Q. Do you remember of being there more than once in July, 1879? A. I have not.
Q. At that time, I understoodd you to say you saw Mr. Barker? A. Yes, I saw Mr. Barker.
Q. Did you see Mr. Green at that time?
A. I don't think I did.
Q. Did you see Mr. H. B. Munn at that time?
A. Not at the time I refer to.
Q. Did you ever have any conversation with Mr. Barker?
A. Yes, sir.
Q. Did you tell him you were there in behalf of John H. Brown as his attorney? A. The substance.
Q. Please answer yes or no?
A. I can't say yes or no. I can state the substance, what was said, what I told him.
Q. Did you tell him you were there in behalf of John H. Brown as his attorney? That is the question and that can be answered categorically, and we ask your honor to direct the witness to answer it so. If, later on, he desires to make an explanation his own counsel will give him every opportunity to do so. A. From John H. Brown, I did.
Q. Did he tell you, inform you, that he was attorney for one or another of the defendant insurance companies?
A. He told me whether he did not know whether he was or not. He had no authority to act or accept for them.
Q. You say that you did not see Mr. Green at that time?
A. I don't think I did.
Q. How long was your interview with Mr. Barker at that time as your recollection serves you?

A. Very brief. I don't recollect, sir. I have no recol-
1517 lection now as to the length of it.

Q. When did you next see Mr. Barker either at Lawrence or anywhere else?

A. I don't know where I next saw him. I saw him after that in Kansas City.

Q. Where in Kansas City. A. At the Coates House.

Q. Was Mr. Munn present at that time? A. He was.

Q. Mr. J. W. Green present at that time?

A. I think not.

Q. Were Mr. Munn and Mr. Barker together in your presence there in Kansas City there at the Coates House?

A. Yes.

Q. What time of year or when was it that that interview occurred?

A. I can't fix the time. I can fix it by the incident.

Q. Was it in August, 1879?

A. Possibly it might have been. It was between September and July. I would say it was in August.

Q. August, 1879. A. Yes, sir.

Q. How long did that interview last?

A. It was a part of an evening.

Q. Did you know that Mr. Barker at that time was attorney for the insurance companies? A. I assumed that he was.

Q. Did you know that Mr. Munn was a representative or attorney of the insurance companies.

A. I knew that he was an agent of the insurance companies.

Q. You say that interview last part of an evening?

A. Yes, sir.

Q. Did you inform both Mr. Munn and Mr. Barker then or did they know that you were attorney for John H. Brown?

A. I think so; I represented him.

Q. You represented him? A. Yes.

Q. And did you state then and there that if they agreed to not press any prosecution against John H. Brown that you would obtain from him a statement that would be of assistance to the insurance companies? A. I think—

Q. Please answer the question, yes or no. A. I think not.

Q. Was any statement made to you by Mr. Green, Munn or Mr. Barker that they would pay you or pay Brown
1518 any sum of money if the policies were obtained by him?

A. At the same interview——

Q. Please answer that question, yes or no, if you can?

A. I can not answer it yes or no.

Q. Either yes or no, now. A. No, sir.

Q. I will ask you if before that interview you had seen your client, John H. Brown, that interview when Mr. Munn and Mr. Barker were present?

A. I had already seen him at Lexington.
Q. You had had a conversation with him? A. Yes, sir.
Q. He had made certain statements to you?
A. Yes, sir.
Q. Did you repeat this statement in substance or effect to Mr. Barker or Mr. Munn or both?
A. I think neither of them.
Q. Did you tell them he had made a statement to you?
A. Possibly I might, I don't recollect now.
Q. What is your best recollection, that you did or did not tell them he had made a statement?
A. Well, my recollection is that I said to them——
Q. I didn't ask you that, I am simply asking you whether or not you told them he had made a statement to you?
A. I think I probably did; I think undoubtedly in some way; as to how—I have no doubt I told them.
Q. Did you tell them any part or portion of the statement or what it consisted of?
A. It is a mere reminiscence to me, I can't say as to what I said.
Q. It is very important to us.
A. I think it is quite possible that Brown had said something——
Q. I didn't ask you what he told you. I asked you whether you gave them any portion of the statement Mr. Brown had given to you? A. I don't recollect that I did.
Q. Do you remember whether the name of John W. Hillmon was mentioned in the interview? A. I presume it was.
Q. And the name of Sallie E. Hillmon?
A. I expect all of them.

Q. Were you invited to go there and meet them or
1519 did you invite them to meet you?
A. No, I was invited to meet them.

Q. From whom did the invitation come to you?
A. As I recollect it by letter, either from Mr. Barker or Mr. Green to meet them and Mr. Munn at the Coates house in Kansas City, by letter.
Q. You think Mr. Green?
A. I don't think it was Mr. Green.
Q. That interview was subsequent to your interview with Barker in Lawrence preceding? A. Yes sir.
Q. At the July interview you had told him you were attorney for John Brown?
A. I told him I was representing John Brown.
Q. Representing him as attorney?
A. I don't think I put it in those words. That was the inference.
Q. You were a practicing attorney?

A. Oh, I certainly was representing John Brown.
Q. You were practicing your profession at that time?
A. Yes sir.
Q. And you professionally were representing John Brown?
A. Yes sir.
Q. Did you at the July interview say to Mr. Barker or ask him whether or not he had any proposition to make with relation to the Hillmon matter in connection with John H. Brown? A. As I recollect—
Q. Please answer that yes or no.
A. As I recollect that that interview was simply to this effect—
Q. I did not ask you what the effect was. I simply asked you—

By the Court: That question can be answered either in the affirmative or in the negative.

A. No, I think not. I had no such conversation as that.
Q. He told you at that time that he was not a representative of the insurance companies?
A. He did not know whether he had authority to act or not. My recollection is that he did not know whether he was or not. He had appeared for the insurance companies—
Q. You have answered the question. Did you ask him if he represented the insurance companies?
A. I expect I did; that is what I went for, to find out if he did.
1520 Q. You went from that interview with Robert Brown who employed you to look after his son, John H. Brown?
A. I went from my interview with John H. Brown.
Q. You went from the interview with one or the other to Lawrence and asked him if he represented the insurance companies and he told you that he did not know whether he did or not; he had no authority to negotiate with you?
A. He did not know whether he represented them or not.
Q. Did that terminate the interview?
A. As I recollect it it did; it was a very short interview.
Q. Then, having received a letter from Mr. Barker or Mr. Green asking you to meet them at the Coates house in Kansas City? A. Yes sir.
Q. And in pursuance of that invitation did you meet them?
A. Yes sir.
A. And you had a talk with them. You did not tell them about the statement you say John had previously made to you?
A. I don't recollect whether I did; have no recollection as to what the conversation was.
Q. Is there any reason why you should not?

A. I think they knew or inferred from my conversation that I had a statement from John Brown that that was not the body of Hillmon brought to Lawrence?

Q. That Mr. Brown had made a statement to you as his attorney? A. Yes sir.

Q. How did they come to know what he had said if you did not tell them?

A. I presume they inferred from my conversation possibly that it was not the body of John W. Hillmon.

Q. When was it you told them this portion of the alleged conversation?

A. I don't know; possibly at that interview.

Q. Then if you did you did tell them some portion of the statement you claim Brown had made to you?

A. None in July.

Q. What was said by them when you told them this
1521 portion you have repeated of the alleged statement that Brown made to you? A. I don't recollect.

Q. How long did you say that interview lasted?

A. Part of an evening, I don't know how long.

Q. You said that Brown had told you, accepting you as his attorney, that was not the body of Hillmon?

A. I could not say, Mr. Atwood, any detail, any conversation, I could not do it.

Q. I understood you to say that your recollection serves you that you did tell them that much?

A. They knew from my conversation; might have known from my positive statement for all I know, that John Brown had made a statement to me and in that statement he had said that the man over whom the inquest was held at Lawrence was not the body of John W. Hillmon but another person whom John W. Hillmon had killed.

Q. Now, as a matter of fact, Mr. Buchan, does not your recollection serve you that you did practically tell them the whole statement you claim Brown made to you?

A. No, I think not, only part of it; I may have told them more.

Q. Now, at that interview what was said by Mr. Barker or Mr. Munn to you?

A. I don't remember. I don't even remember that I said what I have now; that I conveyed that information to them.

Q. You have no recollection, then, of the conversation other than you think probably you told them what your client had told you, is that a fact?

A. No, I don't say that; I said that I thought I had conveyed that information to them that my client, as you may put it, John Brown, had told me.

Q. Now, will you please answer if you have a recollection of any other part of the interview there, except that you told them what you have stated?

A. I have no recollection in detail of the conversation either by myself or by them at that interview.

Q. Have you any recollection of the substance of any statement made by Mr. Munn to you?

I cannot at this time recollect.

1522 Q. Have you any recollection of the substance of any statement made at that time by Mr. Barker?

A. Yes sir.

Q. What did Mr. Barker say, if you remember?

A. I would not be positive as to it being Mr. Barker; it may have been Mr. Munn; at all events—

Q. Well, give us the man, one way or the other?

A. It was either the general agent of the insurance company, Mr. Munn or Mr. Barker whom I assumed at that time was representing the insurance companies as attorney.

Q. What did Mr. Barker say?

A. One or the other or both of them said to me John Brown had made proofs of death or was about to make them—I think had made them; that they had information that he had gone to Kansas City with Mr. Riggs and had made proofs of death or statements contrary to the intimations I had given them and they wanted to know what he was going to do about it, what it meant and what they were to understand by his action.

Q. That is the substance of Mr. Barker's statement?

A. That is the substance of the statement either by Mr. Barker or Mr. Munn. I replied to them—

Q. No matter; I didn't ask for your reply. Was that statement made to you by Mr. Barker before you had made the statement you have described at that time or subsequently?

A. My recollection is that that was before; that they sent for me for an interview.

Q. It was pursuant to this statement and when you got there they told you he had made statements, proofs of death, contrary to your intimations and asked for an explanation?

A. Yes sir.

Q. Then you must have told Mr. Barker in your July interview what Mr. Brown previously said to you?

A. I don't know whether I did or not.

Q. Do you know where he obtained the information that Brown had made a statement different from the proof of death?

A. Now, to get that in connection. I went with old

1523 Bobbie Brown the next day after having seen John at Lexington to Lawrence to hunt up the attorneys for the insurance company and say to them—

Q. Excuse me, Mr. Buchan, I am endeavoring to find out how Mr. Barker or Mr. Munn secured information of Brown's statement prior to the Kansas City meeting?

A. That is what I was trying to get at. I saw Mr. Barker; what I said to him I don't now recollect; it is possible that I intimated to him something of the statement or something to that effect, but the interview terminated pretty shortly for the reason Mr. Barker says, "Well, I don't know whether I represent the insurance companies or not; I appeared for them on this inquest, but I have heard nothing from them since."

But I understood you to say—

A. I may have at that time, I may have intimated to Mr. Barker, or may have said—

Q. Was this the July meeting with Barker, or a third meeting between the July meeting and the meeting at the Coates House.

A. It was the meeting I saw Barker after having seen John at Lexington. I think it was in July.

Q. Then, at that interview with Mr. Barker, your recollection is that you told him in substance, at least, what your client had told you?

A. No, my recollection is not whether I told him anything or not; possibly I may.

Q. What is your recollection?

A. I am trying to give it as near as I can. I have no recollection of any conversation with Barker there at that time except his stating to me the fact in some way that he was not, or didn't know whether he was attorney for the insurance companies or not. Now, what I said to him, I don't know; I don't [recollection]; it is possible I may have said to him then—

The plaintiff moves to strike out the answer of the witness as not responsive to the question. Motion overruled, the plaintiff duly excepts.

Q. Now, when you met at the Coates House, was that the first time you saw Mr. Barker after your July meeting in Lawrence, which you have just described?

1524 A. It is the only meeting I recollect of now.

Q. As your recollection serves you, you saw Mr. Barker not at all between the meeting at Lawrence in July and the Coates House meeting?

A. I do not now recollect whether I did or not. It is possible I might have seen him frequently.

Q. But your recollection is that you did not at this time?

A. Yes, sir.

Q. When you met them there, they had met you with a view of ascertaining why Mr. Brown should have made a different statement in the death loss than what he had made to you?

A. I think I stated prior to that time—

Q. Will you please answer the question yes or no?

A. I was trying to give the chronology of that matter.

Q. Is it a fact that when they met you there at the Coates house it was as you understood it for the purpose of ascertaining what explanation you had to make for Brown having made a different satement from that which he had made to you?

A. Yes, sir.

Q. So it is a fact, is it not, that you must have told Barker what Brown had told you when you met Barker in Lawrence in July?

A. No, I think Mr. Barker came down to Wyandotte and saw me once or twice between that time and I talked with him about it.

Q. We will drop Barker and take up Green. When did you first see Green? A. I don't recollect.

Q. Now, will you please tell me when it was your recollection serves you as the time of your first meeting with Green?

A. It was after I had seen Barker in Lawrence.

Q. Did you go to Lawrence? A. No.

Q. Did you see him in Wyandotte?

A. It occurs to me in Wyandotte at my office.

Q. Did he go there as representative of the defendant insurance companies? A. I think he did.

Q. He came to see you after your interview with Mr. Barker in Lawrence? A. Yes, sir.

1525 Q. Give the month; can you fix that interview with Mr. Barker at Wyandotte; in July or August?

A. I would not like to say.

Q. Was it between the Barker-Lawrence meeting and the Coates house meeting? A. Yes, I am quite sure it was.

Q. Did you tell Mr. Green any part or portion of the statement that you got your client, John Brown, to make to you?

A. I don't recollect; I think it is possible that I did.

Q. Avoid possibilities. What is your recollection? Do you remember telling him anything about what you say Brown had told you?

A. In the conversation I said something about it; gave him to understand it.

Q. You think you did tell him something of it?

A. I think he understood from me that Brown had said that it was not the body of Hillmon, but what I told him I don't recollect.

Q. It was at this interview that he became possessed as you remember it, of the information that Brown had told you that this was not Hillmon; that Green became possessed of that information?

A. Yes, I think he came to inquire where he was.

Q. That information that Green got came from you, is that a fact? A. I must have talked with him about it.

Q. Did you see Green from that time when you met him and talked with him in Wyandotte before the Coates meeting?

A. It seems to me that Green was two or three times in my office within a short time there.

Q. Between the Coates house meeting and the Barker-Lawrence meeting? A. Yes, sir.

Q. At those interviews you talked about this matter?

A. Something.

Q. Talked about Brown? A. Yes, sir.

Q. And Hillmon? A. About the cases, I presume.

Q. And the result of these things was that you were written by either Barker or Green by letter to meet them and Mr. Munn at the Coates house in Kansas City?

1526 A. Why, I presume so.

Q. And at that meeting you were asked to explain why it was that your client Brown had made up in a death loss, proofs of death, a different statement from what he had made to you? A. Yes, in that nature.

Q. I will ask you again if you when there in the presence of Munn and Barker told them the substance of this story that you had told to Green about what Brown had said to you?

A. I don't think I told them any of that in detail, the story that Brown gave me, but I had said to them that Brown had said that that was not Hillmon and he would swear to it whenever suit was brought.

Q. That is the meat of that statement of his?

A. I have no doubt that is a fact.

Q. And the substance of it you gave to them?

A. I presume so.

Q. Of course, you didn't attempt to clothe it in his phraseology but your own? A. Yes, sir.

Q. What was the result of the meeting between you and Munn and Barker at the Coates house; did they employ you to do anything? A. The result of it was—

Q. Answer yes or no. Did they employ you to do anything?

A. I think they wanted me to go and see John and find out about it and what he was going to do about it. I said I would go and see him; one or the other—

Q. Did they employ you to go and see Brown?

A. Well, I can't recollect anything about—

Q. You were not running around for the insurance companies for your health, were you?

A. I was not running around for anybody. I don't remember about any employment; it was understood—

Q. I didn't ask you what was understood. I asked you whether or not you were employed, and you say you don't remember. Is that a fact?

A. I don't know as there was any specific employment.

Q. Did they promise to pay you anything for what you might do in pursuance of their request?

1527 A. I don't recollect as to when they promised to pay me.

Q. I am asking at this Coates house meeting. What time in August did you fix that; the middle of August or the first or last? A. No, I would not atempt to fix it at all.

Q. You think it was in the month of August?

A. I think it was.—

Q. They asked you to see John H. Brown, did they not?

A. I fix it by documents.

Q. They asked you to see John H. Brown?

A. They wanted to know what I was going to do and what John was going to do and what the facts were.

Q. Did they ask you to see John H. Brown?

A. I think so.

Q. And did you say you were—

A. Yes, sir. I don't know whether they asked me or whether I volunteered to go and see him.

Q. Did they promise to pay you anything for any services you might perform for them in seeing Brown at that time?

A. I don't know.

Q. You don't know?

A. No, sir, they simply promised to pay me.

Q. They did? A. They did pay me.

Q. They paid you whether they paid Mrs. Hillmon or not?

A. They paid me, yes, sir.

Q. When did you next see Mr. Barker after this interview at the Coates house? A. I can't fix the next interview.

Q. Did you see him prior to the time you went to Lawrence with the written statement you have told about?

A. I don't recollect about that.

Q. What is your best recollection, if you have any at all upon the subject?

A. I don't now recollect of having seen him.

Q. Did you see Mr. Green at any time getween the Coates house meeting and the time when you went to Lawrence with this statement that you got from Brown?

A. Mr. Green was in my office as I recollect two or three times during those two or three months and it is possible that

1528 one of his calls might have been after the Coates house meeting and after I had gone to see John. That is quite possible.

Q. At each of the calls he made upon you during that time, did he come as representative of the insurance companies in connection with these cases?

A. We communicated back and forth.

Q. Did you see Mr. Munn at any time between the Coates house meeting and the time you went to Lawrence with this alleged statement of Brown's?

A. I don't recollect that now.

Q. Was the Coates house meeting the first time that you met Mr. Munn? A. Indeed I don't know.

Q. What is your recollection?

A. I am under the impression it was, but I don't like to say so. I don't recollect having seen him before that.

Q. When you went to see your client, Mr. John H. Brown at Lexington, he there made to you the statement that you have in substance repeated on the stand? A. He did.

Q. Didn't he also say to you and haven't you always claimed heretofore that in addition to the statement you have already made, that this was a fact: That Hillmon told Brown some time before he killed this man Berkley or Burgess—whatever his name was—what he was going to do and that Brown remonstrated with him but consented to go on with him; that finally he was killed after some time, after Hillmon had communicated to Brown this statement that he intended to kill this man Berkley?

A. I think Brown made some statement like that; something like that.

Q. Your client made that statement to you then and you went and repeated it in substance to Mr. Green; is that a fact? A. I went over there—

Q. You told him the meat of it?

A. Yes, sir; I didn't tell him the details of it.

Q. You told him the substance; the main points?

A. I presume I did.

Q. And also Mr. Munn?

1529 A. I presume that I told all of them, in our talk that Brown had said to me that this was not the body of Hillmon.

Q. That was the substance of your statement?

A. Yes, sir.

Q. You told it to them? A. I have no doubt I did.

Q. At the time he made this statement to you, did you believe that your client was telling the truth? A. I did.

Q. Then you believed he had entered into a conspiracy to obtain money from these insurance companies under false pretenses and by false pretenses, you believed that?

A. I did.

Q. And you knew and he told you he had made a certain statement relative to this matter before the coroner's inquest at Medicine Lodge, didn't he? A. Yes, sir.

Q. You knew— A. He told me all about it.

Q. You knew also all about the coroner's inquest at Lawrence? A. I know he testified there, yes, sir.

Q. You knew what his statement was in substance there before those two coroner's inquests, didn't you?

A. I knew what he had sworn to.

Q. That it was the body of Hillmon?

A. At Medicine Lodge; that it was the body of Hillmon, and that he had also sworn to that in Lawrence which he said was a lie.

Q. Then you believed that when he made that statement he had committed perjury, once at Medicine Lodge and once at Lawrence—John Brown? A. I thought so.

Q. You knew from the statement that had been made, so far as you knew, there was no evidence against your client except what the client had told you. Did you know of any other evidence against him?

A. Why I don't know, I don't think I did. I don't recollect that there was.

Q. Knowing then and believing that your client was guilty of perjury twice and of the crime of attempting to obtain money by false pretenses and knew that in your breast was the only knowledge of his guilt, you went and told the insurance companies' lawyers, is that a fact?

A. I went from John Brown to—

1530 Q. Please answer that question yes or no, Mr. Buchan? A. I can't answer that yes or no.

Q. We submit he can? A. I can state the facts.

By the Court: He has practically answered that in the affirmative. He went to the companies' lawyers.

Q. When did you see him in Lexington? About what time? A. Time of day?

Q. Time of year, as near as you can recollect?

A. It was the time of that letter he gave me there.

Q. That is the "Where is John" letter?

A. I went down to Lexington whatever the date of that letter was.

Q. That he gave you to be given to Mrs. Hillmon?

A. Whatever the date of that letter is; there was only one trip to Lexington.

Q. This, you say, is the leter you have reference to?

A. I presume it is the one I had a while ago, is it not?

Q. I think it is, but I want you to be sure?

A. I think that is the letter. There don't seem to be any date to it either.

Q. That you say was given to you to give to either Mrs. Hillmon or to John Brown's father, is that a fact?
A. Through the old gentleman.
Q. Will you answer that question yes or no?
A. It was given to me to be conveyed to Mrs. Hillmon.
Q. Did you deliver it to Mrs. Hillmon?
A. I don't think I did.
Q. Did you give it to the insurance agents or lawyers?
A. I presume I did; I give up to the lawyers of one side or the other whatever I had.
Q. But you gave this letter—I understood you received—and to convey it in some way to Mrs. Hillmon, but gave it to the insurance companies' lawyers?
A. I don't know now whether I gave it to the insurance companies' lawyers or to Mrs. Hillmon's attorneys. I gave all the papers I had.
Q. What is your recollection, if you have any recollection, whether you gave that letter to Mr. Wheat or Mr. Riggs?
A. If that was the paper that the insurance lawyers
1531 wanted, I probably give it to them; if it was a paper Mrs. Hillmon's attorneys wanted, I probably gave it to them.
Q. What is your recollection? That is what I am asking for.
A. I have no recollection at all about it, Mr. Atwood.
Q. You recollect giving it to Mr. Green or Mr. Barker. It is a fact you gave it to Mr. Green?
A. I gave some papers to Mr. Hutchings, who was formerly in the case; whatever he wanted.
Q. I am talking about this one, don't you know that paper dropped into the hands of Mr. J. W. Green, one of the attorneys? A. It is quite possible it did.
Q. That is the manner in which you delivered it to Mrs. Hillmon?
A. I didn't deliver it to Mrs. Hillmon; didn't have any occasion to.
Q. These other letters; did you recognize them?
A. The two communications from Mrs. Hillmon?
Q. Yes. A. I identified those as Mrs. Hillmon's letters.
Q. Now then, these were received by you from Mrs. Hillmon? A. Yes.
Q. And you gave them to the insurance companies?
A. I presume I did; quite sure I did.
Q. That was a part of your employment for which you were hired, to receive and deliver a lady's letters to these people?
A. That was a long time afterward, Mr. Atwood.

Q. Will you answer the question? Was that part of your employment that you were paid for; handing these letters over to them?

A. No, sir, I say it was a long time after that transaction was settled.

Q. The question was whether you were paid and did it voluntarily?

A. I did it voluntarily undoubtedly, after these suits had been brought and depositions taken.

Q. Now then, Mr. Buchan, when you saw him in Lexington. what was the month, if you remember?

A. We fixed it in July I think it was.

Q. The Lexington interview?

A. Yes, I think it was then.

1532 Q. Then after this Coates house meeting you went to see John Brown again? A. Yes, sir.

Q. Now, when was it you wrote to Reuben Brown. You say you wrote to him?

A. Why, I am not sure whether I wrote to Reuben Brown at the solicitation of Mr. Green or Mrs. Hillmon or both; possibly both; Mrs. Hillmon came to my office—

Q. I am not asking about Mrs. Hillmon; I am simply asking you when you wrote Reuben Brown?

A. I don't know when I wrote to him.

Q. Does your recollection serve you that you wrote to him after the Coates house meeting?

A. Well, I don't know about that, Mr. Atwood.

Q. You don't remember whether you did or not?

A. I don't rememeber now when it was I wrote to him.

Q. Did he come to your office after the Coates house meeting? A. John Brown?

Q. Reuben Brown? A. No, sir.

Q. What was the time when he came to your Coates house meeting? A. Who came there?

Q. Mr. Reuben Brown.

A. He never came to the Coates house.

Q. I say when after the Coates house meeting was it that he came to your office, if at all?

A. I don't think Reuben was at my office.

Q. Did he come to your office at all?

A. He came to my office the day before he and I went to Lexington.

Q. That was in July?

A. It was when we went to Lexington.

Q. Did you see Reuben Brown between that time and the time you went to his house in Parkville?

A. I saw him the next day or two after he came to my office at the time we went to Lexington. He came there to

make an appointment and then I saw him at the time we went there. I don't remember of seeing him after that.

Q. You didn't see him after that until the Parkville meeting? A. I don't recollect that I did.

Here the court took a recess until 2 P. M.

1533 Afternoon session. W. J. Buchan, on the stand. Cross-examination continued by Mr. Atwood.

Q. Referring to the interview at the Coates house. Mr. Buchan, to refresh your recollection, I will ask you if you didn't have an interview at the Coates house with some of these gentle men on the third day of September, the day before you went over to Parkville to see your client Mr. Brown?

A. I think I did.

Q. At that interview the question as to what Mr. Brown had said in the proof of death was mentioned, was it not?

A. Yes, sir.

Q. It was then stated there by you or them that you should or would go over to Parkville and see Mr. Brown, your client; is that a fact?

A. I think I said I would go over and see what he had to say about it.

Q. You volunteered that? A. Yes, sir.

Q. And the next day you did go over to Parkville?

A. If that was the third I should say that I did.

Q. On the fourth of September following you went there?

A. Yes, sir.

Q. How did you go, please; I mean what conveyance, by rail or wagon or how?

A. I went once by train; the first interview that I had with John I went on the train.

Q. Did you see him twice at Parkville? A. Yes, sir.

Q. What was the next time?

A. It was the second time that I got his statement.

Q. That would be the fourth of September? A. Yes, sir.

Q. What was the other time? A. It was before that.

Q. Can't state exactly? A. No, sir.

Q. This time that you went over there to get the statement Ward was with you? A. Yes, sir.

Q. You went there with a team owned by the sheriff
1534 of Wyandotte county? A. Yes, sir.

Q. Mr. Ward drove for you? A. Yes, sir.

Q. Mr. Ward was an officer of Wyandotte county?

A. Yes, sir.

Q. Known by Mr. Brown to be such? A. I guess so.

Q. He knew all the Brown family? A. Yes, sir.

Q. As you did? A. Yes, sir.

Q. You had known the Brown family for many years?

A. Yes, sir.

Q. Was a friend of the fathers. Your relations were pleasant and intimate? A. Yes, sir.

Q. You had known Old Robbie Brown as you call him, for a long time? A. Yes, sir.

Q. And you knew the boys, Reuben, Tom and John?

A. Yes, sir.

Q. That was the situation when with the deputy sheriff, Mr. Ward, you drove to Parkville? A. Yes, sir.

Q. Following the interview at the Coates house on the third of September with Munn and Barker? A. Yes, sir.

Q. Was Mr. Green present at that last third of September interview at the Coates house? A. I don't recollect.

Q. But you remember that Barker was there and that Munn was there?

A. I remember at one of these interviews Barker or Munn and possibly both of them were present. I don't recollect of Green; he might have been.

Q. Do you remember of his being at any of the Coates house interviews? A. I can't now say that I do.

Q. Is it not a fact that you had at least three interviews at the Coates house with some one or some of these gentlemen?

A. I don't recollect but two.

Q. The one that you were talking of this morning was in August. I think that was your recollection this morning.

A. At Lawrence?

Q. No, the one at Lawrence was in July you said this morning.

A. I said it was immediately—early after I came from Lexington, I think it was July. I think at another time
1535 I stated I was in—I suppose that it is a mere slip of memory. It was immediately after the interview with Brown at Lexington.

Q. Your interviews with these gentlemen at the Coates house were two in number? A. Yes, sir, I think so.

Q. The last of which was on the third of September, am I right? I think that is the day before you went to Parkville?

A. Yes, the fourth the statement was signed.

Q. This was the second interview of the two interviews?

A. I think the second interview was just a day or two before; that was when they wanted to know what he was going to do and I said I would go and see.

Q. That was on the third of September? A. Yes sir.

Q. There was an interview earlier than that in point of time was there not?

A. I am not sure whether that first trip to Parkville was caused by an interview with these gentlemen at Kansas City

or whether it was the result of an interview with Green at my office; I am mixed about that; one or the other.

Q. Both trips were the result or outcome of certain interviews you had with the insurance men? A. Yes sir.

Q. And you went over there with that purpose, taking pen, ink and paper with you? A. I think so.

Q. With a view of getting the matter in the form of a statement in writing if you could do so, and you took pen, paper and ink for that purpose? A. Yes sir.

Q. And after you got there you did take down his statement in writing? A. Yes sir.

Q. And that afterwards you say you tore up?

A. Yes sir, originally.

Q. What became of those pieces that were torn up?

A. I gave them to some of the attorneys here; I think Mr. Barker or somebody.

By Mr. Atwood: Mr. Barker, will you produce those?

By Mr. Barker: I haven't got them.

1536 Q. When did you give them to Mr. Barker?

A. I gave them to Mr. Barker I think at the time they took the deposition of John Brown after this suit was commenced, and I gave to Mr. Hutchings—

Q. I am not asking what you gave to Mr. Hutchings.

A. Mrs. Hillmon's attorneys—

Q. Please confine yourself to answering the question, Mr. Buchan. You say you gave them to Mr. Barker at the time Brown's deposition was taken? A. Yes sir.

Q. That was in 1881?

A. It was when his deposition was taken.

Q. You have seen the pieces of paper that you tore up on that occasion in this court room since that time?

A. I saw them on one or two trials. Yes sir.

Q. But you don't know what has become of them?

A. They have never been in my possession since.

Q. You made a copy of it, did you not?

A. I had a copy.

Q. Was it not made in your own handwriting and certified to by you and J. W. Green?

A. Whether it was in my handwriting, I don't know.

Q. You say there was such a copy made?

A. There was a copy.

Q. That was left in the hands of these gentlemen?

A. No, I gave that to Mr. Hutchings, Mrs. Hillmon's attorney.

Q. Did you give a copy of it to Mr. Green?

A. I think that is the copy Mr. Green had if I recollect right.

Q. Whose handwriting is this in, if you know? (showing paper to witness) Is that your certification?

A. No it is not. This must be a copy of the copy; that is not my handwriting.

Q. Did you ever make a copy that you left in the hands of the insurance people? (No answer.)

By Mr. Atwood: Have you got that copy, Mr. Barker?

By Mr. Barker: I don't know whether we have or not. I have not charge of the papers.

1537 By Mr. Atwood: Mr. Green, have you a copy of that paper?

By Mr. Barker: That is in Mr. Riggs' handwriting.

By Mr. Atwood: We want that paper.

By Mr. Barker: If you call for it in a proper manner and give us a little time we will produce it. I want to state I haven't that paper.

Q. That statement was made in writing at Parkville and was made in your handwriting, that is a fact?

A. Yes sir.

Q. The phraseology, I think you said to Mr. Barker this morning, was largely your own? A. I think so.

Q. You took the statement from Mr. Brown and formulated it in your own language and wrote it down?

A. Yes sir.

Q. And that statement was in substance what you have already stated he at the time told you?

A. As near as I can recollect.

Q. Now, the date of that paper on which it was made was the fourth of September, 1879? A. I believe so.

Q. That is correct, is it not? A. I believe so.

Q. When did you next go to Lawrence after that?

A. I think by some of these papers I was there on the sixth; it might have been the fifth and sixth both.

Q. You were there two days? A. Possibly so, yes sir.

Q. In other words, as soon as you obtained this written statement from your client, prepared in your handwriting—I think you said it was sworn to? A. Yes sir.

Q. At which place did he swear to it, at Parkville?

A. Yes sir.

Q. You then took this paper; he entrusted it to your keeping? A. Yes sir.

Q. And then on the fifth, the following day, you went to Lawrence? A. The fifth or sixth, yes sir.

Q. And on that trip in Lawrence you saw Mr. Barker, did you not? A. Yes sir.

1538 Q. And Mr. Green? A. Yes sir.

Q. And Mr. Munn? A. Yes sir.

Q. Now, this paper, will you kindly look at it, dated the sixth of September and signed by H. B. Munn. Is that one of

the papers that was executed on this trip; I mean that was written up and signed on this trip that you made to Lawrence following the getting of this statement from Brown at Parkville? A. Yes sir.

Q. That is in the handwriting of Mr. Munn, is it not?

A. I presume it is.

Q. It was placed in your possession at that time on that trip at Lawrence [Q.] Yes sir.

By Mr. Atwood: I don't think this has been read, if it has, I desire to call the attention of the witness to it and I will read it again.

"The undersigned attorney representing the Mutual Life Insurance Company of New York, The New York Life Insurance Company of New York and the Connecticut Mutual Life Insurance Company hereby stipulate and agree, so far as said companies are concerned, to desist from any further pursuit and prosecution of John W. Hillmon, John H. Brown, or any other parties in connection with the Hillmon case, provided the respective policies are surrendered and an order for their delivery executed and all claims under the same released to said companies by Sallie E. Hillmon, wife of said John W. Hillmon, beneficiary under said policies, and in so doing represent their officers and agents everywhere. H. B. MUNN."

Q. That is the paper that was signed and delivered to you at that time? A. Yes sir.

Q. Now, prior to the securing of this paper, state whether or not you had shown to Mr. Munn or Mr. Barker or Mr. Green or all of them this statement that you obtained from Brown?

A. My recollection is now that I did afterwards.

1539 Q. Did you show it to them on that trip at Lawrence? A. I think so.

Q. Did you show it to all?

A. Well, I don't remember about that. My recollection is that I—

Q. I will change the question if it embarrasses you.

A. It don't embarrass me at all. I was trying to think which two; I think I showed it to Mr. Green and Mr. Munn; I don't think Mr. Barker was there.

Q. Well now, what was that this morning about Mr. Barker going over to the hotel to you when you got in a durgeon and sort of apologized to you. Wasn't it this very matter?

A. Mr. Munn after he had read this statement gave me this paper and after he gave me this I let him read this statement and showed it to him and then he flew up and said that this man ought to be prosecuted and all this. I felt as though he was going back on his agreement and his arrangement and I took the paper out of his hands and says, "You can't have

anything more to do with me," and I went, I think, to the hotel.

Q. It is a fact that Mr. Barker came afterwards to you?

A. Yes sir.

Q. And sort of apologized for the way Munn had talked?

A. Yes sir.

Q. And induced you to go back again?

A. Yes, possibly, something like that.

Q. Before this sixth day of September and before they handed you this paper you told them the substance of the statement that Brown had made to you?

A. No, I don't think I told them anything more than what Brown told me.

Q. Then you had prior to this sixth of September told them some portion of what Brown had said to you; that is a fact, is it not? A. Something about it.

Q. Now, when you went there on the fifth or sixth of September, did you tell them that you had that statement formulated in writing or that you had a statement from Brown in writing? A. Why I presume I did.

Q. Wasn't that stated by you, Mr. Buchan, before any paper was handed to you by Mr. Munn? A. I think not.

1540 Q. Wasn't it done before Mr. Munn wrote this paper out? A. No I think not.

[—] Wasn't it done in pursuance of a suggestion by you or him that you should get these policies?

A. No, the suggestion that I get these policies—

Q. I am not asking that. Will you answer the question?

A. I will say no.

[—] It was not done in pursuance of a suggestion that you get the policies? A. No, I will say—

Q. Now then, this paper is the result of that interview whether it was on two days or one day or whether on the fifth altogether, or the fifth and sixth together; the result of that was that you placed in Mr. Green's hands a copy of the statement, did you not? A. I presume I did.

Q. And you received from Mr. Munn this paper that you have just heard read? A. I received that paper first.

Q. Well, during that interview? A. Yes sir.

Q. You got the paper; they gave you that? A. Yes sir.

Q. At the time that you received this paper from Munn was Mr. Barker present? A. Well, I don't know.

Q. Was Mr. Green present?

A. I don't think I saw Mr. Munn except in company with one or the other of those gentlemen.

Q. And he said that that man ought to be prosecuted for murder, did he not? A. He made some remark of that kind

Q. And you were offended and left? A. Yes sir.

Q. And Mr. Barker then came to your hotel and apologized for the idea of prosecuting Brown for murder; that is a fact is it not? A. I don't know what he came for.

Q. You went back with him in any event? A. Yes sir.

Q. You believed at that time that this statement was true, did you not? A. Brown's statement?

Q. Yes. A. Yes, I believe it now.

Q. You believed he was guilty of murder, didn't you.

A. No.

1541 Q. You didn't believe he had participated in a conspiracy that resulted in the death of this man?

A. He didn't say he killed this man.

Q. He told you, however, that on the way out from Wichita they overtook a man by the name of Burgess who got into the wagon and that Hillmon suggested the idea of killing him?

A. Yes sir.

Q. He protested against it? A. Yes sir.

Q. He continued in his company? A. Yes sir.

Q. He knew the killing was going to take place, didn't he?

A. I don't know what he knew.

Q. Didn't he state that to you; didn't he state to you that he knew Hillmon was talking of killing this man?

A. Yes, I think he said they had talked about it.

Q. He said to you that he thought Hillmon was going to kill a man; didn't he tell you of it?

A. I don't recollect that he told me that.

Q. Didn't he say also that he kept out of the sight of the man fearing, thinking, believing and knowing that Hillmon was going to kill him; didn't he say that? A. I think so.

Q. Do you mean to say that as a lawyer that would not make him a conspirator with John W. Hillmon if that statement was true? A. I am not giving my opinion.

Q. I am asking what is your belief. Do you believe him guilty of murder or not? A. No, I don't.

Q. You believed him guilty of attempting to obtain money by false pretenses? A. Yes sir.

Q. And you believed him guilty of perjury? A. I did.

Q. Now, when this paper was made, this agreement, I presume you knew the nature of this business? A. Yes.

Q. Did you know of the statute against compounding a felony? A. Yes sir.

1542 Q. You knew you were guilty of compounding a felony? A. Oh, no.

Q. Didn't you know at that time of the statute on this subject that if any man prevents or aids or abets in the prevention or prosecution of a crime that has been committed, is guilty of compounding a felony and that is a felony?

A. I was probably looking at it as you have done many times.

Q. It is not a question of what I have done. I am not on the stand; you are and you will please answer my question; did you know that that was a fact?

A. I don't recollect that I discussed that proposition.

Q. I will ask you if you did not know that that was the compounding of a felony; do you know or did you know?

A. I don't know whether I had read the statute or not.

Q. You are a lawyer? A. Yes.

Q. A member of the bar? A. Yes.

Q. You took the same oath as every other lawyer is supposed to when he enters the bar? A. I presume so.

Q. Among those oaths is one to uphold the laws and constitution of this state, is there not? (No answer.)

Q. Now, as a matter of fact, was Mr. Green there at this time? A. Where?

Q. The time this talk was going on which resulted in the obtaining of this paper? A. Part of the time he was, yes.

Q. Mr. Barker was there was he not?

A. I think one or the other was there at every interview I had.

Q. They knew as much as you knew what was being done, didn't they? A. Yes.

Q. Both Green and Barker; that is your understanding?

A. I think it is.

Q. And they gave their consent to it?

A. They acquiesced in it.

Q. You were not acting in antagonism with each other?

A. No sir.

Q. You and Munn didn't? A. No sir.

Q. And the result was the receiving of this paper by
1543 them from you. Whose handwriting is that paper?

A. That is my handwriting.

Q. Will you look at the back and see whether or not that is a certified copy of this statement that Brown gave to you?

A. The certificate seems to be in the handwriting of Mr. Munn, and the certificate at the bottom here my own and I think Mr. Green's.

Q. Will you just look it over enough so you can say whether in your opinion it is the copy that you delivered to them of this statement?

A. I think it is. I gave this to them or Mr. Hutchings. I don't know which.

Q. It is in their possession now?

A. These papers have been all around.

Q. But it is in their possession now?

A. I gave them a copy.

Q. This is your writing? A. This is my writing.
Q. The balance of it is your writing? A. Yes, sir.
Q. Is that the signature of J. W. Green, do you know?
A. I think it is?
Q. Is that dated on the day that copy was made?
A. I presume it is.
Q. That would be your recollection?
A. I believe it is. I don't know anything about it.
Q. Now, then, I will ask you whether or not this paper which you have already identified this morning which reads: W. J. Buchan, Esq., Dear Sir: On behalf of the Mutual Life, New York Life and Conecticut Mutual Life, I hereby authorize and employ you to procure the surrender of the policies of insurance on the life of John W. Hillmon.

"H. B. MUNN."

Now, when was that delivered to you—on the day that it was made and where?

A. It was delivered to me I presume on that date, on the day it was made; I don't know about it. It was delivered to me shortly after, probably the next day after I made the trip to Parkville, in which John Brown authorized me—

Q. I am not asking anything about what John Brown did. I asked you if you didn't receive this on the fifth or sixth day of September? A. I presume I did.

1544 Q. This was received prior to the time that this was executed; this was the sixth of September, is that right?

A. I presume so.

Q. The order of these papers would be: The execution of this statement or writing in your handwriting by Brown on the fourth of September? A. Yes, sir.

Q. Then the employment to get the policies from Munn to you on the fifth of September and this immunity from prosecution from these people if the policies were surrendered, on the sixth?

A. On the sixth; I presume so. The authority from Brown—

Q. I haven't asked you anything about authority from Brown. The fact remains as I have stated it, does it not, with reference to the time these papers were delivered?

A. Yes, sir.

Q. Now, after this paper was delivered to you, what did you do with it? A. This copy?

Q. This original statement, what did you first do with it, where did you first take it? A. I took it home.

Q. From there did you take it to Lawrence?

A. From there I went to Lawrence.

Q. And there the copy was made that I have already shown you?

A. Well, I presume so. As to when those copies were made I have no recollection.

Q. You have no reason to doubt it was made on the date indicated at the bottom?

A. No, it might have been; that certificate might have been on the day before; I think not, though; probably all done on those two days.

Q. Well, now then, when you went there on the sixth or fifth and these transactions were had, then was [was] it that you had your interview with Mrs. Hillmon with a view of obtaining the policies?

A. That was on the fifteenth. You mean, up here?

Q. Yes, at Leavenworth?

A. I think it was on the fifteenth.

Q. At that time then you had already given to Mrs.
1545 Hillmon or Barker or both, this copy dated the thirteeth? A. I presume so.

Q. That is your recollection of it? A. Yes, sir.

Q. Now, then, after you went from Leavenworth to Wyandotte on the morning after this Leavenworth interview, Mr. John Brown and Mrs. Hillmon came to your office; that is a fact; is it not?

A. After this interview here?

Q. After the Leavenworth interview on the fifteenth of September when you claim to have gotten these satisfactions, etc.

A. It might have been the next day or the day after.

Q. Would not your best recollection be it was the next day; it don't matter whether it was or not?

A. It was very shortly after.

Q. And this paper was torn, this same paper of which this is a copy? A. Yes, sir.

Q. You told Brown at that time that there was a copy outstanding of the original that was torn up, didn't you?

A. I don't know whether I did or not.

Q. You say you don't remember whether you told him there was a copy in existence when you tore this one up?

A. No, sir.

Q. Did you put them in the stove? the original in the stove; the torn pieces in the stove? A. Yes, sir.

Q. Some of the torn pieces you have since seen at some of these trials? A. Yes, sir.

Q. And then you fished them out of the stove?

A. Along afterwards.

Q. How long afterwards?

A. I don't know when. When I found that the suits were brought; when I found that John Brown was making counter statements.

Q. Was that at the time that John's deposition was being taken.

A. No, I don't think so. I think I heard that.

Q. Did you hear of his making counter statements about the time the deposition was taken? A. Yes, I think—

1546 No matter what you think? Did you hear he had made counter statements when his deposition was taken here?

A. I don't recollect. It seems to me I did.

Q. How long was it before the deposition was taken?

A. I don't know.

Q. Would it be about the time—

[A] The deposition was taken—

Q. Answer my question. Do you know how long it was before the John Brown deposition was taken that you took it out of the stove? A. I don't know.

Q. Was it a long time before?

A. I have no recollection.

Q. Would it be a month, as your recollection serves you?

A. Oh, I would not attempt to fix the time. I can only—

Q. Is it a fact that you heard of his making counter statements before the deposition was taken?

A. I heard that he had—

Q. Prior to the time the deposition was taken?

A. He had gone back on his statement.

Q. When was the deposition taken, if you remember?

A. I coudn't say.

Q. You don't know, but you say until you heard he had made counter statements you left it in the stove? A. Yes.

Q. And you say that was long after? A. Yes.

Q. What is your best recollection as to how long after?

A. I don't know.

Q. You said along after. What did you mean by "along after," Mr. Buchan? A. I mean it was afterwards.

Q. Of course it was afterwards, but what did you mean when you said "along" afterwards? Did you mean a week, a month or two months? Does your recollection serve you it was more than a month?

A. I have no recollection about it.

Q. But it was along after that you fished these pieces out of the stove? [—] It was along after.

Q. How many pieces was it torn into? A. I don't know.

Q. A great many?

A. Yes, sir, I just threw it into the stove among other

1547 papers, I used the stove as a waste basket.

Q. There was a good many pieces, was not there?

A. Yes, sir.

Q. It was a piece of paper originally nearly as big as this (illustrating).? A. It must have been.

Q. It was in your handwriting?
A. It was in my handwriting.
Q. Consumed considerable paper in the construction of it?
A. I think so.
Q. Consequently, to tear it up so as to be destroyed it required it to be torn into a good many pieces? A. Yes, sir.
Q. You picked all these pieces out, did you?
A. I think I took them all.
Q. You say you used your stove as a waste basket?
A. I was then, yes, sir.
Q. You did then use it as a waste basket? A. Yes, sir.
Q. And when you had papers that you desired to throw away you threw them in there? A. Yes, sir.
Q. And you piled them in there and along afterward you took those same pieces out and you think you got the whole of them? A. I think I did.
Q. And then you took these pieces along after the time they were put in there from this place you had used as a waste basket and put them in an envelope, did you?
A. I believe so.
Q. And gave them to the insurance companies' lawyer?
A. No, I gave them—
Q. Did you give them to the insurance companies' lawyer?
A. Not when I took them out, no, sir.
Q. How long after that time?
A. When taking the deposition.
Q. That you say was along afterwards?
A. I didn't say when it was.
Q. You won't say when it was, but you will say that you gave it to them when taking Brown's deposition?
A. I won't say that; it might have been a good while before, but I gave it to them—
Q. You do say you gave it to the insurance men?
A. Yes, sir.
Q. Now, how much did they pay you? A. Not anything.
Q. Not a cent? A. No, sir.
1548 Q. That was included in your original employment?
A. No, sir, that was all settled.
Q. Then you just did it gratuitously?
A. I gave it to Mr. Hutchings.
Q. This statement that showed your client had been guilty of attempting to obtain money by false pretenses, this paper that showed he was guilty of perjury, this paper you believed did show that he was guilty of perjury, didn't you?
A. I don't think there was any doubt about that.
Q. And knowing that, you protected your client by turning it over to these people, that is a fact, is it not? A. Yes, sir.
Q. Did you not say to him, Mr. Buchan, that you had a

guaranty of the company against further prosecution of him; didn't you say that to Brown?

A. I think I showed him the paper.

Q. And didn't you tell him that that was a guaranty; that the companies would not prosecute him, could not prosecute him? A. I presume that I did, I don't know.

[A.] You knew that was not true when you told him so?

A. No, I didn't.

Q. You knew that wasn't of no more effect in law than a blank piece of paper?

A. That didn't prevent others from prosecuting him.

Q. Did you tell him it would prevent them from giving any evidence against him? A. Prevent them?

Q. Yes.

A. I probably said it was an agreement for them not to do it.

Q. Did you tell him whether it was binding upon them?

A. I don't think I did; I don't know whether I did or not. I took that paper for just what it was worth.

Q. You were his lawyer? A. I was.

Q. And you explained to him the legal import of the paper, did you not?

A. I explained to him that it was a little better than word of mouth; that with that written statement they would
1549 not voluntarily furnish evidence against him. I did what you would have done.

Q. I am asking you if you knew when you told your client that this was a guaranty against the insurance companies furnishing evidence, that it was not true?

A. No, sir, I don't think I did.

Q. You don't think you told him?

A. I told him they would not furnish evidence to prosecute him.

Q. It is a fact that you did tell him they would not prosecute after they had agreed not to do so in writing, is that not a fact? (No answer.)

Q. Didn't you then know it to be a fact, that the authorities, Mr. Green, or any person else who was an officer of the law, caused a prosecution that the companies would be obliged under a subpoena of the law to disclose all the evidence they had against this man?

A. I told John Brown that there would be nobody interested in Douglas county in following up this prosecution.

Q. Did you give him that information? The question is this, Mr. Buchan, whether or not you told your client, John Brown—

A. I will have to answer my questions.

Q. Answer yes or no. That question is so disconnected I will withdraw the question.

Q. Did you know at the time you showed him this statement and told him the import of it, advising him of its import in law as his attorney, that if anybody choose to institute a prosecution against him that the insurance companies or anybody else would be obliged to give, be obliged to disclose all they knew against him; didn't you know that?

A. I probably knew that, yes, sir.

Q. At the time you told him that and knew that—at the time you destroyed this original paper by tearing it up and then picking it out of the stove you knew that there was
1550 in existence a certified copy of that original [existed], didn't you? A. I presume so.

Q. And you knew if any prosecution was instituted against him that in the absence of the original statement that certified copy could be instituted against your client to prosecute him, didn't you? A. Now—

Q. Please answer that question yes or no?

A. I will answer that question both yes and no.

Q. You can do it if you wish; I simply want your answer.

A. If you will allow me—

Q. No, I want your answer yes or no.

A. I will answer that both yes and no.

Q. Very well if that is your answer. You told your client, did you, of his real situation under the law in connection with this paper and this copy, did you not? A. I think I did.

Q. You told him at the time you destroyed the original in his presence that there was in existence a certified copy, did you not? A. I don't remember whether I did or not.

Q. That it was certified to by you, did you; did you tell him that? A. I don't remember that I did.

Q. And it was a fact and you knew it to be a fact that there was a certified copy in existence at the time you destroyed the original? A. Yes, sir.

Q. You destroyed the original in his presence?

A. Yes, sir.

Q. Did you do it with the idea of deceiving him and making him believe that it was destroyed? A. I did not.

Q. After it was destroyed it was put in the stove and Mr. Brown went away? A. Mr. Brown went away.

Q. Mr. Brown was not in your presence when you fished those pieces out of the stove? A. No, sir.

1551 Q. Having fished them out you finally gave them to the insurance people? A. Yes, sir.

Q. That is a fact, is it not?

A. Yes, sir, if the court will allow me to finish that answer.

By the Court: That will probably come on re-examination.

Q. I will ask you if you knew there was a warrant out against Brown? A. No. I don't think I did.

Q. When you went to Orrick—

A. That Hillmon business had all passed over before the early stages of this matter.

Q. Well, with whom did you go when you went to Orrick to look after John?

A. I went with John Brown's father and Mr. Walker.

Q. Was Mr. Walker an officer of the law?

A. I don't know whether he was or not.

Q. You understood him to be that; you understood the fact to be that be was? A. No, I don't think I did.

Q. Haven't you stated at every trial of this case that you didn't know that Walker was in the insurance employ but that he was an officer of the law?

A. I know that he had been an officer or marshal of Lawrence.

Q. Did you believe he was a representative of the insurance companies?

A. Why I don't recollect that he was, no I don't; I understand now from—

Q. You have answered the question that you didn't understand he was an insurance representative. Did you understand him to be there acting as an officer?

A. Well, I don't know that I could tell what I did understand.

Q. Was it as an officer you understood he was there?

A. That is not my recollection.

Q. He was not there as a representative of the insurance companies nor as an officer of the law, that is a fact?

A. I don't think I did know.

Q. It is a fact he had been sheriff or marshal?

A. I knew he had been, yes.

1552 Q. And with him old man, William Brown, or whatever his name was— A. Robert.

Q. You went over to Orrick to find John?

A. Yes, sir; he went on his own account.

Q. You didn't find him? A. No, sir.

Q. When you went to Parkville, September 14th, you took another officer, Ward? A. Yes, sir.

Q. Did you say to your client John Brown that he was liable to be arrested? A. I did not.

Q. Have you ever stated any reason why you should have taken an officer with you to see your client when you went to Parkville? A. Have I ever stated?

Q. Yes, have you ever made any explanation of it?

A. I think I have explained that two or three times in the trial of this case, how it came about. Do you want me to do it now?

Q. No. I will ask you whether this is a fact: At the previous trial of this case in 1895, I think it was, whether this question was propounded to you and this answer made: "Q. Did Walker to your knowledge have a warrant for the arrest of Brown? A. I understood he had; I don't recollect now, I am not positive that he did."

Q. Do you still state that it is your understanding that he had a warrant for Brown?

The defendants object to the question as incompetent, irrelevant and immaterial and not proper impeaching question.

The Court overruled the objection to which ruling of the Court the defendants and each of them at the time duly excepted.

A. I never went to Orrick but once.

Q. Is it a fact that refreshing your recollection from 1553 what I have just read to you that you do not remember your understanding was that Walker had a warrant for Brown? A. I don't recollect that he had now.

Q. What is your recollection?

A. I don't know, I won't undertake to say the language that I testified years ago.

Q. It is probably a fact; it would be more apt to be true?

A. I haven't read it since, I don't remember.

Q. I will ask you if in answer to a question whether or not in substance you said that Brown was liable to be arrested at the time you were at Parkville, September 4th, 1879; that that question was not asked you at the last trial and you didn't say, "I might have been talking the matter over and I might have said he was liable to be arrested." A. I don't think I intended to make such a statement as that.

Q. Did you ever hear there was a warrant out?

A. Yes, I think I did.

Q. Didn't Brown tell you there was a warrant out against him?

A. I think he talked about they were going to arrest him or had a warrant or was going to get one.

Q. Didn't you at the time you were there at Parkville on the fourth of September say to him that he was liable to be arrested? A. I don't remember.

Q. Didn't you assure him if he made out this statement you could use it with the insurance companies as to prevent a prosecution?

A. No, sir, I don't think I made any such statement as that.

Q. Didn't get it; wasn't it gotten for the purpose of preventing prosecution? A. It was gotten for the purpose—

Q. Please answer that question yes or no.

A. In a measure it was.

Q. It was gotten by you as his attorney to prevent prosecution? A. Yes, sir.

Q. And then when you got this other statement, this other paper, which promised that they would not prosecute him then you had discharged your duty had you not; is that a fact?

A. They wanted and I gave them a copy of that as
1554 a sort of guaranty as I wanted myself. He had made apparently two statements. I said to him, "I want you to put it in writing."

Q. And he did put it in writing, in your writing?

A. I put it in writing for him. He authorized me to take it to them.

Q. He signed it? A. Yes, sir.

Q. And then you took it to the insurance people?

A. Yes, sir, with his knowledge and consent.

Q. And with that paper you got him to sign which was written in your handwriting you had accomplished what you believed was the compounding of a felony, had you not?

A. Oh, I don't know about that.

Q. But the fact remains that the result of all this intercourse between you and the companies was that Munn signed this paper and that you told Brown it was in some degree a protection to him?

A. I will tell you, Mr. Atwood. I will waive the statute of limitations if you want to prosecute me.

Q. No, this cross-examination is bad enough. You went to the interview at the Coates house on the third of September in pursuance of a telegram sent you by Mr. Green, did you not? A. Telegram, letter or something.

Q. State whether or not you knew from any source that the statement made by Brown in what is called the Proof of Death was in conformity with his statement made at the coroner's inquest in antagonism to the statement you had written out?

A. I knew it was in antagonism with the statement I had written out; or that he had told me; it was not in writing yet.

Q. Did I understand you that this paper, so far as you know that was torn up—the scraps of paper of the original statement—is in the possession of the lawyers on the other side? A. The last I knew of it.

(A paper is here handed to Mr. Atwood by Mr. Green.)

By Mr. Atwood: Without reading this over, I have no doubt this is the original paper that you fished out of the stove signed by John Brown at Parkville.

1555 By Mr. Atwood: We now offer this in evidence.

Said paper was admitted in evidence without objection and by consent of the defendants was read to the jury from a copy certified to be correct over signatures of W. J. Buchan and J. W. Green.

Q. This is the paper that was prepared in your handwriting at Parkville? A. That is a copy of it.

Q. This is also in your handwriting? A. I believe so.

Said paper is in words and figures as follows, to wit:

1556 State of Missouri,

County of Platte—ss.

John H. Brown of lawful age being first duly sworn according to law deposes and says: My name is John Brown. My age thirty years. I am acquainted with John W. Hillmon, also Mrs. Sallie E. Hillmon, and Levi Baldwin of Douglas County, Kansas, have known John W. Hillmon for about five years have been with him a good deal for the past two years, was out with him last March at Wichita, and on the trip from there to and around Medicine Lodge in Barbour County, Kansas, where it is claimed that I killed him on the 17th of March 1897. Along about the 10th of December 1878 John W. Hillmon, Levi Baldwin and myself talked about and entered into a conspiracy to defraud the New York Life Ins. Co. and the Mutual Life of New York out of some money to be obtained by means of affecting a policy or Policies on the life of said John W. Hillmon. Baldwin was to furnish the money to pay the premium and to keep up the policies in case they had to be renewed. Our original arrangement was to get Hillmon's life insured for Fifteen thousand but it was afterward changed to Twenty-five thousand Dollars. Hillmon and myself were to go off Southwest from Wichita Kansas ostensibly to locate a stock ranch but in fact to in some way find a subject to pass off as the body of John W. Hillmon for the purpose of obtaining the insurance money aforesaid we had no definite plan of getting the subject but to in some manner get one, the final termination of the matter was the last idea thought of. our first trip out from Wichita the last days of December while the snow was on the ground we expected to find a subject that would appear to be Hillmon frozen to death and that could not be identified only by the clothes and papers found on it, and so I could pass off as Hillmon. We went from Wichita to Medicine Lodge then direct to Sun City, from there to Kinsley from there to Great Bend on the Santa Fe road then

1557 to Larnard and on to Wichita Via Hutchinson. Hillmon and myself were entirely alone on this trip. Isliff

of Medicine Lodge saw Hillmon on this trip we put up at his stable. I then stayed at Wichita until the 4th of March Hillmon in the mean time went up to Lawrence to see his wife and get some more money he returned about the first of March and on the 5th we left on our second trip. We went due west to Cow Skin Creek then west to Harper City then to Medicine Lodge on by Sun City and beyond some miles then we turned North east down Medicine River to a camp on Elm Creek about 18 miles North of Medicine Lodge where Hillmon is claimed to have been killed. We got there about an hour before sun down, and stayed in camp until the next evening. We overtook a stranger on this trip out from Wichita about 2 or 2 1.2 miles from town, who Hillmon invited to get in and ride, and who he (Hillmon) proposed to hire to herd and work for him on the ranch as proposed to be located. This man was with us during all this trip. Hillmon proposed to me that this man would do for a subject to pass for him. I told him and contended with him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because his proposition was to take the man's life, and I protested and said that was goin beyond what we had agreed and something I had never before thought of an was beyond my grite entirely. But Hillmon seemed to get more deeply detemined and more and more desperate in the matter. Pains were taken not to have more than two of us seen together in the wagon. Sometimes one an dthen the other would be kept back out of sight. On this trip up to Lawrence Hillmon was vaccinated, his arm was quite bad. Hillmon kept at the man until he let him vaccinate him which he did taking his pocket knife and using virus from his own arm for the purpose. He also traded clothes with him. Hillmon first giving him a change of underclothing, then traded suits, the one he was killed in was a suit Hillmon traded with Baldwin for. This man appeared to be a stranger in the
1558 country, a sort of an easy go long fellow, not suspicious or very attentive to anything. His arm became very sore and he got quite stupid and dull he said his name was either Berkley or Burgess or something sounding like that. We always called him Joe. He said he had been around Ft. Scott a while and also had worked about Wellington or Arkansas City. I don't know where he was from nor where his home or friends were. I did not see him at Wichita that I know of. I had but very little to say to the man, and less to do with him. He was taken in charge by Hillmon and yielded willingly to his will. I dreaded what I thought was to be done and kept out of having any more to do with him than possible. I frequently remonstrated with Hillmon and tried to deter him from carrying out his intentions of killing the

man. The next evening after we got to the camp last named the man Joe was sitting by the fire I was at the hind end of the wagon either putting feed in the box for the horses or taking a sack of corn out when I heard a gun go off. I looked around and saw the man was shot and Hillmon was pulling him around to keep him out of the fire. Hillmon changed a day book from his own coat to Joe's and said to me everything was all right and in shape just as he wanted it and that I need not be afraid but it would be all right. He told me to get a pony and go down to a ranch about three-quarters of a mile and get some one to come up. He took Joe's valise and started North. This was about sun down. We had no arrangements about communicating with each other, he first proposed to do so but I told him I did not want to know where he was, that in case I should I might find out some other way. I have never heard a word from him since. At Lawrence Mrs. Hillmon gave me to understand that she knew where Hillmon was, and that he was all right. The man over whom an inquest was held at camp afterwards at Medicine Lodge and at Lawrence Kansas was the man Joe Burgess or Berkley killed by Hillmon as related above and John W. Hillmon I believe to be still alive at least he left our camp and
1559 went north as stated above after Killing Joe. Hillmon said he would assume the name of William Marshall. Baldwin's wife and Mrs. Hillmon know all about this. In my testimony at Lawrence I stated the route taken as above described but the man who I described as being in camp with us and who I said went off with some wagons was Joe the man killed. I afterwards sometime in August 1879 made four affidavits under great importunities from Baldwin who came after me three different times the last time pursuading me to go with him to Kansas City where Hon. Saml Riggs insisted on me signing them. I don't think Mr. Riggs is aware of the facts in this case nor the other counsel in the case.

I make the above statements in the Hillmon case as the full and true facts in the case regretting the part I have taken in the affair.

(Signed) JOHN H. BROWN.

Subscribed in my presence and sworn to before me this 4th day of Sept. A. D. 1879. My term expires on the 3rd day of April 1883.

[Seal] FRANCIS M. McDONALD,
Notary Public.

This is to certify that we have this day compared the above with the original and that the same is a true and correct copy of said original.

W. J. BUCHAN,
J. W. GREEN.

Lawrence Sept. 13" 1879.

1560 Q. These signatures I think you said were yours and Mr. Green's? A. Yes sir.

Q. Now, when you met Mrs. Hillmon in Leavenworth did you tell her you were attorney for the insurance company?

A. I don't think so.

Q. Your best recollection would be that she did not know that you were an attorney for the insurance company at that time?

A. I don't think that matter was spoken of at all. I have no recollection that it was.

Q. This letter, this copy, was written at Lawrence, wasn't it, Mr. Buchan? A. I don't know about that.

Q. What is your recollection?

A. I haven't any recollection. I can't recollect when that was made; it might have been done then.

Q. What would your best recollection be; that it was?

A. It would be a presumption; I presume it was.

Q. The original was there at the time; you had the original there at the time that you were leaving this copy; is that a fact?

A. I presume so. I recollect the circumstance.

Q. That is your best recollection of it? A. I presume so.

Q. Your best recollection is that when you met her at Leavenworth you didn't state that you were an insurance agent or attorney? A. I don't think so, no sir.

Q. Did you tell her that you were Brown's attorney?

A. I don't think so.

Q. Did Brown in your presence tell her that you were his attorney? A. I don't remember about that matter.

Q. Did you know whether she knew you were Brown's attorney? A. I don't know anything about it.

Q. It was a fact you were Brown's attorney at that time?

A. I considered myself his attorney.

Q. And it is also a fact that you were attorney for
1561 the insurance companies at that time?

A. I presume so.

Q. Under this authority that you had to get these policies?

A. Yes sir, under the employment that I had to get the policies.

Q. Then, so far as you know, Mrs. Hillmon had no knowledge that you were acting in the capacity that you actually were acting in, namely, as attorney for the insurance people at the time you had this interview with her at Leavenworth? Is that a fact?

A. I don't know whether she did or not. It was not discussed at all. She came from Tonganoxie over here for the purpose of getting these policies.

Q. Did Brown know that you were acting for the insurance companies at that time? A. Yes sir.

Q. Brown knew that you were acting as insurance agent but Mrs. Hillmon didn't; is that a fact?

A. Why I presume.

Q. The whole interview was carried on without disclosing your real identity to her, the real capacity in which you were acting? A. Nothing mentioned about that at all.

Q. When you got these releases you have told about you took them to the insurance people? A. I did.

Q. And they paid you for it? A. Yes sir.

Q. How much did they pay you?

A. Five hundred dollars, I believe.

Q. Is that the only money you have been paid for all these things you have done for them? A. Yes sir.

Q. Cheap.

And in answer to redirect interrogatories propounded to him by George J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. That statement that you were examined in re-
1562 gard to; calling your attention to this statement signed by John Brown which has been read to the jury. I will ask you how you became possessed of the facts which are contained in that paper? A. How I became possessed of them?

Q. Yes. A. From John H. Brown.

Q. Did you have any means of information except what Brown told you in regard to the matters contained therein?

A. None in the world.

Q. Had you ever heard of this man whose name is mentioned in that paper before John Brown told you in regard to the matter? A. Had I ever heard of him?

Q. Yes. A. No sir.

Q. Now, in that statement there is a route described which they had taken; a trip which he claims they had taken. Did you have any knowledge of that trip, that he and Hillmon had taken such a trip as that until you were so informed by Brown?

A. Brown told me practically this same story verbatim at Lexington.

Q. What I want to get at is whether you had any other means of information in regard to the matters contained therein? A. I never had.

Q. You could not have gotten any information from the newspapers because Brown had testified had he not at Medicine Lodge and at Lawrence that the body brought to Lawrence was the body of Hillmon? A. I understood so, yes sir.

Q. Now, in regard to the delivery; you said that you delivered this paper to either Green or myself, I believe?

A. One or the other I think.

Q. Did you state when that was; if not, I will ask you to state when it was?

A. I think it was when you were taking the deposition of John Brown.

Q. Will you look at this paper and state in whose handwriting that is if you know?

A. Well, I don't know that I know; it looks something like Green's. It would be a mere guess.

1563 Q. You don't know whose handwriting this paper is? A. No, I would think it was Green's.

By Mr. Atwood: Is that the Riggs paper?

By Mr. Barker: Yes.

Q. Now, at the time you delivered that paper to Mr. Green or myself what did you do with reference to furnishing Mr. Riggs then with a copy of the statement?

A. I furnished Mr. Hutchings, Mr. Riggs' associate.

Q. Mr. Hutchings?

A. John Hutchings, who was Mrs. Hillmon's attorney with Mr. Riggs.

Q. Mr. Riggs and John Hutchings were at that time attorneys for Mrs. Hillmon? A. Yes, I gave them, I think, this copy.

Q. At that time you gave them a copy?

A. Yes sir, I think I gave them this copy. That is a copy of a copy. I think that was taken from this.

Q. They have called your attention to this paper designated "Where is John?" letter. I will ask you if you remember when was the first time that you showed this Exihibt B. I think it is, to any one connected with the insurance companies or said anything in regard to it?

A. When they were taking the deposition of John Brown at Kansas City, Kansas, or Wyandotte, I gave to both sides whatever papers I had, whatever letters I had that they wanted. That is the time I think I gave this to some of you.

Q. Prior to that time had you said anything to any one in regard to having that letter in your possession? A. I don't think I had to anybody—any of these papers.

Q. Did you show it to any one that you have any knowledge of?

A. No, I understood that Brown was making a deposition and that he was telling an entirely different story, saying that this—

Q. You gave it at the time Brown was giving his deposition? A. Yes sir.

Q. Where was his deposition being taken with reference to your office?

1564 A. Right below, down stairs; same building.

Q. I will ask you to state whether or not it was during his cross-examination that you let Mr. Green have this paper?

A. Well, it was during the taking of that deposition, when he seemed to be telling two different stories. I don't know whether it was cross-examination or examination in chief.

Q. They have called your attention to what is called the Munn paper, the indemnity paper? A. Yes, sir.

Q. Now then, I will ask you to state what you said to John Brown in regard to that. You were only allowed to answer the definite questions. You may state fully what you did state to him on that subject?

A. I think I stated in my examination in chief that I told Brown that the insurance companies had no right and could not prevent the authorities from prosecuting him and they probably would have to furnish any testimony they might have. But in Barber county they thought he was innocent and that if this thing was settled up nobody in Douglas county would have any interest in prosecuting him and the chances were there never would be any prosecution. I discussed that pretty fully with him and took that paper as an additional—the best security that I could get that they would not prosecue him voluntarily.

Q. Was it explained in that way to Mr. Brown?

A. Yes, sir, I talked with him about it down at Parkville. It was his own suggestion. It was John Brown's suggestion for getting up the policies.

The plaintiff moves to strike out the last part of the witness' answer as not responsive to the question.

The Court sustained the motion to which action and ruling of the Court the defendants and each of them at the time duly excepted.

Q. Now, in regard to you and Colonel Walker and
1565 old gentleman Brown going down to Orrick to see John Brown. You said that you didn't know whether Colonel Walker was an officer then or not?

A. I don't know whether I ever have been examined on that question. My recollection now is—I know that Old Bobbie Brown came to me and wanted me to go with him.

The plaintiff objects to the answer as not responsive to the question.

The Court sustained the objection to which ruling of the Court the defendants and each of them at the time duly excepted.

Q. Is that a fact? A. I said I don't recollect.

Q. You say now you don't know whether he was or not?

A. Yes, sir.

Q. They have asked for your knowledge as a lawyer. You would know that an officer from Kansas had no jurisdiction in

Missouri, would not have any power to make an arrest in Missouri?

A. I presume so. I went at the request of Bobert Brown to see—objection.

Q. Now, in regard to Mr. Ward. If he was an officer at all of what county was he an officer?

A. He was one of the deputy sheriffs of Wyandotte county. The sheriffs office was in the same building with my offices and he had a very nice team, and therefore had—objection.

Q. I say if he was an officer he was an officer of Wyandotte county?

A. He was one of the deputy sheriffs of Wyandotte county.

Q. Now you may explain to the court and jury how you happened to go there with Mr. Ward or how Mr. Ward happened to go over with you.

The plaintiff objects to the question because the same is incompetent irrelevant and a repetition.

The Court overruled the objection to which ruling of the Court the plaintiff at the time duly excepted.

A. As I said, his office was in the same building with my own; and he had a very good team that this deputy always drove. And therefore didn't use it much and it was liable to run away, and I said to him that I was going over to
1566 Parkville and I would like to have you take your runaway team and drive me over there if you have nothing to do and he says "If Ryan says so, all right, if he don't want me for anything." I asked Ryan if Ward could go over with me and he said it is all right to drive me over. He knew Barnes; knew them as long or longer than I had.

Q. Now, had Mr. Ward ever claimed to have or was it represented to John Brown that Mr. Ward had any papers for him? A. Why no; that was never thought of.

By the Court: Were you then county attorney of Wyandotte county?

A. No, sir; I never have been, never was. It is a mere accident that Mr. Ward went along. No, sir, I never was county attorney.

Q. Now, I want to call your attention to another matter, which I meant to inquire about on direct examination, and that was in regard to your advising Mrs. Hillmon to change her name. I want to draw your attention to that matter. State whether or not you have had any conversation with her on that subject.

A. About changing her name?

Q. About changing her name after the transaction there at Leavenworth on the 15th day of September, 1879.

A. Nothing of the kind.

Q. I want to ask you if you have punished or threatened to punish your little boy—he was a little boy then, the captain now—for calling her Mrs. Hillmon at your house.

A. He was not over three years old. No sir, I never did.

Q. Did anything of that sort take place?

A. Nothing of that kind ever took place.

Q. For the purpose of refreshing your memory now I will call your attention to Exhibit H. The date of that is September 5th, 1879, is it not? A. September 5th, 1879.

Q. I will ask you to state if prior to that time you
1567 you had any employment whatever from either of these companies? A. None whatever.

Q. Then I will ask you to state whether or not the compensation which you received was for services which you performed after that time? A. Yes, sir.

Q. I will ask you, Mr. Buchan, whether you had any other employment or connection with the insurance companies except in regard to this particular matter?

A. Never had any other employment.

Q. You were not in their general employ? A. No, sir.

Q. Referring to Exhibit number 31. State what that letter has reference to?

A. Do you want me to make an explanation of this?

Q. Yes, I want you to state all there is to it.

A. When Mrs. Hillmon—after she had signed the releases of these policies here she, by her statement, had quarreled with Baldwin over at Tonganoxie; that he had gone back on his agreement to come over here and get the policies and she was very angry with him. She was at my house a short time waiting for her trunk to be sent, she did not want to go to Lawrence—waiting for her trunk to be sent to Ottawa, and she had some notes, a lot of notes that Baldwin had given her or her husband, and she left them with me; said that she some time in the future would tell me what she would do with them and what she wanted done with them or something. It seems she wrote me from Tonganoxie after she had got back with with Baldwin and asked me to send the notes to her and I sent them.

Q. Is that the letter you sent enclosing the notes?

A. Yes, sir.

Q. What is the date? A. Dated March fourth, 1880.

Q. I want to ask you, Mr. Buchan, whether there had been any talk between you and Mr. John H. Brown in regard to getting up these policies prior to the fourth day of September, 1879 at the time this letter or authorization was given?

A. No; as I recollect it, coming down from Reuben's house to Parkville John said if he could see Mrs. Hillmon he would get those policies and he knew that would end it.

1568 Q. When did that conversation occur?
A. At Parkville at the date of this September sixth statement.
Q. I want to know if there had been any conversation between you and him on that subject before that time?
A. Oh, no; it was his suggestion.
Q. Who suggested getting up the policies?
A. John Brown did.
Q. Then what followed after the suggestion; where did you go?
A. We talked about it and I wrote this paper then authorizing—
Q. Is that the paper? Look at that exhibit?
A. Yes, I wrote this at the office there in pursuance of that conversation and suggestion I wrote this, "I hereby authorize you, etc." and he signed it authorizing me to go and do—
Q. Did he give any reason or make any statement to you as to when he desired these policies taken up; if so, you may state what he said, if anything on that subject?
A. The burden of his talk was that John Hillmon got away and there was nobody to stand a brunt of this thing but him and he wanted to get out of it, he wanted to close it up some way and his excuse to me for signing the proofs of death was that he—
Q. The question I am asking you is what he said with reference to getting up these policies; why he desired to get them up?
A. He wanted to end this whole thing, this transaction.
Q. Now, you may state what he said in regard to that matter, I mean by that matter, about getting up these policies at Parkville at the time or before this paper was signed?
A. Why, he stated he was going to see Mrs. Hillmon; he would get up these policies if he could see her; he could get them up and would see her; he was going to do it or something of that purport.
Q. I will ask you, Mr. Buchan, if you have any knowledge of Mr. John H. Brown ever having been arrested in regard to this matter? A. No, sir.
Q. To your knowledge has he ever been arrested?
A. No I think not.
1569 Q. He never was arrested?
A. I don't understand he was.

In answer to recross interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. When were these notes mentioned in this letter, Mr. Buchan, placed in your possession?

A. Sometime when she was at my house.

Q. And they remained in your possession until they were enclosed in this letter? A. I presume so.

Q. There seems to be a little misunderstanding among my associates that I want to make clear. This copy that I read here of that statement, that was made as your recollection serves you as I understood you to say at the time you were at Lawrence; is that right? A. I think so.

Q. And the Riggs copy; the one in Riggs' handwriting must have been made long after that, wasn't it?

A. As I recollect it, I think the one I gave Mr. Hutchings, the copy which was the copy, at the time of the taking of the deposition of John Brown.

Q. That was nearly two years after that?

A. Yes, the copy of that was.

Q. The copy of that copy was made by Riggs?

A. That is what I think.

Q. That is, between the two copies, the original copy and the copy of the copy, something like two years intervened?

A. I think it was about that time, whenever the depositions was taken.

Q. What about this copy that you say you gave to John Hutchings? A. That is what I am speaking of.

Q. This is the Riggs copy?

A. As I understand it, as I recollect it, I had this copy, this copy in my handwriting, when I returned the policies I got it from Green, and I had it in my possession until
1570 the taking of John Brown's deposition.

Q. Either whole or in pieces?

A. No, I had the original and I had this copy that I got from Lawrence and I had it in my possession also, and at the taking of John Brown's deposition there I gave it to Mr. John Hutchings, now dead, who was then in the case. This is the copy that I made and my understanding is that from that copy Mr. Riggs then made this copy. That is the way I understand it.

Q. What copy was it John Hutchings got?

A. The original copy in my handwriting.

Q. The one that has been introduced in evidence?

A. Yes, I think the other is copied from it.

Q. Do you know how it got into the hands of the insurance companies if you gave it to John Hutchings?

A. No, I don't know, but it might have been bandied back and forth when taking that deposition. They were several weeks at it.

By the Court: That is very clear. He says the copy that Green has was produced at the time of the taking of the deposition and at that time the witness gave it to John Hutchings,

one of the counsel for the plaintiff, and at that time Mr. Riggs made this copy.

Q. So Mr. Riggs and Mr. Hutchings had two copies between them?

A. That is the way I understand it, Mr. Atwood.

Q. As a matter of fact what copy was in the hands of the insurance people at the time that deposition was taken?

A. They had none until that deposition was taken. After I returned the surrendered policies I took up this copy.

Q. You say at the time of the taking of the deposition that there was no copy in the hands of the insurance people?

A. I don't understand that there was.

Q. Do you know where it was when they got their long quotations from it that they put in the questions they propounded to John H. Brown at the taking of that deposition?

A. Both sides had that copy. As I say, I gave it to Mr. John Hutchings but I think it was used by both sides.

1571 Q. You say it was the property of John Hutchings; you gave it to him? A. Yes, sir.

Q. The one that has been read here to-day. You don't know how it passed into the possession, became the property of these gentlemen?

A. No, I don't know how it came into their possession.

Q. While it is a fact it was the property of one of the lawyers of Mrs. Hillmon, another lawyer, Mr. Riggs, goes to work and makes another copy; is that a fact?

A. That is as I understand it.

Witness excused.

By Mr. Hutchings: I desire for John Hutchings to disclaim that he ever had that paper.

By Mr. Barker: You haven't been in the case all the time.

By Mr. Hutchings: I have been attorney long enough to know that that paper never was given to him.

1572 Frank Woodruff, a witness, produced by the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name and residence?

A. Frank L. Woodruff. I reside in Guthrie, Oklahoma.

Q. How long have you been residing there?

A. About eighteen months.

Q. Where were you residing prior to your going to Guthrie?

A. Why just prior to going to Guthrie I was at Joplin, Missouri.

Q. Did you ever reside in Lawrence? A. Yes, sir.

Q. Where were you living in the years 1878 and 1879?

A. In Lawrence.
Q. What was your business at that time?
A. I was engaged in selling clothing.
A. What is your business at the present time?
A. In the same business.
Q. For whom, if any one, were you working in 1878?
A. I was working for William Bergman.
Q. Where was his store located?
A. In the same block as the Eldridge House. I have forgotten the numbers. About the middle of the block, on the west side of the street.
Q. What line of goods was Bergman carrying?
A. Clothing, furnishing goods, hats, etc.
Q. Did you, at any time, know a man by the name of John W. Hillmon? A. I did.
Q. When was it that you knew him?
A. Knew him in the fall, well rather winter of 1879, fall and winter of 1879.
1573 Q. Do you remember how early in the fall you met him?
A. No, I do not. I met him. Well, he was in the store quite a number of times that winter. Came in to see [him] whenever he was in town, and had promised to buy a bill of goods of me.

The plaintiff objects to the answer as not responsive.

Q. How often do you think you met him at that time?
A. Well, it is hard to say. I met him possibly, he may have been in the place twelve or fifteen, or possibly twenty times.
Q. Would he remain there long?
A. Sometimes he would remain for an hour or two, if it was a bad day, and sit around and seem to make himself at home at the store.
Q. Now, did you meet him at other places than there at the store? A. No, I don't think I ever did.
Q. Only when he came into the store then, that you met him? A. I saw him most always at the store.
Q. Did you have any business transactions with him?
A. Yes, sir. I sold him a suit of clothes.
Q. About when did you sell that suit of clothes?
A. It was the early part of March, 1879, just previous to his taking a trip.
Q. Now, do you remember the occurrence of a dead body being brought back, claimed to be the body of said Hillmon?
A. Yes, sir.
Q. About how long was that after that time, if you remember?

A. I sold him this bill of goods some three or four weeks previous to that; somewhere in that neighborhood. It was not long.

Q. Did you become well acquainted with him during these visits at the store?

A. Yes, sir; I knew him pretty well. Sometimes he was in in the evening for an hour or two, and I had numerous conversations with him, in which he told me that he—

Q. Never mind what he told you, Frank. Did you
1574 go to see that body? I did.

Q. Whom did you expect to see when you went there?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled. Plaintiff excepts.

A. I expected to see the body of Hillmon.

Q. How many times did you go to see that dead body?

A. Just one time.

Q. Do you remember how long it was after the body had been brought there before you went down?

A. Yes, quite early in the morning. I know the body had been there then. It was quite early in the morning. I was taken down there along between eight and nine o'clock in the morning, as near as I can recollect. I understand it was as soon as the body was prepared.

Q. Was it the same day that the body was brought back there, if you know?

A. Yes, sir. It was the morning the body arrived at Lawrence.

Q. In what state of preservation was that body at that time?

A. It was in a fair state of preservation. It seemed to be a little discolored about the neck and where the wound was, a little about the nose, and the eyes were a little sunken. That was about all.

Q. You may state whether or not that was the dead body of John W. Hillmon, whom you had known there?

A. It was not.

Q. At whose instance, do you remember, did you go down there?

A. I should say the only man I am certain of, I was told by Mr. Charlie Smith for one; when I was there there were several others present at the time; I think I walked down the street with Ollie Walker and Mr. Levi Baldwin. I think was in Smith's rooms where the corpse was, a little building back of their store.

Q. Were there other people there that you saw?

1575 A. Yes. There were two or three in the room at the time.

Q. Did you have any difficulty in getting into the room where the corpse was?

A. No. I was taken right to the body, and the cloth was taken off the face for me to identify.

Q. Were there people coming and going there all the time?

A. There were quite a number of people outside. There were some two or three persons inside. They were not letting everybody come in, but there was quite a crowd between the store building and this building in which the body was shown.

Cross-Examination

By Mr. Hutchings:

Q. You were clerk there in a clothing store? A. Yes, sir.

Q. When did you first see Hillmon? When did you first see the man?

A. Along that fall sometime. I do not just remember when.

Q. What fall?

A. The fall of, well rather to sell him this suit of clothes. That would be the fall, I think, possibly, in November or December, possibly December, 1878.

Q. That is the first time you saw him, in 1878?

A. That I knew who he was.

Q. About what time in the month of December?

A. I could not fix the first time I met him.

Q. You think it was in December?

A. Yes, sir; I think it was in the early part of December.

Q. You say he was there in your store frequently in December?

A. No. I don't know whether he was in there frequently during December. He was in there frequently between that and March.

Q. I am just asking you about December. Was he in there frequently during December?

1576 A. No. I could not answer that. I don't know whether he was there frequently in December.

Q. Was he there frequently in January? A. I think so.

Q. How frequently in January?

A. I could not state just how many times.

Q. You testified in your direct examination, he was in there frequently. Was he in there frequently?

A. I have testified in my direct examination he was in there ten or [or] fifteen, or possibly twenty times.

Q. In the month of January?

A. No. During the season between the fall and the time I sold him the suit of clothes.

Q. The first time you saw him was in December?
A. Yes, sir.
Q. You do not remember how often he was in there in December? A. No, sir.
Q. Your recollection is, he was not there frequently in December? A. No. I don't think he was.
Q. Don't think he was there frequently in December?
A. I don't know about that though.
Q. If he was there frequently, then it must have been in the month of January?
A. I think I became acquainted better with him later.
Q. Well what do you mean by later?
A. Some time, it must have been in January or February.
Q. He was there how many times, would you say?
A. A dozen or fifteen, may be twenty times. I could not tell you.
Q. During the month of January and February?
A. December, January and February.
Q. He was in there that many times?
A. I think that many different times.
1577 Q. When was it you sold him the suit of clothes?
A. It was in the early part, early in the month of March I think.
Q. Early in the month of March?
A. I think it was. Yes, sir.
Q. About what time in the month of March?
A. The only means I have of fixing it exactly is, just previous to the time he went away. He bought that suit of clothes just before he went away.
Q. When did he go away?
A. I don't know just exactly when; I think the early part of March.
Q. Do you know he left in February? A. No, I don't.
Q. Don't you know he was not in Lawrence ten days during January and February, 1879?
A. No, sir. I do not know that.

By Mr. Green:
Q. How long was it prior to the bringing back of this dead body that you sold the clothes to him?
A. I don't think it was over possibly three weeks, possibly four weeks; not to exceed that, I don't think.

Witness excused.

1578 Lemuel Evans, a witness produced by the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Barker:
Q. State your name and residence?

A. My name is Lemuel Evans. My residence is Tonganoxie.

Q. In what county?

A. Leavenworth County, Kansas.

Q. How long have you lived in Leavenworth County?

A. Since about 1867 or 1868, I ain't positive which.

Q. In what business are you engaged?

A. I am in the real estate business at present.

Q. In what business were you formerly engaged?

A. Farming and stock raising.

Q. Where?

A. Well, let me see, in Tonganoxie township, and I have been in business in different parts of the state, generally Leavenworth County.

Q. Did you live on a farm? A. Yes, sir.

Q. Where did you live before you removed to Leavenworth County? A. Lived in Douglass County.

Q. How far from Lawrence?

A. Part of the time I lived about six miles, and part of the time about two miles and a half.

Q. Did you know the father of Levi Baldwin?

A. Yes, sir.

Q. Where did he live one time?

A. He lived up on the California road, Douglas County.

Q. How far did you live from him, when you were living in Douglas County?

1579 A. I lived about six miles from him when he lived on the California road.

Q. Did Levi Baldwin ever live in Douglas County?

A. Yes, sir.

Q. Did he live there at the same time that you were living there? A. Yes, sir.

Q. Were you acquainted with him when he was living there? A. Yes, sir.

Q. Do you know about the time he removed from Douglas County to Leavenworth County?

A. Why I do not know as I can fix the year exactly.

Q. Well he did remove to Leavenworth County?

A. About 1876 I should judge.

Q. What year did you remove to Leavenworth County?

A. It was either 1867 or 1868.

Q. When Levi Baldwin removed to Leavenworth County, how near did he live to you? A. About two miles.

Q. Were you upon a farm then? A. Yes, sir.

Q. How long did you continue to live there in that neighborhood, and he?

A. I lived there until he sold out and went to Mexico.

Q. I will ask you if— A. On the same farm.

Q. You [are] acquainted with one John W. Hillmon?
A. Yes, sir.
Q. When did you become acquainted with him?
A. I think the first time that I recollect of meeting him to know him was at my house.
Q. When was that? A. About 1868.
1580 Q. That was at your house in Douglas County?
A. That was at my house in Leavenworth County.
Q. Well, did you become acquainted with him then?
A. Yes sir, we had some talk. That is the time I met him.
Q. Did you see him after that? A. Yes sir.
Q. Where did you see him?
A. I have seen him on the road, and I have seen him at Levi Baldwin's.
Q. How many times did you see him at Levi Baldwin's?
A. Oh, I could not tell you the number of times.
Q. Frequently or only seldom?
A. Probably, in all, as much as half a dozen or a dozen different times from one year to another.
Q. Now at other places besides Levi Baldwin's, where did you see him?
A. I think I seen him in Tonganoxie, and I have seen him on the road with Levi, and rode with him and Levi Baldwin together.
Q. You travelled with him, did you? A. I have.
Q. From what point to what point?
A. Well, going or coming from Lawrence, him and Baldwin would be going to Tonganoxie.
Q. In going from your place did you pass Baldwin's farm?
A. No. He generally passed mine.
Q. Your farm was nearer to Lawrence than Baldwin's?
A. Nearer Tonganoxie.
Q. But what about Lawrence?
A. Well, to go to Lawrence I would not go past Baldwin's unless I had business with Baldwin.
Q. But you say you did ride with him?
A. Yes, rode with both of them.
1581 Q. On what other occasions did you see him?
A. I saw him in Lawrence. I have met him on the road between Levi Baldwin's and Lawrence.
Q. Do you remember about the last time you saw Mr. John W. Hillmon?
A. The last time that I ever seen him that I know of I met him, I was going from my place to Lawrence, met him coming from Lawrence.
Q. Can you tell about when that was?
A. No, but I think it was directly after he came back out south, from the southwest.

Q. Did you hear of the fact or the circumstance of his being married? A. Yes sir.

Q. What would you say about seeing him after you heard that he was married?

A. I think I met him after he was married.

Q. Now over what period of time did your acquaintance with John W. Hillmon extend, about how long?

A. Well, I didn't see Mr. Hillmon every year.

Q. I say over what period of time?

A. From about 1868 to 1878.

Q. About ten years? A. Yes sir.

Q. During that time did you become acquainted with him?

A. Well, ordinarily I did. He was not there all the time.

Q. Were you associated in business with Mr. Levi Baldwin?

A. Yes sir.

Q. During any time, was Mr. Hillmon working for Mr. Baldwin? A. Not at that time.

Q. I mean during any time that you was acquainted with him?

A. Oh, yes, I seen him often with Mr. Baldwin, but, now, whether he worked there as a laborer or not I could not say, but he would be with him around after stock before Mr.
1582 Baldwin and me went into business together.

Q. Do you remember the fact of a dead body being brought to Lawrence in 1879, and being at Bailey & Smith's undertaking establishment? A. Yes sir.

Q. Did you see that body? A. I did.

Q. Do you know when you saw it, with reference to the time that it was brought there?

A. I think it was brought there in the morning, as I understood it, and Mr. Ollie Walker came after me.

Q. I am not asking in regard to that. Do you know what time it was with reference to the body being brought there, that you saw it?

A. I think it was the morning of the second day after it came.

Q. Where was it?

A. It was in Smith's undertaking establishment.

Q. Do you remember about what time of the day you saw the body?

A. I should suppose it was about nine o'clock. We drove from my place over there, which was about ten miles.

Q. I am only asking you in regard to the time you saw it there. You say you saw it about nine o'clock?

A. I should take it to be.

Q. You saw it at Bailey & Smith's undertaking establishment? A. Yes sir.

Q. Do you remember the condition of the body, whether it was in a good state of preservation or not? A. I called it so.

Q. What was the condition of the body, so far as being dressed and lying in a coffin?

A. It was lying with the head to the west, and was dressed with a full suit of clothes on.

Q. It was not nude? A. No sir.

1583 Q. Now you may state whether that was the body of John W. Hillmon or not? A. It was not.

Cross Examination

By Mr. Hutchings:

Q. You say you now live in Tonganoxie? A. Yes sir.

Q. You say you lived near the Baldwins?

A. Yes sir; both in Douglas County and Leavenworth County.

Q. You say you knew Hillmon between 1868 and 1878?

A. I think I did.

Q. During that time, will you tell the jury, what proportion of the time he was here?

A. I could not tell what years he was here, but he was here off and on. The first year he was here, after I seen him in the summer or fall here, I think he was here most of the time until cold weather, and probably during a part of the winter too.

Q. That is, 1868 and 1869?

A. I think it was 1868, from 1868 to 1869. It was the next year after I moved from Douglas County.

Q. After 1869, was John W. Hillmon here all together six months? A. I should think he was.

Q. How much would you say he was here from 1869 up to the time when he came back in 1878?

A. Well now, I didn't keep track of just the time I met him, the number of different years.

Q. Don't you know that almost continuously from that time he was out in the west hunting buffalo or engaged in some other business in the west?

A. I knew he was gone a great deal of the time.

1584 Q. Gone most of the time, wasn't he?

A. A greater part of his time.

Q. You have been in the employ of the defendants, haven't you? A. I have, some.

Q. In this case? A. Yes, sir.

Q. You are one of their detectives?

A. I don't think I have ever been a detective.

Q. Were you not employed by the defendants in this case as a detective?

A. No, sir, I would not call it that.

Q. You were in their service, hunting up witnesses for them, were you not? A. They asked me to go and see—

Q. Just answer my question. A. I will all right.

Q. Were you employed by them in the business of hunting up and getting their witnesses?

A. I don't think I was. I didn't understand it that way.

Q. You were employed by them?

A. I have done some work for them.

Q. You have been in their employ at every trial of this case, have you not? A. No, sir.

Q. You have been present at every trial of this case, haven't you? A. No, sir.

Q. How many trials of this case have you been present at?

A. I think this is the third one, as near as I can recollect.

Q. On each one of these occasions you were employed by the defendants? A. I was not, sir.

Q. You were in the service of the defendants were you not?

A. No, sir.

1585 Q. You were not here as a witness?

A. I was subpoenaed as a witness.

Q. They never put you on the stand? A. They never did.

Q. You have been here three times, and they have never put you on the stand until this term?

A. That is correct, I think.

Q. When you went down to see John W. Hillmon you went at the request of Ollie Walker? A. I did.

Q. Ollie Walker was the son of Col. Sam Walker, wasn't he? A. Yes, sir.

Q. He was in the employ of the companies??

A. I suppose he was afterwards.

Q. You understood at the time that Ollie Walker requested you to go down there to see the body, that he was in the employ of the companies, did you not? A. I did not.

Q. You understood that his father was? A. I did not.

Q. When did you first know that?

A. I did not know it until after the coroner's inquest.

Q. But each time that you have been here in attendance upon the court during the trial of this case, you came at the request of the defendants? A. Yes, sir.

Q. And at one of the terms you were in their employ?

A. I was subpoenaed to come.

Q. Were you in their employ at one of the terms?

A. I don't think I was.

1586 Cross-Examination

By Mr. Hutchings:

Q. Didn't you state a little while ago that you were in their employ? A. I said I had done some work for them.

Q. Who employed you to do the work?

A. Why, I think Mr. Barker and Mr. Green asked me to see and to tell them, give them the names of some different parties that were wanted, to see whether they knew Hillmon or not.

Q. They knew that you had looked at that body at the request of Ollie Walker, didn't they?

A. I don't know whether they did or not.

Q. You were subpoenaed as a witness on three trials and claimed your fees? A. Yes, sir.

Q. They never put you on the stand? A. Never did.

Q. How long have you been acquainted with them; that is, Mr. Green and Mr. Barker?

A. I have seen them before the coroner's inquest but I have never had very much of an acquaintance with either of them.

Redirect Examination

By Mr. Barker:

Q. In regard to this employment, I want you to state to the jury what there was to it. Weren't you simply requested by us to give us the names of parties who were acquainted with John W. Hillmon?

Plaintiff objects to the question as leading. Objection sustained. The defendants, and each of them duly except.

Q. Go on and state the nature of the employment, what there was to it?

A. The first employment was by one of the companies' agents, Mr. Wiseman I believe his name was, who wanted me. He came to me and he said—

1587 Q. You are not asked in regard to that. I want to know the nature of your employment?

A. He wanted me to give him the names of parties that I knew that was acquainted with Mr. Hillmon, and I did. I seen some parties and told him that I had sent some parties to see the remains upon request of Mr. Wiseman.

Q. That was at the corner's inquest? A. Yes, sir.

Q. Now the entire employment? I want you to state the nature and character, and by whom, at any time since that, if there has been any employment by any one connected with th companies, attorneys or any one else; state what it was? What was the nature of it?

A. I was sent word one time to appear the first [time] of court. I was over here at the courthouse, and there was a question raised about the identification of a picture of John Hillmon, and Mr. Barker or Mr. Green, one, wanted me to go and bring some witnesses from Tonganoxie or near there to identify the small picture that was denied by the other side.

Q. When was that? A. I do not recollect what year.

By Mr. Hutchings: I move to strike out the answer of the witness because there has never been any picture presented here that has been denied by the plaintiff. No ruling.

Q. Well, was that the nature and extent of your employment?

A. I think that was the most of it, that I can recollect of now.

Q. That was during which trial of the case?

A. That was during the trial before Judge Brewer at the court house; I think the first trial.

Q. I will ask you if, since that time, you have had any connection with this case on behalf of the defendants in any way? If so, state what?

1588 A. I have not, any more than being in attendance on a subpoena.

Q. You were subpoenaed, and why you were not put upon the witness stand I suppose you do not know?

A. No sir.

Re-Cross Examination

By Mr. Hutchings.

Q. You mean to tell us you were employed by Wiseman?

A. Mr. Wiseman.

Q. To work in relation to the coroner's inquest?

A. To tell him anybody that I knew that knew Mr. Hillmon.

Q. He was going to put you on the stand?

A. Yes sir.

Q. And at another trial of the case you were employed by Green and Barker to hunt up witnesses for them?

A. In that respect.

Q. That was the first trial of the case, wasn't it?

A. Yes sir.

Q. And the subsequent trials of the case you had been present as a witness, subpoenaed by them? A. No sir.

Q. I wish you would state which one of these trials you have attended?

A. I think only one, I have attended, except the first one. That was at Topeka once. I might have been there twice.

Q. Were you not there in both 1895 and 1896, when this case was tried before?

A. Twice, and when it was tried before Judge Williams.

Q. Did you not stay there in the court house during the entire time of both of these trials? A. No sir.

Q. You say you were there. Do you remember the judge who tried the case at that time?

1589 A. I don't remember.

Q. Don't remember his name?

A. No sir. I was there.

Q. You were there during the entire trial were you not?

A. No sir.

Q. How long were you there?

A. I think I was there part of the two days and one night. I was excused without being put on the stand.

By Mr. Barker:

Q. On this cross-examination; did I understand you to state why you did not want to go on the witness stand at the coroner's inques?

The plaintiff objects to the question for the reason that the witness has not said why.

By the Court: He did not state.

Witness excused.

1590 The defendants and each of them next offered in evidence the testimony of Dr. V. G. Miller given upon the trial of 1885.

It is admitted by the parties that Dr. Miller is dead.

Said testimony was thereupon read in evidence and is in words and figures as follows, to wit:

Dr. V. G. Miller called for defendant, and after being duly sworn, testified as follows:

Questions by Mr. Barker:

Q. State your name and residence?

A. My name is V. G. Miller, Lawrence, Kansas.

Q. State where you lived in 1879? A. In Lawrence.

Q. What is your profession? A. That of a physician.

Q. How long have you practiced your profession?

A. Ever since 1852.

Q. Were you engaged in the practice of your profession in 1879 in Lawrence? A. I was.

Q. How many years have you practiced in Lawrence?

A. Since 1872.

Q. Were you acquainted with John W. Hillmon?

A. I was.

Q. When did you become acquainted with him—state as near as you can remember.

A. It was in 1878, probably in December.

Q. State if you ever measured John W. Hillmon?

A. I didn't measure him when he first presented himself. I took his word for it, as I often do.

Q. When was that?

A. It must have been a few days before the 17th of December.

Q. In connection with an application for life insurance?

A. Yes sir.

Q. On that occasion you didn't measure him but took his word.

1591 A. Yes sir.

Q. After that did you measure him correctly—accurately?

A. No, I can' say that I measured him accurately, yet I think the measurement was pretty accurate. I had him stand up beside the door and I measured him.

Q. When did you measure him and under what circumstances?

A. I measured him on the 17th day of December, 1878. Hillmon came into my office and said that he had made a mistake as to his height, that he was five feet nine inches in place of five feet eleven. That was the way he put it.

Q. Then what did you do?

A. He wanted to know if it would make any difference. I told him I didn't think it would, but he made a statement at that time and I took it down. That was the reason I remember the exact time. Then after that he stood up by the window and I measured him. His height was five feet nine inches.

Q. Did you make any record of that?

A. No, I made a record of the fact that he had stated it.

Q. How did the measurement which you made correspond with his statement as to hight?

A. It corresponded with his last statement.

Q. You may state if you were living in the city of Lawrence in April, 1879, at the time a dead body was brought there?

A. I was.

Q. State if you examined that body? A. I did.

Q. State the first time you examined it, who was with you, and what examination or investigation you made of the body at that time.

A. I know that Dr. Stuart was with me, and at that time we investigated the body and the character of the wound and the hight of the man, etc.

Q. What time in the day was that?

A. I think in the fore part of the day.

1592 Q. Do you remember of anybody being with you except Dr. Stuart, on that occasion?

A. There must have been three or four in the dead house.

Q. Was the body stripped on that occasion?

A. No, the body was not stripped except that we took it back and Dr. Stuart cut the sleeve and we examined the arm as to vaccination.

Q. Afterwards did you make further examination of the body?

A. Yes, sir, I was present when it was made. I didn't make very much of the examination.

Q. When did you make further examination?

A. That must have been three or four days afterwards; I don't know when it was. It was when the post-mortem ex-

amination was held. Then I made a still further examination after the body was taken up.

Q. I want to know if you examined it in reference to the coroner's inquest? A. Yes, sir.

Q. Who was present on that occasion—what doctors?

A. Dr. Fuller, Dr. Stuart, Dr. Miller, I think, and myself.

Q. Do you remember on what day that examination occurred? A. I do not.

Q. Now, state how complete that examination was?

A. I think most of the internal organs were examined.

Q. After that did you make a further examination?

A. Yes, sir.

Q. At the [semitary] A. I did.

Q. And then you examined that body how many times?

A. I was there in the presence of Dr. Stuart in the first place, and then in the presence of those doctors I have named, three or four of them, and then at the [semitary;] there were two or three doctors there, but I had borrowed a magnifying glass, such a one as watch makers have— that was at the [semitary].

1593 I want to call your attention now to the examination which you made of the arms of this person. When was the first examination that you made of the arms?

A. It was the morning that the man was brought in, or the next morning ,—the day the first examination was made. Dr. Stuart and I was present, and I think Mr. Bailey, and perhaps three or four others,—there were several others in the room.

Q. Now, will you state what you found on the first examination upon the arm of the dead body when it was brought in there?

A. We found two scars or scabs; they looked like scabs where the man might have been vaccinated.

Q. Did you examine sufficiently so you are positive in regard to the number?

A. Yes, I am, because sections were taken out, and those sections were carried over to Dr. Stuart's office and Dr. Fuller and I think some other physician and myself were there.

Q. Did you examine these scabs that were taken from the arm, at the office of Dr. Stuart afterwards? A. Yes, sir.

Q. Explain briefly to the jury the process of vaccination; that is, state the regular stages, what those stages are?

A. In the first place the matter is inserted and then there is a slight irritation, a little itching and irritation.

Q. How many days is it from the time the virus is inserted until the lymph is formed?

A. Well, I think four or five days.

Q. From that time how long is it until the scab is

1594 [it until the scab is] complete and falls off, usually?

A. I should think from that time it would be from eighteen to twenty days.

Q. I am speaking now from the time the vesicle is formed?

A. Eighteen to twenty days until the scab falls off.

Q. Then how long would that be from the time the virus is inserted until the scab would fall off?

A. Usually about twenty-five days.

Q. Did you examine this scab so that you were able to tell about how long this person had been vaccinated?

A. I did. I examined it especially with that view.

Q. So you are able to tell? A. I think I am.

Q. How long should you say this man had been vaccinated from the time the vesicles had formed?

A. I should think that it had probably been ten days.

Q. What would you say in regard to its being more or less than that?

A. It may have been less, and it certainly could not have been more.

Q. So that this body that you saw brought threre in your judgment could not have been vaccinated more than fifteen days.

A. Not more than fourteen or fifteen days.

Q. Were you present when this body was measured?

A. Yes, sir, I was present when it was measured.

Q. Do you know how long this body was?

A. It was five feet eleven inches and something. I don't recollect the exact length. It was five feet eleven inches and something.

Q. Did you make or was the body examined with reference to scars—particularly the face of the body?

A. I was called upon some how or other to go and see
1595 the body; it was reported that there were scars upon it, and that was the reason that I took that magnifying glass that I borrowed from the watch-maker. I went out to the grave yard and run it over his hands thoroughly and also examined his face when at the grave yard.

Q. Now, what would you say in regard to their being any scars upon his face? A. There was not any.

Q. State whether or not there was a callpus upon the face as large as a ten cent piece? A. There was not.

Q. You are positive in regard to that? A. Yes, sir.

Q. Calling your attention to the hands, particularly to the little finger; state whether or not there was any discolored skin upon that, or anything of that sort? A. There was not.

Q. Any scar or marks whatever?

A. None except a little scar probably an eight of an inch long on the little finger.

Q. Such as a ring mark?

A. There was nothing of that kind that I saw.

Q. Do you remember who was present at the time you measured this man?

A. Well, Dr. Stuart was I know, and Dr. Fuller.

Q. I mean at the office.

A. I don't think that anybody was present. There was nobody present the morning that Hillmon came in; I was in the office alone. He had a brother-in-law living in the same building on the same floor, and he came from his brother-in-law's door into my office made that statement that I have given you.

Q. Did you see the body dissected—open the stomach?

A. Yes, sir.

Q. You may state what was the condition of the
1596 stomach so far as being full or empty?

A. I don't think there was anything in it.

Q. State whether there was any appearance of food?

A. No, I can't say that there was.

Q. You can state whether it was empty or not.

A. It was empty.

Q. You stated that you were acquainted with this man Hillmon? A. Yes, sir.

Q. In regard to his brother-in-law's living near you—

A. That was probably the reason I saw Hillmon oftener than I would have seen him otherwise.

Q. There was only one dead body brought there?

A. Yes, sir.

Q. That was at Bailey & Smith's? A. Yes, sir.

Q. Now, will you state whether or not that was the body of John W. Hillmon? A. I know it was not.

Q. You may state if you know anything in regard to John W. Hillmon's teeth?

A. I know that as well as I know anything.

Q. What was the condition of his teeth?

A. On the left side there was either a tooth broken off or out; the left of the first front incisors.

Q. Now, I will call your attention to the condition of the teeth of the dead body?

A. They were a very perfect set of teeth.

Q. State [when] any of those teeth were gone or not?

A. They were not.

Q. You haven't got that book with you?

A. No, I have not. I had it here before, but I haven't it at this time. I examined it yesterday. I have it at my office.

Cross-Examination.

1597 Questions by Mr. Hutchings:

Q. When did you first see Hillmon?

A. I can't tell. I may have seen him before, but I didn't know [—] until he came to me to be examined for life insurance.

Q. What day was that?

A. Prior, not very many days, however, to the 17th day of December, 1878.

Q. About how long prior?

A. I don't know—perhaps ten days.

Q. That was the first time you ever recollect seeing him?

A. To know him, yes, sir.

Q. He came in to be examined for life insurance, did he?

A. Yes, sir.

Q. In making out these applications you generally read the questions off of your blank, and write down the answers?

A. Yes, sir.

Q. That is about the extent of the examination you usually make?

A. No, sir; we always take the respiration, measure the chest, and all that kind of a thing.

Q. Then you are very particular to do everything except measure the height? A. Yes, sir.

Q. And that you take a man's word for. You are very particular to do everything except measure the body?

[—] Yes, sir. If a man does not know his h-ight, I measure him. I am particular about that.

Q. Why don't you take his word as to the size of his chest?

A. That is one of the things that a man don't usually know.

Q. You take a man's word for his h-ight, and everything else is a matter of examination? A. Yes, sir.

1598 Q. That is the way you do it? A. Well, yes.

Q. Then, after he came there how long was he in your office when he made that examination?

A. The first examination?

Q. Yes.

A. Well, I suppose it would take an hour to make the examination—perhaps longer.

Q. Was there anybody present?

A. I don't know whether there was—I think Major Wiseman was present.

Q. Now, when he left your office when did you next see him? A. I perhaps seen him the next day.

Q. I don't want any perhaps, if you don't remember When do you remember next seeing him?

A. Well, I can't answer that direct, but it could not have been more than two or three days.

Q. Can you tell when you next saw him?

A. Not to the day or hour.

Q. Can you tell any time you saw him?

A. Yes, one time.
Q. When was that?
A. On the seventeenth day of December, 1878.
Q. How did you come to see him at that time?
A. That is the time he came in and told me he had made a mistake as to his h-ight.
Q. Now, can you tell any other time that you saw him?
A. Not to give the exast date, but I saw him frequently.
Q. Can you remember definitely any other time that you saw Hillmon so as to name the time?
A. So as to name the time? No, I can't.
Q. Can you tell any other time as to the place?
A. Yes, sir.
Q. When was it?
A. On the stairway leading up to his brother-in-law's and my office.
1599 Q. He was just going up and you were going down?
A. Yes, sir.
Q. Was that all there was of it?
A. I met him four or five times.
Q. On that occasion was that all there was of it?
A. No; when I got acquainted with him we stopped and talked.
Q. When did you stop and talk with him after that?
A. Some time between the 7th day of December for a few days and perhaps before that. I am sure I see Hillmon a dozen times.
Q. That is, you saw him?
A. Yes, and talked with him four or five times.
Q. Whereabouts did you talk to him?
A. Right about my office and the floor his brother-in-law worked on.
Q. The last time you say that you saw him was on the 17th day of December?
A. No, I didn't say that. I think I saw him afterwards. But I said I thought it; I know certain.
Q. Can you say certain that you ever saw him after that day? A. Yes, sir.
Q. When and where?
A. I can't, if you are going to confine me to the hour and day.
Q. I am not confining you to the hour and day.
A. Then I saw him two or three days afterwards at his brother-in-law's office.
Q. Can't you remember when it was the first time—when you saw him first?

A. To know him, yes; I think I can remember within four or five days.

Q. Tell us when it was.

Q. I think it was about ten days prior to the 17th of December, 1878—very close to that

1600 Q. Did you ever see him in the year 1879?

A. I don't know that I did.

Q. Do you think that you did? A. I don't know that I did.

Q. What do you think about it?

A. I don't know that I do; I don't believe I did. I may have done so, but I don't know.

Q. Then your acquaintance with him was between the seventh day of December and the seventeenth day of December?

A. No, I didn't state that. I say that on that time and about that time Hillmon came to me to be examined for life insurance.

By the Court: The witness said he saw him two or three days probably after the 7th; now you ask him if it was not between the 7th and 17th.

By Mr. Riggs: There is a purpose in this examination.

By the witness: I say that on the 17th of December I examined him and that prior to that time he was examined for life insurance and his policy written; it was some time I think in that month, and that is the reason I am putting it now somewhere about ten days before; and I think if you examine the policy you will find that is so.

Q. Then as I understand you, your acquaintance with John W. Hillmon dated exclusively about between the 7th day of December and about the 17th day of December, and that included the whole period of your acquaintance with that man?

A. No, I may have known him even after the 17th.

Q. Now then, you say that you measured him, but not very accurately? A. Well, I didn't accurately.

Q. And you measured him—where was it?—up against the window? A. Yes sir.

1601 Q. Was there anybody in there?

A. I don't know that there was.

Q. Was Wiseman in there? A. I don't think he was.

Q. What did you measure him with? A. A tape line.

Q. I want to ask you if that tape line that you had there hadn't been broken? A. No sir.

Q. Hadn't there been a piece broken off of it? A. No sir.

Q. Do you swear that? A. Yes sir.

Q. Is it not a fact that that tape line was broken and you had to double it together in one place, bring the inches together, so as to make an accurate measurement of the inches of it? A. I say that is not a fact.

Q. When you made that measurement didn't you double up one end of the tape line and hold it against the floor and Wiseman hold the other? A. No sir.

Q. Did you hold both ends of that tape line—one at the bottom and one at the top? A. No, I didn't.

Q. Didn't you tell me about the time of the other trial that that was a broken tape line? A. No sir.

Q. Do you say you didn't? A. I say I didn't.

Q. What did you do with the other end of the tape line, the end that you didn't hold?

A. I could get at that with the jury by telling them what I did. I took it up this way (illustrating) and held it up.

Q. Didn't you tell me about the time of the other trial that that measurement was so uncertain that you would no swear to it? A. I said it was not very accurate.

Q. Then you told me repeatedly in my office that that measurement was so uncertain that you would not swear to it?

A. No, I don't know that I told you that.

Q. Didn't you say that now?

A. I said I measured him and I stated that, and I
1602 now state it, that I measured him in that way. I measured him so that it came out five feet nine inches.

Q. But haven't you told me repeatedly since then that that measurement was so incorrect that you could not swear to it?

A. I don't think I have.

Q. Haven't you said that substantially today?

Objected to.

Q. Now, I want to ask you about that memorandum: When did you make that memorandum?

A. I made that on the 17th day of December, 1878, with John Hillmon standing no further than Judge Barker is from me now.

Q. You say it is a general rule of practice for you to take a statement of men's heights? A. Yes sir.

Q. Do you always find that a candidate for life insurance knows his exact measurement—is it not a fact that you seldom ever find a man but that gives you an estimate of his height?

A. Very often; if they don't know I measure them.

Q. Did you ever make such a memorandum as that in your book before—men frequently make incorrect statements?

A. Yes sir.

Q. And it frequently turns out so? A. Yes sir.

Q. Did you ever before when you found out an error of that kind had been made, make a memorandum of it?

A. Not in life insurance.

Q. What kind of a book did you put it in?

A. In the back part of my ledger.

Q. Is it a book that you use for such purposes, your account book? A. Yes sir.

Q. You wrote it in the back part of your ledger?

A. Yes sir

Q. You took particular pains on that day to go write
1603 right in that book that he had come in and told you that there was a mistake in his height? A. Yes sir.

Q. But you didn't put down the measurement that time you claim you measured him? A. Yes sir I did.

Q. Now sir, did you put down with that memorandum that he came in there and made that statement, the fact that you had measured him? A. I didn't make the statement.

Q. You didn't put it in your book? A. No.

Q. You didn't put down what he measured?

A. No, I didn't.

Q. Did anybody put down what he measured? A. No.

Q. Then his height is not in your book? A. No.

Q. Only what he said? A. Yes.

Q. Is the height that he gave put down in the book, or simply a memorandum that he said there was a mistake in his height? A. That is it exactly.

Q. Your memorandum don't, then, state what he said his height was? A. Yes sir.

Q. What does it say?

A. It says "I made a mistake in my height; I am five feet nine inches instead of five feet eleven inches as I stated in my policy."

Q. You had measured him then? A. Yes sir.

Q. And never made any statement of his measurement?

A. I had given you precisely and absolutely the statement of what I put down.

Q. What particular object had you in putting that down?

A. Just simply because the man came to me and wanted to know if it would make any difference. He came in there and said he had made a mistake and wanted to know of
1604 me if it would make any difference. I made a record of that kind of things so that I could present the facts if anything came up.

Q. You regarded that a presentation of his statement that he had made a false statement was going to help him?

A. The man was living yet.

Q. You made a record of it for Mr. Hillmon's benefit in case anything came up in regard to his policy, you made a record there in that book for his benefit?

A. No, that he had been mistaken simply. I told him I didn't think it would make any difference, and I so stated it and then put it down.

Q. What company was it that you made the examination
or? A. The Mutual Life of New York.
Q. That was the company you acted for? A. Yes, sir.
Q. Did you send the correction on it to the Mutual Life
'ompany?
A. No, sir, I didn't do anything. I told him I thought it
would make no difference. Never heard of it until this case
ame up.
Q. In the morning [what] that body arrived there did you
all on Dr. Stuart to go down there or did he call on you?
A. I don't believe it was either. I think that Mr. Smith
old me about it.
Q. How did you and Dr. Stuart come to go there?
A. I don't know whether we went together or met there.
Q. When you and Dr. Stuart were first there, was there
nybody else there?
A. The man that let us into the dead house.
Q. Was there anybody else?
A. I don't know. I think there was, but I don't recollect.
Q. At that time were you the examiner for the Mutual
Life and Dr. Stuart the examiner for the other two com-
panies? A. So I understood afterwards.
1605 Q. Did you notify any of the parties, Mrs. Hillmon
or anybody that represented her, that you were going
down there to examine the corpse?
A. I can't tell whether I did or not.
Q. You think you did, don't you?
A. No, sir, I don't think I did; but I will tell you what
was said.
Q. You needn't mind that? A. I don't think I did.
Q. Well, was Dr. Fuller there? A. The first morning?
Q. The first morning? A. I think not.
Q. Was there any other physician there besides you and
Dr. Stuart? A. I don't believe there was.
Q. Were you there when that vaccination mark was cut
out of the arm? A. Yes, sir.
Q. Who did it? A. I think Dr. Stuart?
Q. What did he do it with?
A. He did it with a knife.
Q. What did he do with it after he cut it off?
A. He took it over to Dr. Stuart's office.
Q. Then afterwards other doctors came in there and saw
it? A. Yes, sir; and then we examined it.
Q. State if there was anybody present but you and Doctor
Stuart when it was cut? A. I don't think there was.
Q. Was anybody besides Smith?
A. I don't know. There might have been others.

Q. I ask you if there was any other physicians present when you cut that out? A. There was not.

Q. Was there any vaccination marks on the arm when the coroner's jury had the body under consideration?

A. I don't think there was.

Q. Those marks were taken from the body before the coroner's jury had an opportunity to examine the body?

A. I think so.

1606 Q. You said you recollected noticing his teeth?

A. I did.

Q. You made no examination of the teeth for the purpose of insurance? A. Nothing at all.

Q. Then your observation of the teeth was just as a mere accident? A. Just as it happened.

Q. Your eye-sight is pretty poor, is it not?—has been for a number of years? A. No, not very long.

Q. It has been before the time this happened,—it was pretty poor—is not that a fact?

A. I couldn't say that exactly. I could read then without glasses.

Q. Is not it a fact that your eyesight has been pretty poor for some time before you examined Hillmon—you have had ever since before that to use your glasses whenever you do anything? A. No, sir, that is not a fact.

Q. How long have you been wearing glasses?

A. Off and on for ten, twelve or fourteen years.

Q. Now, where was it that you observed his teeth,—on what occasion was it?

A. It was on the occasion when Hillmon came in and made the statement to me that he had made a mistake.

Q. In his height? A. Yes, sir.

Q. Was that the only time?

A. That was the only time that I noticed that specially.

Q. How long did Hillmon remain in your office that time?

A. Anyhow from half an hour to an hour.

Q. It took him an hour to an hour to state to you that he had made a mistake, did it? A. No, that isn't so.

Q. What did he do?

A. We talked about cattle ranches and sheep and all such things.

1607 Q. You know Samuel A. Riggs? A. Yes, sir.

Q. How are his teeth in front?

A. I don't know, but I think my attention was called to them on the other trial, and I think I know something about it. I think there is a shortage on one side of his jaw.

Q. Is there any teeth out? A. I don't know.

Q. In front? A. I don't know.

Q. You have talked with him a great many more times than you ever did with Hillmon, haven't you? A. Yes, sir.

[—] Jacob House,—you know him? A. Yes, sir.
Q. How many years have you been acquainted with him?
A. Six or eight years.
Q. You see him every day, several times a day for that matter? A. Yes, sir.
Q. And you have talked with him a great many times?
A. Yes.
Q. Tell me how his front teeth are? A. I don't know.
Q. Do you know anything about his teeth?
A. I don't.
Q. Do you know whether he has a mustache or not?
A. I don't know as I have examined his as to that.
Q. Do you know Joseph E. Riggs? A. Yes, sir,
Q. Have you ever examined his teeth? A. No.
Q. Do you know anything about his teeth? A. No.
Q. Do you know whether any of them are out or not?
A. No.
Q. Do you know whether he wears a mustache?
A. I think he does.
Q. There is a little scientific experiment that you inaugurated, doctor, that I want to converse with you about; that is, taking a red-hot iron and trying to make a vaccination mark on a dead man's arm? A. I did that.
1608 Q. You saw Hillmon, you knew it was not him?
A. Yes, sir.
Q. That was a pretty plain thing to you?
A. Yes, it was to me.
Q. And you saw those vaccination marks on there—you understood about that? A. Yes, sir.
Q. What was your object in burning that arm?
A. Because Dr. Stuart had stated to me that that vaccination had been done for a certain length of time, twenty or twenty-odd days, and I knew this condition of things [didn't] existed that long and the tissues beneath hadn't been broken down, and that was the reason that I suggested that the same thing would come out by a burn, that the tissues would not be broken down, and I suggested the matter just simply from that fact, that I wanted to know that fact, and the doctors gratified me; but we could not bring about anything of the kind.
Q. That was all with the assumption that the body was Hillmon's? A. No, it was just the opposite.
Q. You stated that Dr. Stuart said that that vacination had been on that arm for twenty-five days. And you thought you had some doubt about it?
A. I was satisfied that this vaccination hadn't been there twenty-five days.
Q. What was the purpose of the experiment, then?

A. To show that it hadn't been there twenty-five days.
Q. Who did you want to satisfy?
A. I wanted to satisfy myself I guess.
Q. Then you had some doubt about the vaccination having been on for a certain length of time?
A. Not as to its being Hillmon and as to the vaccination.
Q. You had some doubt as to the time it had been
1609 there? A. I hadn't, no.
Q. Put on your glasses, doctor, and see whose signature that is? (Handing witness paper.—Rep.)?
A. That is mine.
Q. Whose is that?
A. I expect that that was Hillmon's.
Q. Now look at the body of this and see whose writing it is—whose writing is that in the medical examination?
A. It is mine.
Q. There is your signature to it again—this? A. Yes, sir.
Q. This date, is this—read it to the jury?
A. That is December 5.
Q. What year? A. 1878.
Q. That is your writing, too, is it? A. Yes, sir.
Q. Now then, look right there. Here is the answer and the question, "What is your h-ight? Five feet eleven inches," You wrote that? A. Yes, sir.
Q. And you made it out on this day?
A. Yes, sir, it must have been so.
Q. And wrote it into the policy? A. Yes, sir, I did.
Q. You were paid for your services on that occasion, were you not—the post mortem examination?
A. I got nothing for the post-mortem.
Q. For your attendance on the inquest?
A. For giving testimony before the inquest I was paid.
Q. How much were you paid? A. I don't know.
Q. Didn't you state before?
A. No, I don't think I did. If I did I have forgotten it now.
Q. Who paid you?
A. I believe I go my money from Dr. Morris, the coroner.
Q. Do you swear to that?
A. No, I don't swear positively, but I think so.
1610 Q. You don't know how much you got? A. No

Redirect Examination.

Questions by Mr. Barker:
Q. You observed the wound through the head of this person? A. Yes, sir.
Q. I want you to state now from the nature of that wound, what would be your judgment in regard to that, what effect it would have? whether a person injured in that way would fall instantly or not?

A. I think he would, sir, without a doubt.
Q. Another question: in regard to the age of this body?
A. That is something that I don't know anything about. It was comparatively a young man, I know, but I didn't examine him as to that point, and I don't know.
Q. Do you remember the clothes on that corpse—whether they fit or not?
A. They didn't fit very well. They were short in the arms and short in the legs.
Q. Did you notice in regard to their being loose in the chest?
A. Yes, they were plenty large enough, at least about the chest and sleeve, and the pantaloons were too in the leg.

Questions by Mr. Hutchings:
Q. The fit of a suit of clothes put on a man would depend something about how they were pulled around and fitted on, would it not?
A. Yes, but these were too short.
Q. It would be a question of adjustment, would it not?
A. Yes, except—
Q. You want to put in the exceptions all the time. Suppose a corpse had been ridden eighty or ninety miles in
1611 a wagon, would you expect the clothes to be fitting all around like a dude's? A. No, I don't know as I would.
Q. Are you a tailor? A. No, sir.
Q. Are you an expert on a suit of clothes?
A. No, I am not.

Questions by Mr. Barker:
Q. Do you recognize that picture? A. Yes.
Q. Is that the picture of the person you have been speaking of? A. Yes, sir.
Q. Do you recognize that? A. Yes, sir.
Q. Is that a picture of the same person? A. No, sir.
Q. Don't that look like him?
A. No, sir, and it aint him, either.

Questions by Mr. Hutchings:
Q. Did you say that you didn't recognize that last picture? A. No, I didn't say that.
Q. What did you say?
A. I said that was not the picture I looked at first.
Q. Do you recognize it?
A. Yes, sir; I think that was the man that was buried out there.
Q. The remark you made out there was that you thought it was the picture of the man that was buried there?
A. Yes, sir, at Lawrence.

Q. The man that was buried at Lawrence? A. Yes, sir.

Q. Examine it closely. After you have examined it closely we wish you to state to the jury wherein the resemblance to that dead body that was buried at Lawrence exists?

By Mr. Riggs: He said that he thought he recognized that as the body of the man that was buried.

1612 By the witness: I didn't say that exactly, but I say this. I think I see a resemblance to the man that was buried there across the maler bones, and then I think I see a resemblance across the jaws here.

Q. Then is there any other point of resemblance, doctor, to the man that was buried in Lawrence?

A. No, I don't think that there was.

Q. In the length of the face for instance?

A. That I couldn't tell.

Q. There is a pretty strong resemblance between the two—between this and the man that was buried in Lawrence?

A. There is in some things, but the picture of the man that was buried at Medicine Lodge I never saw that man.

Q. I mean the man that was buried at Lawrence, A say this picture is a strong resemblance to him?

A. In some things it does not look so strong, and in some things it does. I would say this, that the coat and the character of the goods the coat was made of looks very much like it, but otherwise I can't see very much resemblance. Across the maler bones it looks some like the man they brought here.

Q. And the lower part of the face?

A. Well, I think the jaw is pretty heavy, but that man I think had a pretty heavy jaw.

Q. Then you think the jaws have a striking resemblance?

A. Somewhat.

Q. Compare the two pictures.

A. This is the picture of the dead man as it was taken out at the grave yard.

Q. Now then, I would like to have you state if the clothes were the same or anything like it, in the two pictures?

A. They don't show, but I am satisfied clothes the 1613 man had on.

Q. You think this picture shows the clothes more plainly? A. Yes sir.

Q. Now, then, the resemblance in the jaws?

A. Nothing about it except the chin.

Q. In the chin you think there is a resemblance?

A. Yes, somewhat.

Q. Across the maler bones

A. This picture is broader, and it looks as though the man that was brought here had a broader space across the maler bones than this one.

Q. See if this picture don't show the broadest across the malar bones? A. No, I don't think it does.

Q. What other resemblance did you see between the two?

A. Not much as it is presented here. I don't see so much after looking at it a while; I only see that this coat resembles the coat that I saw in Bailey's shop.

Q. You stated it was your recollection, did you not, before you compared these pictures, that the picture of the coat of this man was the picture of the kind of the coat the body had on? A. That was the first impression I had.

Q. That was the way your recollection run?

A. Yes, but now I don't see so much resemblance.

Witness dismissed.

Dr. V. G. Miller recalled for defendant.

Direct Examination

By Mr. Green:

Q. You spoke the other day, that at the time you made the measurement of Mr. Hillmon you put it down in a book? Have you the book here present?

A. Yes sir, the book is here.

1614 Q. Will you turn to the entry? A. Here it is.

By Mr. Green: We offer this in evidence.

By Mr. Hutchings: We object to the introduction of that memoranda. It is a mere matter for him to refer to. His memorandum is not evidence.

By the Court: It can be admitted.

By Mr. Hutchings: We except.

By Mr. Green: I will read the entry.

(The plaintiff objected to the reading of said entry in evidence as hearsay. Objection sustained; defendants and each of them duly except.)

Cross examination

By Mr. Hutchings:

Q. What is this book? A. An old ledger.

Q. An account book? A. Yes sir.

Q. You never made any such entries as that in that book before did you? A. I made other entries.

Q. What other entries?

A. There is one (indicating)

Q. That is your account with the Presbyterian church?

A. Yes sir.

Q. Did you ever make any other memoranda in this book of that character before?

A. Yes sir—not of that character—no.

Q. Did you ever make any other memoranda of that character in this book before?

A. I think not. The book is there you can look at it.

Witness dismissed.

(At the request of the defendants the book identified by the witness is marked Exhibit K by the Court.)

The plaintiff admits that the book Exhibit K is the book shown to Dr. Miller and that it contains the entry concerning which he testified.

1615 The defendants offer the book in evidence and offer to read the entry upon page 328.

Plaintiff objects to the admission of the book or to the reading of said entry in evidence as hearsay.

Objection sustained; the defendants and each of them duly except.)

1616 Charles J. Webb, a witness produced by the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Ware:

State your name? A. Charles J. Webb.

Q. Where do you live Mr. Webb? A. Topeka, Kansas.

Q. What is your occupation?

A. It includes that of Chief Clerk to the Superintendent of the Eastern Division of the Atchison, Topeka & Santa Fe Railway Co.

Q. I will ask you whether, as such chief clerk, you have in your custody any of the time tables and files of the Santa Fe Railroad? A. I have.

Q. I will ask you if you have the time tables or schedules back in 1879? A. I have.

Q. March, 1879? A. Yes, sir.

Q. I will ask you if you have got a schedule or time table of that date in your possession now? A. I have.

Q. Will you please produce it?

(Witness does so.)

Q. I will ask you where this time table, or schedule, comes from?

A. It came from the official files in the Superintendent's office of the Atchison, Topeka & Santa Fe Railroad Company at Topeka.

Q. In your custody and control? A. Yes, sir.

Q. I will ask you why these time schedules are printed?

A. This time schedule is printed for the information

1617 government, and instruction of the railway employees of the Atchison, Topeka and Santa Fe Railroad Company.

Q. Does the railroad, as far as possible, run trains on the time of this schedule? A. Yes, sir.

Q. Will you look at this schedule of Mch. 30th, 1879, and state when a person leaving Lawrence, Kansas, after dinner, between twelve and one o'clock, at noon, would arrive at Hutchison, Kansas?

By Mr. Hutchings: We object to that as secondary evidence. The paper itself is the best evidence of what it shows. I do not know what the purpose of it is unless it is to show that the train was on time.

By the Court: The bearing would be this: Alva Baldwin testified that he arrived in Hutchinson and made inquiries of an undertaker as to the removal of the corpse and was advised that the body ought not to be removed at that time of night. I suppose the purpose is to show that he arrived there too late to transact such business. You will notice that this time table is of March 30th.

By Mr. Ware: We have not got the time of Mr. Alva Baldwin's visit exactly.

The plaintiff withdraws her objection.

A. The time schedule shows that a train was due to leave Lawrence at 12-44 p. m.; that is, 44 minutes past noon, past twelve o'clock; that a person taking that train would arrive at Hutchinson at 10:45 p. m. of the same day.

Cross-Examination

By Mr. Hutchings:

Q. Were you in the employ of the company in 1879?

A. No, sir.

Q. All you know about it is this paper? A. Yes, sir.

Q. You have no actual knowledge as to when any
1618 train left Lawrence that day, or when it reached Hutchinson? A. No, sir.

Q. You do not know when the connecting mail coaches or stages that left Hutchinson would go south to Medicine Lodge either? A. No, sir.

Q. There is a train register kept, is there not, at Hutchinson? Does not every train, when it gets there, register the time of its actual arrival? A. I think there is at this time.

Q. If you desired to show what time this train or any train reached Hutchinson that day, there is a register kept down there of the arrival of each train? A. There was.

Redirect Examination

By Mr. Ware:

Q. As a mater of fact, trains do not generally run ahead of time, do they? A. No, sir, not scheduled trains.

Q. You may state what further trains left Lawrence and arrived in Hutchinson; that is, passenger trains?

A. Train No. 53 is scheduled to leave Lawrence at 1-11 a. m., arriving at Topeka at 2-27 a. m. and connecting at Topeka with train No. 3, leaving Topeka at 3 a. m., arriving at Hutchinson at 11-56 a. m.

Q. That is four minutes before noon? A. Yes, sir.

Q. These were the only two passengers trains at that time on the Santa Fe? A. The only two shown on this schedule.

Q. At that time the Santa Fe did not go through to California?

1619 A. This schedule only shows as far as Pueblo, Colorado and south of LaJunta as far as Otero, Mexico.

Cross-Examination

By Mr. Huchings:

Q. There was one train that left Lawrence at what hour, you say; that you read in your last answer?

A. One train scheduled to leave Lawrence at 12-44 p. m. and scheduled to arrive at Hutchinson at 10-45 p. m. of the same day.

Q. That would be just after noon?

A. Forty-four minutes past noon.

Q. And the train would get into Hutchinson at 11-45?

A. 10-45.

Q. And the other train left Lawrence when?

A. Scheduled to leave Lawrence at 1-11 a. m.

Q. That is, just after midnight?

A. Yes, sir, and arriving at Hutchinson at 11-56 a. m.

Q. That is just before noon? A. Yes, sir.

By the Court: Are there, in these time schedules, notes calling attention to specific changes in time?

A. The rule is, simply to call attention to any important change which may have been made from the issue of the current time table.

By Mr. Ware: (Producing bound volume of newspapers.)

Q. Will you admit that these are the files of the Hutchinson News? I want to show the published time tables in the weekly newspapers of the Santa Fe Road?

The plaintiff make no objection.

Mr. Ware reads as follows: "Hutchinson News,
1620 Thursday, March 27th, 1879, railroad time table, No. 1, express and passenger, going west 10-45 p. m.; No. 3, Dodge City express, going west 12-30 p. m.; No. 3, Immigrant, 1-36 p. m.; No. 5, freight, 12-5 p. m."

The reason I call attention to this is, that this time table shows the same 10-45 going west as the time card does, and this is Mch. 27th, 1879.

Witness excused.

1621 The defendants and each of them next offered to read in evidence the diary found upon the dead body, already offered in evidence by the plaintiff.

By Mr. Hutchings: We offered the diary because it was found upon the body and because it had some bearing on the question of identity, but as to particular matters written in this diary, while we have no objection to their reading it, they read it as their own evidence. The statements made in the diary I apprehend would be incompetent, immaterial and irrelevant to anything here.

By Mr. Ware: When Mr. Hutchings introduced the book, I asked him if he introduced the book or the book and contents and he said the book and contents.

By Mr. Hutchings: I introduced it so far as to show it was his diary, but if it is introduced for the purpose of proving anything that is stated in the diary, they make it their own evidence, I apprehend. I think we would have the right to show that Hillmon's jack knife was found in the pocket of this dead body, his wife's picture, his wife's letter, his discharge and other papers, going to the question of its identity, without introducing the particular contents. I want to make this point, that so far as the contents is concerned, further than the identity of the book, it is objected to as incompetent, irrelevant and immaterial and hearsay.

The Court overruled the objection, to which action and ruling of the Court, the plaintiff then and there duly excepted.

Mr. Green thereupon read said dairy in full to the jury. It is in words and figures as follows, to-wit:

1622 "John W. Hillmon's Book. Residence, Lawrence, Kansas. Mrs. S. E. Hillmon, corner Henry and Alabam St., Lawrence, Kan. Traveling Companion, J. H. Brown; Residence, Wyandotte, Kan.

My first memorandum I lost after I had been out a few days, so I replaced it with a new one. Could not recall all that I had in my first, but placed my dates correct. I lost it the second day from Wichita, togeather with some cough medicine. I had caught a severe cold at Wichita and provided for it. Colds are numerous through this part. Prescription, Bone Bay Root.

I left Lawrence on the 18 of Dec., 1878, for the purpes of looking up a stock ranche in the southwest. Went by way of Atchison, Topeka and Santafee to Wichita—Arrived at Wichita at 12 at night, found snow about 3 inches deep. On the

morning of the 19 looked around town during the day. Wichita is a lively town. Streets are full of teams; every day they will face the storm to go to the city. 20 rather warm overhead, the snow melted some, wrote a letter home and one to Baldwin, looked around some for a team, did not get any up to this evening. 21st received a letter from Sallie, bought a team at auction from old 4 eyes, the rest of the day was spent around town. Sunday 22 at Wichita, the day passed by slow and tedious wrote home in the evening went to bed early. 23d had some blacksmithing done, very cold and stormy. Tuesday 24 cold and disagreeable, did not start, thought would remain until Christmas. Christmas comes and a dry and lonesome one it was. On- dry turkey made the roast for about 20 boarders. 26. Started earley for the west, turned cold and begun to storm, drove all day, nearly faceing the storm, the country is dotted with houses all over the prairie, no timber and no
1623 accommodations to amount to anything. Stoped at night about 25 miles from Wichita, their principal fuel is corn stalks. 27. Cold, a long drive through rather an unsettled country. Jack frosted his feet, had to break the road most of the way—snow drifted pretty bad—horses as well as us very tired, stoped for the night with some Hossiers, though the made us very confortable—28 drove 35 miles and arrived at Medacine Lodge, about 4 in the evening, the weather has been so cold and the scarcity of fuel has prevented us from camping out there is no timber from here to Wichita, about one hundred miles. Setlers have to haul what timber they use 40 or 50 miles, received a letter from T. Seleg, Lawrence, Kan., did not receive any word from home—29 at Medacine Lodge snowed during the past night to cold to travel, remained in town, wrote a letter home, went to church at night—Medacine affords a very good congregation for a new and frontier town—30 had some work done, snowed some during the day, pretty cold weather, do not like to start out while the bad weather continues. Had a little excitement in town, a party being tried for killing his neighbors ox, could not do without some excitement once in a while. 31st morning did intend to start, but storming so I think it will prevent us from starting. the weather has been so bad I could not look over the country to any advantage, we will have to abandon our trip until spring if the weather does not get better. the weather moderated in the forenoon and we continued our journey as far west as Sun City Kan. we traveled through a splendid stock country up the Medicine River, so very nice farms Stock generaly looks very well considering the rough weather—we put up at what I call a rare chance the night of the 31st in my estimation and so thought Jack. Our stock well cared for we had nothing more to look after for the night except take items

everything in readiness a few whispers around the fam-
1624 ily bride and groom then a scatering Jack and I left
alone the parties to be made happy retired to a back
shed, 3 or 4 followed and then out of sight of all spectators a
little old man pronounced them man and wife using his own
langague the child was born for we could hear a part of the
cermony shortly after the parties both expressed their anxiety
to retire the bride pulled off her shoes and said she was going
to bed—but preparations had not been made for the night and
she had no gown she sent for one to a neighbor it was brought
into the seting room waded up and passed to the Bride then I
guess she was hapy for she was not seen any more until morn-
ing the 1st of Jan 1879—Shortly after Jack and I was up we
was alone the young bride came in looking as sweet as ever
Barefooted and asked Jack if he knew where her shoes was and
was informed they had not been seen she was about seventeen
years of age I guess the scissors was on the window This
morning blew up cold and snowing I think by far the coldest
day I have experienced this winter. We are compelled to
remain in shelter until the storm abates Our accommoda-
tions are a little better than camp. in this country though
timber is plenty and people do not have to resort to corn stalks
for fuel as they do in Kingman County. New Years day
passed out dry for me, though a drunken crowd around all
day. I never was so tired of a drunken outfit in my life. 2nd
Cold and frosty, the wind blew cold. We did not take our
team out of the barn. Wrote a letter to Sallie this even-
ing. I have not heard from home since I left
Wichita I have caught cold and do not feel much
like doing anything. My bones ache like I was go-
ing to chill. things are not quieted down here
1625 yet, some of the sports of the past day are hanging
around with black eyes, did not go to bed until very
late, have got cold and about past traveling. Morning of the
3d. rather mild in the morning. I am sick this morning, do
not feel able to do anything, sick all night, got up the morning
of the 4th sick. Could not eat any breakfast, have not
any thing since yesterday morning, snowed some during the
day. Very cold not much trade around town, I call this a
dull place for one to stop at, the town is made up of curious
people. Sullivan and myself put in most of the time laugh-
ing at the odity of some of the inhabitants. I guess they
think us about as odd as we do them. The city furnished a
dance Saturday night. Went over and looked on a short
time, the people seemed to enjoy themselves very well. Mostly
married Laydyes attended, snowed about two inches during the

night 5—Waited until near noon and started. Would rather camp out in a storm than stay in a place like Whitikers. I don't think the cooks wash more than once a week at most, did not go but a short distance until it began to snow again. We went into camp on the Medicine River. We have plenty of timber and shelter there. Neither Jack or myself is hardly able to travel on account of cold, think we will remain here two or three days. 6th. After looking around we find that we have broke our wagon. Will have to go back to Sun City to get it fixed, the wind is blowing very hard and cold I think something very strange will happen soon, it has not snowed any since yesterday, have just had a good time after our horses, they got loose and seem all over the country. Think they are done running for a while except they are hiched up—last night was very cold and blustry—this morning the 7th threatens snow, wind cold from the north,
1626 we are in camp on the Medicine River at Myers Ranche about 12 miles west of Sun City. Jack is complaining with cold, nothing to do today except set by the fire and it smokes so we can hardly see at times, this kind of weather will make one almost curse camp life and himself for being so silly as to start on a trip of this kind during the winter months. I have prophesied a cold winter this winter but so far it has overreached my expectations. My opinion was formed by the extra quality of all kinds of furs both small and large. Muskrats in the north built higher than they was known to for years. The sun goes down tonight dark with snow and wind. I think it has been about as blustry afternoon as I have ever witnessed. This kind of weather is what will condemn this part of the country for stock, it will be almost impossible to save near all the stock in the country. Admitting it a good country, why was man made to drift in the world like wild animals. I gues the intent was good and one lives what we can make them. I would freely give fifty dollars if I had postponed my trip until one month later at least. I think then a man would have some show to travel with safety, while now he has but very little. 8th rather pleasant over head. Old man Myers came down to camp and talked until we both had the headache, he thinks himself the pioneer of Kansas, and has only been in the country about 4 years—he says woman is a swindle and that every one knows. At least his for they look worse than H-l sewed for murder. We have concluded that we will set in camp a day or two longer and see what the weather is going to do. A fair prospect for a good day tomorrow. 9th. Clear and rather cold. Most to cold to look around the country. Jack and I amused ourselves by keeping a good fire and seeing it burn down. I am getting very tired of keeping batch. Think I will have to

get a camp russler if I stay out much longer. 10, looked
1627 around over the country some, was down to Sun City
received some mail from home. Seen considerable cattle scattered over the hills, they begin to look as though they would soon require something more nourishing than pasture to keep them alive until spring, the weather looks gloomy again though it is not very cold the wind is very calm. Jan. 11. My birthday, snowing again if I had a sleigh think I could travel with ease, I begin to think that this trip is money throwed away when it might as well been saved by a little prudence, besides the rough weather has made double the expense I had calculated when I started. I made calculations that the trip for three months and see all the country that I care to see would not cost me to exceed three hundred dollars, including rig, it being light and cheap, but express this kind of weather when we have got to lay up so much more than double traveling expenses while out with a team. The last few days I have been in camp over a smoke until we are both about as black as Indians—evening faired off warm and clear thawed some sun sets clear I think it would require a weather clerk to keep track of the weather anything like accurate. 13th. We left Medicine River early in the morning it had every appearance of being a beautiful day traveled northwest crossed the head of Spring Creek near Banister's ranche. We found the road very rough and tiresome. The sand hills numerous, snow badly drifted in many places. We put up for the night at Smith's ranche 14 miles southeast of Kinsley. I should like to own all this country if I had it on a big hill or mountain where I could roll it down by sections. I think then I could save many from living out a miserable
life and existence which they are trying to do here on
1628 these bald prairies without wood or coal to keep themselves warm, if the country afforded such many of them are not able to buy but burn corn stalks and hay. 13th drove over a very rough road to Kingsley on the Arkansas River it is a very nice little town and situated on Corn Creek within a half of a mile of where we had a fight with the Indians the 19th of Nov. 1868 now surrounded with a fine farm country then the heart of the Indian depredations we lost one of our boys and was buried near by. 14 a very cold and uncomfortable travling we started down the river in the morning thing if the weather did not moderate we could go home. We passed Garfield a very nice little town as yet an infant a morral reprisentation—Arrived at Larnard in the evening so cold we could not camp out so we put up at the Larnard house and our horses in the barn we never put up ourselves and leave our stock to the weather if our stock must have rough fare we share it with them. 15 Stormy remained at Larned

had broke our wagon and had to stop to get it repaired did not get through until noon and would not start for half days travel wrote a letter home the 14—16 Started early clear but cold until night blew up cold and ugly at night our winter still holds good every one complains with cold tonight at Great Bend City. Morality seems to predominate in all of these little towns at least they will hold that idea to straingers they show up well in the moonlight but you must not look sideways. 17 sick and unable to travel so I conclude to remain at the bend the day was clear and warm—I think by far the warmest day since I have been on the trip—18 did not feel very well but started on my trip passed through some very fine country two or three small towns put up for the night at Sterling 33
1629 miles east of the Bend. I do not feel very well have got the headache have had it all day—

Sunday the 19th we put in a very tiresome day we traveled about 43 miles it was late when we put up for the night we drove further than we wanted to on account of not being able to find a stopping place. We would have camped but the ground was covered with snow and nothing for fuel, the roads this afternoon has been very rough the snow melting some makes considerable slush. We have good accommodations to-night furnished by a farmer 22 miles northwest of Wichita. I think when I leave Wichita again I shall adopt a camp life the rest of my trip. if the weather will possibly admit of it. last night we put up at the Green Mountain house in Sterling, I think the poorest fare that I ever got at any hotel in my life. I told the proprietor when he offered me one of his cards that I had no use for it. That I would rather put up with a granger if he fed me on parched corn than patronize him again. 20. Warm and pleasant overhead roads very bad mud and ice. Arrived at Wichita in the afternoon think we will wait a few days and see if the traveling will get better. think will go south to the nation line next time—21st Another thawing day farmers in town by the wholesale marketing produce hogs wheat and corn. The rodes are so muddy that teams cannot take much of a load. I have been walking around town most of the day as tired as if I had been hard at work. Jack puts in the day smoking and walking around town—22nd At Wichita waiting for the roads to get a little better, they are very muddy, the weather looks some like a storm again — Cloudy and dark Wichita is blocked with teams in the streets. I think it the boss town of Kansas for business, hogs seem to be in great demand, buyers are quarling over them to-day, they are bring about $2.60 for good ones—wheat 54 cts Corn is selling about 18 cts
1630 Wichita is having a glorious time, that is the praying portion of the city 22d went to church in the evening

I thought it would last all night. They have several mourners fish for the preachers.

23d Weather fair Mud in the streets about 3 in deep passed the most of the day at the hotel, Jack and I went to the revival again, went to bed at nine, one of our horses sick, I guess we drove him too hard that last few days out—24" at Wichita geting kind of tired of this place, nothing to do, that makes it very lonesome and the time pass slow. I think while I am idle here I will make a trip down home. I will not be able to continue my journey for a short time and I might as well go home as to remain here. We went to the revival in the evening, was about the first to church stayed until 10 went to the hotel and left church before they dismissed—25th Started home morning at 5 o'clock arrived at Lawrence at half past three evening. Met Mr. Wiseman of the Mutual Life at Topeka—26 & 27 at home—28—left Lawrence 12-40 by A. T. & S. fe for Wichita, weather damp and cloudy—Arrived at Wichita 10 in the evening.

29 Our team was not in a traveling condition so I had to remain in town—Wrote a letter home—weather damp and cloudy—30—rained all day streets very muddy, not much doing in town, went to church at night—31—drizled rain most of the day—streets very muddy almost impossible to get around, the prospect for going west very soon is not very good —time passes very slow, I am lonesome and hardly know what to do to spend the time.

Feb. 1st Morning clear and warm during the day, the roads muddy the river is broke up at this place. I have remained pretty much all day at the hotel finished a letter and mailed it for home this morning Went to church in the even-
1631 ing. the revival is holding out well—2nd Sunday. Everything quiet met Hartman an old friend of mine from west Texas he just returned from a trip south along the nation line does not speak very favorable for that part as a stock country, thinks the settlers is close on the north and the territory not suitable for a perminent location, thinks in the corse of time the government would be liable to give one trouble if he attempted to hold stock on the Indian land—3d—rather warm and clear, went to church 4—stormy snowed and blew like winter had just begun 5 snowed and thawed roads very bad every thing quiet around town.

6 snow mostly disappeared, we changed boarding houses went to church think I am attending pretty regular the last few days. don't think I am a very good Christian yet—7 wrote a letter home, done nothing all day except walk around town, we are regular at our hotel for our meals and lodging to-day is very warm for the season of the year, farmers are turning out in numbers with produce of all kinds some stock and buying machinery getting ready for spring work low

prices of farm production does not discourage them but only makes them buy more farm tools to enable them to raise corn and wheat in greater abundance, they think that the only was to catch up with hard times—8—Still I remain in Wichita waiting for the roads to get in a passable condition they are very bad I think I never did as hard work in my life as I have done in the past six weeks, it is killing me almost by inches to loaf around and do nothing as I have been doing of late. I think I will leave here within a day or two if I have to go home—9—Sunday went to the office early received a letter from home to-day is another tired and lonesome day for me, time seems to pass so very slow, noth-
1632 ing but mud from morning until night—10—Wrote a letter to Sallie—11-12-13. Stormy and very cold, horses facing the wind gathered great icicles on their nostrils.

14—started for home cold with snow in the fore part of the day—afternoon rather pleasant Arrived at home in the evening—15—at home pleasant until evening began snowing about sundown. 16—Sunday morning about five inches of snow on the ground still and warm—17—cloudy and cool I am at home at Lawrence. 18, 19, 20 at home. 21st 22d at Levis 23d came home in evening very warm I don't see as there is any good to grow out of me trying to keep track of my misdeeds. While I am as apt to err as any one and that I would be sure not to make a memorandum of and only show up the best part as others have done before me I do not want to be an exception to the rule or make any new ones so to keep from answering any hard questions if any one would want to know where I spent my evenings I will say I have forgotten to make a memorandum of the time and my memory is bad as I never charge it with anything and of course cannot answer promptly.

So ends this part at Lawrence.

Feb. 23—79

(Signed) J. W. HILLMON.

Received a letter from home the 14 at Medicine Lodge.

1633 The defendants and each of them next offered and read in evidence the deposition of W. H. Lamon, taken on the 22nd day of August, 1892, at Los Angeles, California. It is as follows, to wit:

W. H. Lamon, of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth the whole truth and nothing but the truth, deposeth and saith as follows:

Direct Examination,

By James W. Green, Esq.:

Question. You may state your name, age and place of residence?

Answer. W. H. Lamon. Age 52 years. Residence, Pasadena, California.

Q. How long have you lived in Pasadena, Mr. Lamon?

A. Six years this coming fall.

Q. Where were you residing in the years 1878 and 1879?

A. At Lawrence, Kansas.

Q. What if any business were you engaged in at that place?

A. In the photographing business.

Q. You may state whether or not you are acquainted with Sallie E. Hillmon, the plaintiff? A. I am.

Q. You may state whether or not you were acquainted with John W. Hillmon? A. I was.

Q. When did you first meet John W. Hillmon and where?

[—] In the spring of 1878 at my gallery at Lawrence, Kansas.

Q. When did you last meet him?

A. In the spirng of 1879.

Q. Can you designate the month?

A. February or March. I would not like to say February or March because I am not positive whether it was the latter part of February or the fore part of March.

Q. Do you remember the circumstance of a dead body being brought from the South West to Lawrence which purported to be that of John W. Hillmon? A. I do.

Q. About how long prior to that circumstance was it that you last saw him? A. About one month.

1634 Q. What if any business did Hillmon have at your gallery? A. He came to have some pictures taken.

Q. You may state whether he had pictures taken at that time? A. He did.

Q. You may state if at any time you took pictures of this dead body which was brought to Lawrence and which was claimed to be the body of John W. Hillmon? A. I did.

Q. Look at the picture now shown you and which J. W. Green, one of the attorneys for the defendant, asks J. K. Urmston, the Notary, to identify by placing his name on the back and mark number one, and state if you ever saw the picture before, and if so, where? A. I did. At my Gallery.

Q. Of what is that a picture?

A. It is a photograph of a dead body.

Q. Did you take the Negative from which this is taken?

A. I did.

Q. Where did you take that?

A. At Oak Hill Cemetery, Lawrence, Kansas.

Q. You may state if that picture or photograph is a true impression from the Negative as you took it at Oak Hill Cemetery? A. It is.

Q. Now will you look at the picture now shown you by J. W. Green, one of the attorneys for the defendant, and which

he requests the Notary, Mr. J. K. Urmston, to mark number two (2) and identify by his signature as Notary, and state of what that is a picture?

A. That is a different view of the same body.

Q. Did you take the Negative from which that impression is taken? A. I did.

Q. And where did you take that?

A. At Oak Hill Cemetery, Lawrence, Kansas.

Q. At what time in comparison as to the time the picture was taken? A. A few minutes afterwards.

Q. On the same day? A. Yes, on the same day.

Q. Is that a correct impression from the Negative which you took at that time? A. It is.

Q. You may state whether or not the body which you saw at Oak Hill Cemetery and of which you took two Negatives was the body of John W. Hillmon? A. It was not.

1635 Q. You may state if at any time in the months of April or May, 1879, you were employed to take the picture of a dead body at Oak Hill Cemetery, Lawrence, Kansas. A. I was.

Q. You may state what you did in regard to that matter whether you took the pictures or not? A. I took the pictures.

Q. You may state if at any time you examined the features of this dead body? A. I did.

Q. You may state whether or not that was the dead body of any person whom you had known in life? A. It was not.

Q. You may describe the face of John W. Hillmon, stating generally the shape, etc.

A. The face of John W. Hillmon was rather short and broadest across the forehead, tapering gradually to the chin, making what we would call a triangular face.

Q. As to the shape of the chin was it what you would call broad, pointed or medium? A. Pointed chin.

Q. You say you saw Hillmon last the latter part of February or the fore part of March, 1879. State how he wore his whiskers if he had any at that time, the last time you saw him?

A. He wore a moustache and chin whiskers, shaving the side of his face, not to his mouth, but where his moustache and whiskers united on either [—]

Q. Look at the Photograph now shown you by J. W. Green and which has been before marked "Exhibit Z. Geo. Heerman. Notary public" and which I now ask J. K. Urmston, Notary Public, to mark with his name as Notary Public and mark number three, and state of whom that is a picture or photograph? A. That is a picture of John W. Hillmon.

Q. Can you, as a Photographer, state whether that is taken from the original or whether it may be a copy of some other photograph of Hillmon? A. That is a copy from a Tin Type.

Q. Do you know who took the tin type from which that is taken? A. I do.

Q. Who took it? A. I did.

Q. When and where?

A. In the Spring of 1878 in my Gallery at Lawrence, Kansas.

Q. You may state whether that is a good, bad or indifferent picture of Hillmon? A. A good picture.

1636 Q. Referring again to the way in which Hillmon wore his whiskers the last time you saw him, how did it compare with the way he wore them as represented in this picture marked number three?

A. It was the same. He wore his beard the same.

Q. Which of the pictures marked number one and two was first taken by you? A. Number one took first.

Q. What was the condition of the nose of the body at the time you took that picture?

Guthrie: Objected to as incompetent, irrelevant and immaterial there being no testimony to show that this witness had sufficient knowledge of Anatomy to testify as an expert.

Green: Withdraw the question.

Q. What was the condition of the nose as to its being in shape or out of shape at the time you took the first picture?

A. It was pressed somewhat out of shape. I mean the end of the nose.

Q. Can you state whether or not the nose at that time had so far decomposed that the tissues had been broken on the outside? A. Yes. They had not.

Q. How many years have you been engaged in the business of Photography? A. About twenty years.

Q. During that time you may state whether or not you were accustomed to closely examine the face and features of parties who desired to have their pictures taken? A. I was.

Cross Examination,

By F. B. Guthrie, Esq.:

Question. How long did you reside in Lawrence, Kansas? And during what period? Answer. From 1857 until 1886.

Q. How long were you engaged in the Photograph business there and during what years?

A. About twenty years. I began the picture business in Lawrence in 1864.

Q. And continued till when?

A. And I discontinued business there in 1884.

Q. And have not been in business since?

A. Not in Lawrence, but elsewhere.

Q. Then you lived in Lawrence until 1886? A. Yes sir.

Q. Then moved to California? A. Yes sir.

Q. And resided where since? A. In Pasedena.

1637 Q. You said that you took a tin type of John W. Hillmon? A. I did.

Q. When? A. In the spring of 1878.

Q. Where is that tin type? A. I do not know.

Q. Who were present when you took that tin type?

A. Mr. Hillmon and myself.

Q. How and where did you first get acquainted with John W. Hillmon?

A. I got acquainted with him on that occasion in my gallery at Lawrence, Kansas.

Q. How do you know then that it was John W. Hillmon?

A. I have since learned the fact that it was John W. Hillmon.

Q. When and from whom did you since learn it.

A. In the spring of 1879 I learned the name from Mr. R. J. Borgolthaus.

Q. What time in the spring of 1879?

A. I think it was in April.

Q. Before you took the photographs number one and two?

A. After.

Q. What time in 1878 was it that you say Hillmon was at your gallery, or the person that you suppose was Hillmon?

A. In February or March.

Q. Did any person come with him there?

A. There did not.

Q. Was there any person in your gallery at the time he was there? A. There was not.

Q. What time of day was it that he was there?

A. In the forenoon.

Q. Will you describe the man that you now say was Hillmon as to height, weight, color of his eyes and hair, mustache and goatee that you say he had?

A. Height, about five feet eight or nine inches. Probably he would weigh one hundred and sixty pounds. Gray eyes. I am not used to describing the color of hair, but his hair was I should say light, perhaps light brown. His moustache was light colored and whiskers light colored, but bleached by the weather or showing signs of exposure to light.

Q. How old a man was he?

A. I should say he was about twenty-eight or thirty years old.

Q. You never saw him but that one time, did you?

A. That was the first time I saw him, not the last.

Q. Did you make more than one tin type at that time?

A. I did.

Q. What did you do with them?

1638 A. I finished them.

Q. What did you do with them when they were finished? A. He took them.

Q. And he took all of them? A. Yes.

Q. Did you finish them and did he take them away the same day that you took the tin type? A. Yes. He did.

Q. How long was he at your gallery?

A. Perhaps an hour.

Q. How was he dressed upon that occasion?

A. He was dressed in rather a light suit.

Q. You mean light clothes, light fibre, or light color?

A. Light colored business suit.

Q. Sack or frock coat? A. I cannot say.

Q. Was the suit of the same material? A. It was.

Q. Did he have on an overcoat?

A. He did not when the picture was taken.

Q. Did he have one on at the time he came to your gallery?

A. I cannot say.

Q. Did he have a hat on?

A. Yes. A soft felt hat.

Q. What color?

A. It was a color that matched pretty nearly with his suit.

Q. Were his clothes apparently new or had they been worn considerable A. Slightly worn.

Q. Did you learn his name at that time? A. I did not.

Q. Did you know where he lived from your own knowledge?

A. No, I did not except that he told me where he lived.

Q. How did he come to tell you where he lived?

A. That is a pretty long answer, but I will give it. He told me he was trading in Western Texas. He left his teams down there to rest while he came up to his old home near Lawrence on a short visit.

Q. Then you did not see him again until when?

A. The fall of the same year, 1878.

Q. What month? A. August or September.

Q. Under what circumstances?

A. There was a party of young persons came up the stairs to have a group picture made remarking that there were others of the party who would be up in a few minutes. Soon the remainder of the party came up and Mr. Hillmon was

1639 among them.

Q. What month was that?

A. In August or September, I am not positive which.

Q. Did you take the photograph or tin type of the group?

A. I did.

Q. Which was it, a photograph or tin type? A. Tin type.

Q. How many of them did you take? A. I took two.

Q. What was done with those?
A. They were finished up and taken.
Q. By whom? A. By the party.
Q. Who took them? Whom of the party?
A. I do not know.
Q. Who comprised that party whose tin types you took at that time? A. They were friends of Mr. Hillmon.
Q. Can you give the names of any of them?
A. I can give the name of his sister and his sister was one of the party.
Q. How do you know it was his sister?
A. Because I afterwards learned that it was his sister.
Q. How did you learn that and from whom?
A. From herself.
Q. When and where?
A. After this dead body was brought to Lawrence.
Q. After you had taken these photographs number one and two? A. Yes.
Q. Who was present when you had a conversation with her? A. I think she was alone.
Q. Where did it occur? A. It occurred in my gallery.
Q. What was her given name? Her Christian name?
A. That I do not know.
Q. How do you know then that it was his sister?
A. She told me she was his sister. That is all I know. I suppose that is evidence enough.
Q. Then these were the two only times that you ever saw the person that you designate as Hillmon?
A. No, sir. It is not.
Q. Well, when again? A. In the spring of 1879.
Q. Where?
1640 A. At the office of Dr. Morse, over Woodward's drug store in Lawrence, Kansas.
Q. State the circumstances connected with the interview, how you came to see him there and then.
A. I should have said that I saw him once before in my gallery, he came in a few days after this group was taken and had some more tin types taken.
Q. Of himself? A. Yes. Alone.
Q. Then the next time you saw him was at Dr. Morse's office? A. Yes, sir.
Q. Well, how did you come to see him at Dr. Morse's office and under what circumstances?
A. I was sitting in the office talking to the doctor when Mr. Hillmon opened the door and looked in and asked "is this Dr. Stewart's office? Dr. Morse told him it was the second door east. I then said to the doctor that I recognized that face.

Q. Well, what then? A. He then closed the door.
Q. Who closed the door?
A. Mr. Hillmon. And when I left the office he was standing at the foot of the stairs. I there had some conversation with him and he told me he was up again from Texas and expected to start back again in a few days.
Q. Well, is that all? A. Yes.
Q. Now, were the persons that composed the group those tin types you took residents of Lawrence?
A. They were not.
Q. Did you know any of them? A. I did not.
Q. Were they ladies or gentlemen or both? A. Both.
Q. How many of each? A. I think three of each.
Q. Including the one you took to be Hillmon?
A. I think Mr. Hillmon was an old one, he was simply a visitor.
Q. Well, that made seven in all?
A. They were friends of him where he formerly lived.
Q. Was Hillmon's picture taken in the group?
A. It was not.
Q. Then, the only tin type you ever took of Hillmon was in the spring of 1878?
A. No, I said that he came up a few days after the group was taken and had had tin types of himself made alone again.
1641 Q. Yes. Well, how many of them? A. Two.
Q. Did he take them away with him? A. He did.
Q. How long did he stay at that time?
A. Perhaps a half hour.
Q. Was any one with him? A. No.
Q. Or during the time we has there in the Gallery?
[—] No.
Q. Nobody but yourself and he were present?
A. That's all.
Q. And during all of these occurrences you did not know his name? A. No.
Q. Nor did you ask it? A. No.
Q. And it was not until after the burial of this corpse that you say was not Hillmon's that you learned what Hillmon's name was? A. Yes.
Q. When you took the Tin Type of him was his hat on or off? A. He had it off.
Q. At the time the group was taken was his hat on or off? A. He did not have his picture taken in the group.
Q. Well, did he have his hat on or off while in the Gallery?
A. I cannot say as to that.
Q. How was he dressed at the time the group was taken?
A. He was dressed in a light suit. Thin light goods.
Q. That was in the summer season?

A. Yes, sir. They were light color and light goods too.

Q. Did you have any conversation with him at that time as to ever having seen him before? A. I did.

Q. In whose presence? A. In the presence of the group.

Q. And where?

A. In my Gallery on that occasion. I called him, not knowing his name, my Texas friend. When we were first in the Gallery I told him that I was formerly in Texas myself, and at the time the group came up I called him my Texas friend and saluted him as such, not knowing his name.

Q. Where did you get the Tin Type from which you made this copy to-day marked number three?

A. I did not make that copy.

1642 Q. Then how do you know it is a copy of any Tin Type that you took?

A. I know that I took the Tin Type and I know that that is a copy of it.

Q. Well now state how you know that that is a copy of the Tin Type that you took?

A. I know that the original picture that I took of him was a Tin Type.

Q. Well, how do you know that "Exhibit Z, Geo Neuman" is a copy taken from that Tin Type?

A. I stated that the original picture was a Tin Type and that I took the original; that this is a photograph and not a Tin Type.

Q. Well, I am not asking anything about that, I ask you how do you know that this photograph is taken from that Tin Type rather than from any one hundred others which he might have had taken?

A. I took the original picture, but I do not know whether I can explain it to you or not.

Q. Well that is just exactly what I want you to do. Look at the photograph marked Exhibit Z, Geo. Herrman and state whether it is a photograph of a person or taken from some other photograph?

A. It is taken from another picture.

Q. How do you know that?

A. Because I took the original Tin Type and saw it afterwards when it was in that condition. (Witness showing the scratches, rubs and nitches from being carried in the pocket.)

Q. Did you ever see the Tin Type that you took of the person that you say was Hillmon after you delivered the two of them to him? A. I did.

Q. When and where?

A. After this dead body was brought to Lawrence and at my Gallery.

Q. Who brought them to you? A. Mr. R. J. Borgolthaus.

Q. Where did you first see the photograph marked Exhibit Z, Geo. Herrman?

A. When did I first see the photograph?

Q. Yes; this one that I hold in my hand?

A. That is a hard question to say, when I first saw it. I have seen it a hundred of times. I do not know as I can say when I first saw it.

Q. Your deposition was taken in this case gefore Geo. Herrman, a Notary Public at Pasadena, was it not? A. It was.

Q. When?

A. To the best of my recoilection it was the summer of 1887.

Q. Was that the first time your deposition was ever taken in any of the cases brought by Sallie E. Hillmon against this or any other insurance company?

A. It was not the first time.

Q. Well, it was the first time your testimony was
1643 ever taken out of Court? A. Yes, sir.

Q. How many times have you testified in this case?

A. Three different times, before three different Courts and this is the second time my deposition is being taken.

Q. When was the last time that you testified in Court in this case? A. Four years and a half ago.

Q. It was after your deposition had been taken in Pasadena? A. Yes, sir.

Q. At the time that you saw Hillmon at Dr. Morse's office, had he his hat on or off? A. He had it on.

Q. You went to Kansas for the purpose of testifying in this case from Pasadena? A. I did.

Q. How much were you paid by the defendant or its agents or attorneys for so doing?

A. My mileage fees amounted to about one hundred seventy-five dollars.

Q. Now, will you answer the question that I have asked you? I have not asked you how much your mileage fees came to, I have asked you how much you were paid?

A. One Hundred Seventy-five Dollars, I do not know the exact amount, now.

Q. By whom was it paid?

A. Well, Mr. Green sent me a check for a portion of it and the balance of it was paid me in Court-room at Topeka.

Q. By whom was the money paid?

A. I do not know whether it was the Clerk of the Court or not. The party who paid all the rest paid me. There was a check for Ninety dollars sent me here by Mr. Green and the balance was paid there.

Q. How much balance?

A. Well, I do not know. About Eighty-five dollars was paid there I cannot get the exact figures because I haven't them with me.

Q. How much were you paid and by whom at any other time?

A. I cannot give the amount during the attendance at the other Courts. I do not remember the number of days I served nor the exact amount of mileage. I could approximate it I suppose. No, I do not remember the exact amount.

Q. Can you give any other amounts that have been paid you for testifying in this case?

A. You mean for testifying before the Courts?

Q. My question is plain is it not?

1644 A. Well, I might infer the Court or the Affidavit that I made.

Q. I mean just what I say, for testifying.

A. I think it was Five dollars I was paid for my time at Pasadena.

Q. Well, what other sums of money have been paid you?

A. I could only approximate the amount.

Q. Well, give it as near as you can?

A. I think at the first trial, it was Ten or Twelve dollars. The second trial about the same. The mileage was a little more. I was then at Baldwin City. I should say probably Twelve or Fifteen dollars for the second trial.

Q. Now, what other amounts have you been paid by this defendant, The Connecticut Life Insurance Company or New York Life Insurance Co.? A. That is all.

Q. Were you furnished a railroad ticket or pass to Kansas when you went there to testify A. I bought my own ticket.

Q. Out of the money that had been sent you? A. Yes, sir.

Q. Have you been promised any money for testifying in additional to that that has been already paid for?

A. I have not.

Q. When you saw Hillmon in August or eSptember, 1878 at the time the picture of the group was taken, how did he wear his beard at that time if he had any?

A. He wore it as he did in the Spring, moustache and goatee. What I mean by goatee is the chin whiskers.

Q. Well then, you mean that he had whiskers from each side of his mouth down? A. Yes, sir.

Q. And how did he wear his beard at the time you saw him at Dr. Morse's office in February or March, 1879?

A. The same way.

Q. Now, will you tell us how it is that you recollect so minutely occurrences that took place fourteen years ago, not knowing the name of the party at the time you took the Tin Type?

A. The circumstances of the case would help me to remember. I would not remember the name now nor the face but for the circumstances of the case.

Q. When and where did you become acquainted with Sallie E. Hillmon, the plaintiff?

A. At the time the dead body appeared at Lawrence.

Q. Did you take these photographs numbered one and two before the body had been buried? A. I did not.

Q. How long after its burial were they taken?

1645 A. I do not remember the number of days. It was buried several days before.

Q. Had the body been buried or simply put in a vault?

A. It had been buried.

Q. At whose instance did you make these photographs?

A. At the instance of the agent of the Insurance Companies.

Q. Was you present at the burial of the person alleged to be John W. Hillmon? A. I was not.

Q. Did you know where he was buried? A. I did not.

Q. How did you know then that this was the same person that was alleged to be John W. Hillmon? whose photographs are represented by numbers one and two?

A. I do not know as it was.

Q. Had the corpse been taken out of the ground before you went there?

A. It was taken out of the ground while I was there.

Q. Do you know whether or not it had been embalmed before burial? A. I do not. I think not.

Q. At the time was it very much decomposed?

A. It showed signs of decomposition.

Q. Where are the negatives from which numbers one and two were taken?

A. I am not positive as to where they are.

Q. Did Sallie E. Hillmon, the plaintiff, or any of the friends of the plaintiff get any notice that this corpse was to be exhumed and the photographs taken?

A. Not to my knowledge.

Q. What date in May were these photographs taken?

A. I cannot give the date as to when they were taken.

Q. Well, as nearly as you can?

A. Well, I should say the latter part of April. My impression is that it was the latter part of April.

Q. What persons were present when these photographs were taken at Oak Hill Cemetery?

A. Mr. Chas. W. Smith, Mr. A. L. Selig, Doctors Miller and Stewart and other parties whose names I did not learn.

Q. Then you were employed by the agent of the insurance companes, who was that? A. Mr. A. M. Selig.

Q. Then you were employed by Mr. Selig to take the photographs of a corpse [corpse] that they would produce at this grave yard, were you? A. Yes.

1646 Q. And you went to the cemetery? A. Yes.

Q. In how many different positions did you take photographs of the corpse? A. Two.

Q. Did you take it more than once in each of these posi? tions?

A. I first took an impression of the first position which was a failure on account of the coffin being slightly jarred and gave a blurred picture. We then made the coffin more firm and you see the result in number two.

Q. The one marked number two, did you raise the head?

A. Yes, we raised it to come above the top of the coffin.

Q. It was an open coffin?

A. Yes, I think it was made of inch or seven-eighths lumber.

Q. Now, the appearance of a photograph can be very much changed in the finishing of it can it not?

A. Not very much.

Q. After photograph number one was taken and before number two was taken, was the nose straightened any?

A. It was.

By whom? A. I think it was Doctor Miller.

Q. What was done to change the appearance by Dr. Miller, if anything?

A. Nothing but simply straightening up the nose.

Q. Did he apply anything to keep it in position?

A. No; he did not.

Q. Did you notice at the time you took the Tin Type whether or not the hair of Hillmon curled?

A. I think it waived slightly right here in front.

Q. Were the ends curly? A. They were not.

Q. You remember that distinctly, do you? A. Yes.

Q. Was his mustache curled? A. It was not.

Q. Was his hair long or short at the time you took the Tin Type?

A. It was fairly long. It was so as not to give the impression of its being very long.

Q. Had he been recently shaved? Or his hair cut?

A. He was recently shaved.

Q. Well, had he his hair cut recently?

A. I could not tell in regard to the hair.

Q. The corpse, the photographs of which you took, could you tell whether it had been shaved after death?

1647 A. It was shaved very soon before death or just after, I would judge.

Q. About [—] long [as] his beard at the time you took the photographs of the corpse?

A. It was very short. Very close to the face.

Examination in Rebuttal

By J. W. Green, Esq.:

Q. You state that you learned that this was John W. Hillmon from R. J. Borgolthaus, will you state the circumstances under which you learned from him that this was Hillmon?

A. He came into my gallery and showed me the original of that Tin Type which I took and asked me if I had taken that. He then asked me if I believed that was the picture of a dead man that I had photographed. I told him it was not. He then requested me to say nothing about it.

Q. Who was R. J. Borgolthaus?

A. He was an attorney, of Lawrence, Kansas.

Q. Do you know whether he was representing Sallie E. Hillmon at that time?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial. The Court sustained the objection, to which action and ruling of the Court the defendant at the time duly excepted.

A. I think he was.

Q. You were asked by counsel in regard to several sums which you have received as compensation at the several times you have given evidence in this case. Were you ever given by either the Mutual Life Insurance Company of New York, the New York Life Insurance Company or the Connecticut Mutual Life Insurance Company anything more than your mileage and per diem for attending and giving your evidence at any time?

A. I was not.

Q. Did you ever ask of them anything more than that which you were entitled to for attending and giving evidence in the case? A. No.

Q. Do you remember how many days you were present at either the first or second trials of this case? A. No, I do not.

Q. You say that Sallie E. Hillmon or her representatives was not notified of the taking of those pictures you took of that corpse at Lawrence to your knowledge. Do you know whether she was or not or anything about it? A. I do not.

Q. Was the corpse of which you took the Negative at Oak Hill Cemetery in the summer of 1879, the corpse of the person whose Tin Types you took in the Spring of 1878, whom you afterward learned to be John W. Hillmon?

Guthrie: Objected to as not rebutting, incompetent, irrelevant, leading and asking for a conclusion of the witness and

for the further reason that the question has already
1648 been asked and answered and the answer was "no."
Green: I will withdraw the question.

Q. State whether or not the corpse of which you took two negatives at Oak Hill Cemetery in the spring of 1879 was the corpse of the person of whom you took the two Tin Types in the spring of 1878 and who you afterwards learned to be John W. Hillmon? A. It was not.

Examination in Sur-Rebuttal

By F. B. Guthrie, Esq.:

Question. You state that you received a check of Mr. Green for ninety dollars, was that acompanied by a letter from Mr. Green. Answer. It was.

Q. Have you that letter? A. Possibly I have at home.

Q. Will you produce it next Wednesday when you come to look over your testimony and sign it?

A. If I have it, I will.

Q. In case you do not find it, I will ask you if you remember the contents of it and if so, give it to us?

A. It stated that I would find the amount enclosed and that I should appear at Topeka as a witness on the 6th of March, 1888.

Q. When did you last see that letter?

A. I have not read the letter for several years.

Q. That is not my question, when did you last see it?

A. Not for several years?

Q. Do you file away your letters? A. No, sir.

Q. Did you have communication with anybody else in regard to your going to Topeka as a witness? A. I did not.

Q. Either verbal or written communication? A. No.

Witness: I wish to correct my testimony in regard to mentioning of Mr. Hillmon's sister who was one of the group who came to have their picture taken, I meant to say that it was a sister of Mrs. Hillmon, the plaintiff, instead of Mr. Hillmon's. Where I testified it was the last of April the photographs were taken, I wish to say that it was in the month of April instead of the last of April.

Question by Mr. Green: You cannot tell whether it was the last of April or as late as May can you?

A. I think it was the middle of April.

Q. Question by Mr. Gutrie: Has not your recollection been refreshed now by the conversation that has taken place here in this room since your deposition was begun?

Answer. My recollection was that the person was killed about the middle of March and when you ask me in regard to

May, I know that would draw it too late. I know that it was not so long as that the body had been dead, but it was nearly three weeks from the time that the body had been dead
1649 to the time it was photographed.

Guthrie: Well, now, will you undertake to fix the time the body was brought to Lawrence and buried?

Answer: I will not.

Guthrie: Do you know whether or not the body had been buried in the Southwestern part of Kansas before being taken to Lawrence?

Answer. I know it had been buried there. I was informed so.

Guthrie: Whom did you learn that from?

Answer. I cannot name the party from whom I learned that. It was the general talk and I heard it, but from who I don't know.

W. H. LAMON.

1650 Martin Metsker, a witness produced by the defendants, being first duly affirmed to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. You may state your name, please.

A. Martin W. Metsker.

Q. Where do you reside, Mr. Metsker?

A. Marion Township, Douglas County.

Q. About how many miles is that from Lawrence, Mr. Metsker? A. About eighteen miles.

Q. Where were you residing in the year 1878?

A. About the same place I do at present; one mile further west.

Q. In the same township and county? A. Yes sir.

Q. Now, did you become acquainted at any time in the year 1878, with a man by the name of Frederick A. Walters, or Frederick Adolph Walters? A. Yes sir.

Q. Where did you meet Frederick Adolph Walters?

A. At my place.

Q. What is your business? A. Farmer.

Q. How did you come to meet this man, Frederick Adolph Walters? A. He came there to work for me.

Q. About what time in the year, do you remember did he come there to work? A. In August.

Q. About how long did he remain with you, if you remember? A. About six weeks.

Q. What was he doing during that time, during that six weeks? A. We were making fence.

Q. General farm work?
A. Yes, general farm work, making hay, threshing, etc.
Q. Did you learn from whence he came?

The plaintiff objects to the question as calling for hearsay.
By the Court: The objection is sustained unless he knows himself; this question involves a statement of what was told him.

1651 To which ruling of the court the defendants and each of them at the time duly excepted.

Q. Now, what was the condition of this man's health while he was with you, Mr. Metsker?
A. He was not very well; he had been sick.
Q. Could you give a general description of this man Walters; how tall was he, could you say?
A. Why something like close to six feet, I should think.
Q. Do you remember the color of his hair?
A. His hair was black.
Q. Can you tell the color of his eyes?
A. No, I could not.
Q. The shape of his nose?
A. He had a Roman nose that was a little higher at the center than it was at the end.
Q. What, if any beard did he wear at that time?
A. He had a mustache was all.
Q. Did you ever notice his teeth? A. Yes sir.
Q. What character of teeth did he have?
A. He had good teeth.
Q. What was his build?
A. He was a rather spare built man.
Q. Could you tell about his hand?
A. He had a long slim hand with long bony fingers.
Q. How about his feet; did you notice those?
A. I could not say in regard to his feet.
Q. Where was your postoffice address at that time?
A. Aladdin.
Q. About how far was that from your place?
A. About three-quarters of a mile.
Q. Who was postmaster at that time?
A. Henry Webber.
Q. You may state whether this party received and sent letters? A. Yes sir.
Q. Did you notice the postmark of any of those letters as to where they were sent from?

The plaintiff objects to the question as calling for secondary evidence. Objection overruled, the plaintiff duly excepts.

A. No, I did not.

Q. Now, where did he make his home during the time that he was in your neighborhood?

A. At my place.

1652 Q. Boarded in your family? A. Yes sir.

Q. Do you know where he had his washing done?

A. He had his washing down at Adam Tuttle's.

Q. How often did you see this man while he was there at your place? A. Every day.

Q. Now, Mr. Metsker, I will ask you to look at the pictures now shown you, which have been marked Exhibit 29 and Exhibit 30, and state if you recognize those as the picture of any person you have known in life, and if so, state of whom.

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. I recognize the side view more plainly than I do the other.

Q. What do you say as to the other?

A. The other one does not show his nose so plain; does not look as plainly to me as the side view.

Q. Now, Mr. Metsker, when did you first see those pictures, or pictures similar to those, if you remember?

A. Sometime before the first trial here in 1882; I could not say positively when.

Q. Who showed them to you at that time, if you remember? A. Henry Webber.

Q. Now, were you present at the first trial of this case?

A. Yes sir.

Q. Have you been at each trial since?

A. Every one except one.

Q. Where were you at that time?

A. In California.

Q. Do you remember which trial that was, whether one held in Leavenworth or one held in Topeka?

A. The first one held in Topeka.

Q. Now, do you remember, Mr. Metsker, about the time that Frederick Adolph Walters left your place?

A. Why, about the last of September.

Q. Do you know where he went?

A. He said he was going to—

Q. Have you any knowledge of where he went except what he told you?

1653 A. He told me he was going to Lawrence.

Q. Have you ever seen him since that time, since the time he left your place? A. No sir.

Q. Ever heard from him? A. No sir.

And in answer to cross interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. When did you say you first saw this man who called himself Walters? A. In August.

Q. Of what year? A. 1878.

Q. Did he work on your farm? A. Yes sir.

Q. How long did he work there?

A. He was there about six weeks; he did not work all the time.

Q. You never saw him before? A. No sir.

Q. And you never saw him afterwards? A. No sir.

Q. You have been shown a picture here, and the side view, you say that you recognize? A. Yes sir.

Q. You think it resembles Walters? A. Yes sir.

Q. The front view you don't recognize?

A. It does not look so natural.

Q. Well you don't recognize it at all, do you?

A. Nothing but the forehead looks natural as I can see.

Q. You think it looks natural; what do you mean by that? It looks like a man alive that you had seen? A. Yes sir.

Q. Can you point out anything in the forehead of the picture different from the forehead of any other dead man; what is the characteristic about that forehead that you say looks natural?

A. He has got a high forehead, and his teeth show there which makes some resemblance.

Q. He has got a high forehead and his teeth show and that makes it look something like Walters?

A. Yes sir.

1654 Q. There is plenty of men who have high foreheads and who show their teeth, is there not? A. Yes sir.

Q. You say that you have testified at each trial, Mr. Metsker: Didn't you testify at the last trial in answer to my question that you did not recognize this front view at all?

A. I could not say positively about that; I don't know.

Q. Will you say to this jury now that looking at that picture of the cadaver, that you recognize that as a picture of any person you ever saw? A. No more than what I said.

Q. Just simply because the picture has a high forehead and its teeth show, you think it is Walters; that is all, is it not? A. That is all I can see.

Q. You have had a good many men working for you from time to time? A. Yes sir.

Q. Some of them had high foreheads, didn't they?

A. Why, I suppose so; I couldn't pick out any particular one.

Q. There was nothing peculiar about this man more than any other man that worked for you, was there; he had no peculiarities, that distinguished him from either men?

A. I don't know.

Q. When he left there he went to Lawrence, you were told by him, and that is the last you ever heard of him?

A. Yes sir.

Q. The last you ever saw him? A. Yes sir.

And in answer to re-direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. You say you had other men at work for you that had high foreheads; if you should meet those men on the streets of Lawrence, would you be able to distinguish one from the of Lawrence, and at the same time meet Walters on the streets of Lawrence, would you be able to distinguish one from the other?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

1655 A. Yes sir.

By Mr. Hutchings:

Q. You say that if you saw a man walking on the streets of Lawrence, and you were acquainted with him, you would know him; that is what you mean to say?

A. Yes, by his appearance.

Q. If you saw him walking on the streets and you were acquainted with him, you would know him, by his appearance? A. Yes sir.

Witness excused.

1656 Mary E. Metsker, a witness produced by the defendants, being first duly affirmed to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to her by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name, please. A. Mary E. Metsker.

Q. Are you the wife of Martin Metsker who just testified?

A. Yes.

Q. You reside with him in Marion township, Douglas county, Kansas? A. Yes sir.

Q. Do you remember of meeting a young man by the name of Frederick Adolph Walters? A. Yes sir.

Q. In the year 1878? A. Yes sir.

Q. Where did you meet him? A. Met him at our home.

Q. Where was that at that time?
A. Marion township, Douglas county.
Q Now, you met him at your home under what circumstances and conditions? A. He came there to hire.
Q. How long did he stay there?
A. About six weeks as near as I can tell.
Q. What was he doing there while he was there?
A. He was doing general farm work.
Q. What was the condition of his health?
A. His health was not good.
Q. Was he there continuously during those six weeks, do you remember, Mrs. Metsker? A. Yes sir.
Q. How often did you see him?
A. I saw him every day while he was there.
Q. Boarded at your house, did he? A. Yes sir.
Q. Took his meals there? A. Yes sir.
Q. Slept there? A. Yes sir.
Q. About what time did he leave there, if you remember?
A. About the latter part of September, as near as I can tell.
Q. Now, could you give a description of this man
1657 Frederick Adolph Walters?
A. He was a tall, slim man.
Q. Do you remember the color of his hair?
A. He had dark hair, real dark or black.
Q. Do you remember the color of his eyes?
A. He had dark eyes.
Q. The nose: What was the shape if his nose?
A. He had a Roman nose.
Q. What, if any, beard did he wear?
A. He wore a mustache.
Q. What sort of a mustache was it, if you remember?
A. It was dark.
Q. As to length? A. Not very long.
Q. His teeth: Did you notice his teeth?
A. Yes sir; they appeared to be good.
Q. State whether or not he showed his teeth?
A. Yes, sir, he showed his teeth.
Q. And as to the color of his teeth?
A. His teeth were not as white as some peoples.
Q. As to the size, do you remember?
A. Just medium size.
Q. And as to his hands, do you remember; did you ever notice his hands?
A. Yes sir. He had a long, slim hand, rather bony, and long fingers.
Q. And his feet: Did you ever notice them?
A. I never noticed his feet.
Q. Now, do you know where he came from; where his home was, other than what he may have told you himself?

A. Iowa.
Q. Do you know what part of Iowa?
A. By what I heard him say he came from Iowa.

Stricken out on the motion of the plaintiff, the defendants duly excepting.

Q. Now, did he have his washing done at your house, Mrs. Metsker? A. No sir.
Q. Do you know where he did have it done? A. Yes sir.
Q. Where? A. Mr. Tuttle's.
1658 Q. Now, do you know whether he sent and received letters while he was at your house? A. Yes, sir.
Q. Did you ever notice the envelopes?
A. No, sir, I never saw his envelopes close by.
Q. You say he stayed there about six weeks?
A. Yes, sir, as near as I can tell.
Q. Did you take letters from the postoffice for him?
A. Indeed, I don't remember.
Q. Now, I will ask you Mrs. Metsker, to look at the pictures marked Exhibit No. 29 and Exhibit No. 30, and state if you recognize those as pictures of the body of any one you have known in life, and if so, please state who it is.
A. Yes, I recognize that more plainly than that.
Q. You recognize No. 30 more plainly than you do No. 29? A. Yes, sir.
Q. Well, what would you say of No. 29?
A. Well, I don't know as I could say very much about that.
Q. Now, as to No. 30; whose picture do you recognize that as?
A. Well, it resembles Mr. Fred Walters as near as I can tell.
Q. You think you see a resemblance in that to this Frederick Adolph Walters? A. Yes, sir.
Q. Do you remember, Mrs. Metsker, when you first saw these pictures, or pictures similar?

The plaintiff objects to the question as immaterial. Objection overruled the plaintiff duly excepting.

A. Well, about 1882, as near as I can remember.
Q. Were you at the first trial of this case? A. Yes, sir.
Q. When was it as to the first trial of this case?
A. It was just a short time before the first trial; I could not tell exactly just how long.
Q. But it was sometime before that trial?
A. Yes, sir, sometime before the first trial.
Q. Where did you see them? [—] At our place.
1659 Q. Who had them there, if you remember?
A. Mr. Weber.

Q. Henry Weber? A. Yes, sir.

Q. Now, when and where did you last see this Frederick Adolph Walters?

A. The last time when he left our place; I never saw him after he left our place.

Q. Did you see the body that was brought back to Lawrence in the spring of 1879? A. No, sir.

Q. I think you said the last time you saw him was when he left your place in 1878? A. Yes, sir.

Q. Did you ever hear from him after he left your place?

A. No, sir.

And in answer to cross-interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. What is your recollection as to the time that this Mr. Walters came there to work at your place?

A. It was in August, sometime, 1878.

Q. And he stayed about a month?

A. About six weeks.

Q. He went away in September, and you didn't see him any more?

[Q.] No, not after he left, of course; he had gone to Lawrence and got medicine, and came back, and then stayed a short time.

Q. After he left finally, you did not see him again?

A. No, sir, I never saw him any more.

Q. As to this front view picture of the dead body, you say you haven't anything to say?

A. No, sir, I haven't anything to say.

Q. Don't see any resemblance in that to Mr. Walters?

A. Not much.

1660 Q. The other picture, you think, resembles in some respects, Mr. Walters? A. Yes, sir.

Q. What part of it, Mrs. Metsker, do you think looks like him? A. His forehead and his high cheek bones.

Q. The forehead and the high cheek bones? A. Yes, sir.

Q. Those are the features that seem to cause you to think there is a resemblance? A. Yes, sir.

Witness excused.

1661 Adam Tuttle, a witness produced by the defendants, being duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Green:

Q. State your name, Mr. Tuttle? A. Adam Tuttle.

Q. Where do you reside?

A. In Marion township, Douglas county, Kansas.

Q. How long have you lived there, Mr. Tuttle?
A. I have been there and in that neighborhood ever since the spring of 1864.
Q. Do you know Martin Metsker? A. Yes, sir.
Q. How far does he live from your place?
A. He lives just about one mile now.
Q. Do you remember where he was living in 1878?
A. Yes, sir, he was living about half a mile nearer to me, I believe at that time.
Q. You may state if you met a person by the name of Frederick Adolph Walters? A. Yes, sir, I did.
Q. Where did you meet him?
A. I met him at Martin Metsker's.
Q. What were you doing there, if anything?
A. I believe the first time I saw him I went there to help build some fence, fencing in a piece of land.
Q. Who was assisting you?
Q. Mr. Walters, and Mr. Metsker and a man by the name of Huyl, I believe.
Q. About what time in the year was this, do you remember?
A. If I mistake not along about the fore part of August, 1878.
Q. How long did you work there at that time?
A. Oh, I worked there at different times, every few days, I was helping whenever he needed some work he would call and I would go and help him.
Q. You were not working there by the month at the time?
A. No, just by day's work.
Q. Now, how long did you see this young man there if you remember?
A. Well, he was there, around there something near six weeks, I think.
1662 Q. How frequently did you see him during this time?
A. I could not say exactly. I worked there several times and then he was at my place different times.
Q. Do you know where he had his washing done?
A. Yes, sir.
Q. Where? A. At my place.
Q. How far did you live at that time from Mr. Metsker's?
A. About half a mile.
Q. How frequently did you see him at your place?
A. Well, I saw him every Sunday; as a general thing he would bring his clothes and take away his clean clothes on Sunday.
Q. How long would he stay?

A. Well, he stayed sometimes, he would stay quite a while; he was there one whole Sunday nearly; that is he was not feeling well and stayed there.

Q. What did he carry his clothes in if you remember?

A. He had a kind of a sack made out of what I would call heavy canvass; he had his clothes in that.

Q. Did that sack, as you speak of it, have any marks on it?

A. Yes, sir.

Q. Any name?

The plaintiff objects to the question as calling for secondary evidence, and immaterial. Objection overruled, the plaintiff excepts.

Q. Did it have any name on it? A. Yes, sir.

Q. What name? A. F. A. Walters was marked on the sack.

Q. Any place, do you remember? A. Sir?

Q. The name of any place on it?

The plaintiff objects to the question as leading, and as calling for secondary evidence. Objection overruled, the plaintiff excepts.

A. I don't recollect of there being anything, anything more than Frederick A. Walters; that was in pretty large letters.

Q. Now, did you learn from whence he came in any other way than from him? Answer yes or no.

A. No, sir, I did not.

Q. Now, had this young man any tools with him?

1663 The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

Q. He had some what he called tools for making cigars.

Q. State what he had?

A. He had a piece of marble, I call it a marble slab, not very thick, probably three-quarters or something like that, and probably 12 or 14 inches square and a knife.

Q. What sort of a knife was it?

A. It was a flat blade, probably about three quarters of an inch wide and probably about four long with a handle on it.

Q. Do you know what that was used for?

A. Used for making cigars.

Q. Did you see him make cigars?

The plaintiff objects to the question as leading. Objection overruled, the plaintiff excepts.

A. Yes, sir, I did.

Q. Where was that? A. At Martin Metsker's?

Q. Where did he get the tobacco, if you know?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

A. There was a German man that had worked there and he had raised some tobacco, and they had cut it and hanged it up to cure and he took some of that tobacco and made a cigar from it and showed me how he made it.

Q. Did you see him more than that one time?

A. That was the only time I seen him making any.

Q. Now, in regard to these tools that he had with him, have you seen similar tools at other places?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

[Q.] I saw his tools at my place.

Q. Have you seen tools similar to those at other places?

A. Yes, sir.

Q. Where?

A. I seen them in the cigar factory at Lawrence.

1664 Q. Now, can you give us a description of this man?

A. Well, he was rather tall, what I call rather slender build man, not very heavy set, slim, pretty tall man.

Q. Do you remember the color of hair?

A. No, I couldn't say exactly the color of his hair.

Q. Do you remember the shape of his nose?

A. Yes, he had a—some would call it a Roman nose; there was a bulge in it here.

Q. Did you notice his teeth? A. Yes, sir.

Q. What sort of teeth did he have?

A. He had good sound teeth.

Q. You may state whether or not he showed them plainly?

A. Yes, sir, he showed his teeth very plainly.

Q. What beard did he wear when you knew him?

A. I think he only wore a mustache; I won't be positive about that.

Q. What sort of a mustache was it? A. I can't tell you.

Q. Can you tell in regard to the heft of it?

A. That is something I can't state—the color of a person's hair; I can't give that.

Q. I am speaking now as to the heft and length of the mustache.

A. Oh, the length of it. Well, I couldn't say in regard to that exactly.

Q. Now, in regard to his hands; did you notice in regard to his hands?

A. Yes, sir, he had a long, slim hand, not as thin a hand as I have but longer.

Q. How about the fingers.

A. His fingers were long; kind of a long, slim hand.

Q. Was he fleshy or raw boned?

A. I would call him rather raw boned.

Q. Did you notice his feet?

A. Why, I couldn't say as I ever had noticed in particular to his feet.

Q. Did you know of his sending and receiving mail while he was there?

A. No, I can't say I did exactly. I heard him talking about getting letters.

Q. If you don't know of your own knowledge—

[—] No, I don't.

1665 Q. About what time did he leave there, if you remember, Mr. Tuttle?

A. I think that he left some place in September and went to Lawrence and was there a week or so.

Q. Did he return again, do you remember?

A. Yes, sir, he was there, came from Lawrence to my place to get his clothes; some that he had left there and went away.

Q. Where did he go from your place at that time if you know?

A. Well, he started off and told me he was going southwest; I didn't ask him where to or anything of the kind; he started off in in that direction.

Q. In what direction is Marion township from Lawrence?

A. Southwest of Lawrence.

Q. About how far?

A. Well, it is about 14 miles to the corner of Marion township, to the northeast of the township.

Q. To where you lived how far was it?

A. 18 miles from my place to Lawrence.

Q. At that time you say he came to your house to get his washing? A. Yes, sir.

Q. His clothes? A. He had his washing done there.

Q. And went away? A. And went away.

Q. Have you ever heard from him since? A. No, sir.

Q. Have you ever seen him since?

A. Never seen him since.

Q. Will you look at these pictures, exhibit 30, and No. 29, and state if you recognize those as the pictures of the body of any one whom you have known in life, and if so, who that person was. A. Yes.

Q. If you recognize them, state.

A. Well, sir, that is Frederick A. Walters.

Q. Do you know when you first saw those pictures or pictures like them?

A. I could not say just exactly the time when I first saw them.

Q. Well, were you a witness at the first trial of this case?
A. I was. I was a witness on the first trial here in
1666 Leavenworth.
Q. Was it before that time?
A. It was before that time sometime; I couldn't say how long but it was a while before the first trial here.

Cross-Examination

By Mr. Hutchings:
Q. You were here at the first trial you say, Mr. Tuttle?
A. Yes sir.
Q. That was before Judge Foster?
A. I don't recollect the name of the judge.
Q. That was in 1882 was it not?
A. Along about that time.
Q. That was some four years after you had seen this young man Walters in your neighborhood, was it?
A. Something like that.
Q. You had only seen this picture a short time before that trial? A. Yes sir.
Q. So that some three years, between three and four years elapsed after you saw this young man out there in that neighborhood when you saw these pictures of the corpse?
A. Yes sir.
Q. I understand you to say you don't remember how he wore his beard or whether he had any beard or only a mustache? A. I said I could not state exactly.
Q. I say you don't remember and you can't state whether when he was out there he wore a beard or only a mustache; is that right?
A. I said I could not state exactly; that was something I could not state exactly.
Q. Now, then, this man that you saw out there, you can't say whether he wore a beard or whether he wore only a mustache? A. I said I thought he wore a mustache.
Q. You said you could not tell, you didn't remember; don't you remember stating that every time?
A. No, I don't think; I could not remember.
Q. What do you say now?
A. I say I can't say what he wore.
Q. You can't say? A. No.
Q. Well, then, you don't remember, do you? Now,
1667 going back to the time when you saw this young man out there, how does your memory operate in that respect; do you see him with a beard on or do you see him without any beard?

A. I see his general appearance the same as I would you; I haven't seen you since the last trial, but I know you when I see you.

Q. I merely, Mr. Tuttle, desire, to learn from you, when you look back, now, at the time this young man was out there in the neighborhood and you saw him often in your own walk about that neighborhood, what is your memory as to whether he wore a beard or not; have you any recollection upon that subject?

A. I told you I couldn't recollect anything about his hair.

Q. Or beard?

A. Or beard, to be positive, I wouldn't say.

Q. You have stated that upon every trial of this case, where you have been a witness, have you not, that you could not remember whether he wore a beard or not?

A. Yes sir, I think I have.

Q. You never saw these pictures here until nearly four years after you had seen him last? A. Yes sir.

Q. That is right, and yet looking at these pictures, and without remembering whether he wore a beard or not, you say you can recognize in these pictures Mr. Walters?

A. Yes sir.

Witness excused.

1668 Philip Huyl, a witness produced by the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Barker:

Q. State your name. A. Philip Huyl.

[—] Where do you reside?

A. In Clinton township, Douglas county, Kansas.

Q. What is your business? A. Farming.

Q. Where did you reside in 1878?

A. I was not residing any place. I was working around then.

Q. Do you know Martin Metsker? A. Yes sir.

Q. Did you work for him at any time during the year 1878?

A. Yes.

Q. How were you working? A. By the day.

Q. Did you ever meet a young man by the name of Frederick Adolph Walters? A. Yes sir.

Q. Where did you meet him?

A. At Martin Metsker's.

Q. About when was that?

A. Sometime the latter part of September 1878.

Q. Where was he living at that time you met him?

A. He was working for Martin Metsker at the same time.

Q. How long did you work there with him?

A. About a week.
Q. How much did you see of him during that time?
A. I worked with him every day I was there.
Q. Did you see him after you left there ?
A. I saw him once after.
Q. When was that?
A. I was building a stable for Mr. Longnecker about half way between Metsker's and Lawrence, and he came along there and got his dinner there while I was working there.
Q. Did you see him afterwards? A. No sir.
Q. About when was that that you saw him at Longnecker's?
A. It was sometime the latter part of October or the fore part of November; I couldn't say which month.
1669 Q. Now, did you learn where he was from from any other source that his own statement? A. No sir.
Q. Did you ever see any letters which were addressed to him? A. No sir.
Q. Can you describe this man Walters?
A. Why, he was a slim, tall man, very near six feet tall.
Q. Do you remember the color of his hair?
A. He had dark hair, very dark hair.
Q. Do you remember the color of his eyes?
A. I don't remember the color of his eyes because I never looked at his eyes.
Q. Do you remember the shape of his nose?
A. He had a large Roman nose.
Q. Did you ever observe his teeth? A. Yes sir.
Q. What character of teeth did he have?
A. He had sound teeth and even.
Q. Did he show his teeth prominently? A. Yes sir.
Q. Do you remember his hand?
A. He had a long slim hand, and long slim fingers.
Q. Did you see him have any tools? A. No sir.
Q. You may look at these pictures which are marked Exhibits 29 and 30 and state if those are pictures of any person whom you have known in life, and if so, state who that person was.
A. The front view is the one I recognize.
Q. Whom you recognize it as?
A. Frederick A. Walters.
Q. The same Frederick A. Walters that you met out there at Metsker's? A. Yes sir.
Q. And of whom you have been speaking? A. Yes sir.
Q. Is this the one you recognize? A. Yes sir.
Q. The picture marked Exhibit 30. (Side view.)

1670 Cross Examination

By Mr. Hutchings:

Q. When was it that you went to work there, Mr. Huyl?

A. It was in the latter part of September, 1878.

Q. The last week in September?

A. Well, I couldn't tell you; it must have been.

Q. It must have been in the last week of September?

A. It was between the middle and the last of Septembe some time.

Q. When you went there this man Walters was at wor there?

A. He had worked there and there at the time I went ther

Q. How long did he stay there?

A. I could not say how long he stayed there for I left week after I went there.

Q. You stayed there only a week?

A. Just a week, yes sir.

Q. He was working there during that time? A. Yes si

Q. Then he went away and you didn't see see him an more? A. I saw him once after that.

Q. Where.

A. I was building a stable at Mr. Longnexker's.

Q. How long afterwards?

A. The latter part of October or the fore part of Novembe I couldn't remember which.

Q. What was he doing then?

A. He stopped there to get his dinner on his way to go Tuttle's after his clothes.

Q. You are sure it was in October or November you sa him going to Tuttle's?

A. Yes, I am sure it was one of those two months.

Q. About how far was it from Tuttle's?

A. About half way between Tuttle's and Lawrence.

Q. How far was that? A. About nine miles, I suppose.

Q. It was in November or December, you say, this san man you called Walters about half way between Longnecker and Tuttle's?

A. No sir, I said the latter part of October or fore part November.

Q. You just saw him going along the road at that time?

A. No sir.

Q. Where did you see him?

A. I was building a stable there and I was working at t stable and he came to me and wanted me to change him son money.

1671 Q. I am not asking you what he wanted; where we you when you saw him? A. I was building a stab

Q. How long did he stay there? A. Not very long.

Q. That was in the fall of 1878? A. Yes, sir.
Q. And you never saw him any more? A. No sir.
Q. You never saw any picture of him for four years did you? A. No sir.
Q. Were you a witness on the first trial of this case?
A. No sir.
Q. When were you first a witness on the trial of this case?
A. The second trial.
Q. In the second trial in 1885; that was seven years after you had seen him? A. Yes sir.
Q. That was the first time you ever saw pictures of this cadaver? A. Yes sir.
Q. You say that after the expiration of that seven years you recognized this as being a picture of a man you had seen a few times seven years before? A. Yes sir.
Q. I will get you to examine a picture here which is marked Exhibit 10, and state whether you ever saw—if you recognize that as a man you ever saw?

The defendants and each of them object to the question as not proper cross examination. Objection overruled, the defendants and each of them duly except.

A. No sir.
Q. I will show you a picture which will be marked Exhibit No. 33; I will get you to state whether you ever saw that man before.

The defendants and each of them object to the question as not proper cross examination. Objection overruled, each of the defendants duly excepting.

Q. Did you ever see that man before? A. No sir.
Q. Never did? A. No sir.
Q. I will show you a picture which will be marked
1672 Exhibit 34 and get you to state whether you ever saw that man before?

The defendants and each of them object to the question as incompetent, and not proper cross examination. Objection overruled, the defendants and each of them duly except.
A. No sir.

By Mr. Hutchings: I want to let the jury examine that picture (33) that he says he never saw the original of.

Q. What is your recollection about whether this man Walters wore a mustache? A. He wore a short mustache.
Q. Did he wear any beard? A. No sir.
Q. You say he had a Roman nose? A. Yes sir.
Q. Was his nose turned to one side out of the medium line?
A. No.

Q. You are sure about that? A. Not that I remember.
Q. You remember that he had a large—
A. A large nose, high bridge on his nose.
Q. He had a high bridged nose? A. Yes sir.
[—] In your direct examination you called it a very large Roman nose? A. Called it a Roman nose.
Q. A large Roman nose? A. Yes sir.
Q. Was it thick through the top here or was it sharp?
Q. It was rather a little pointed.
Q. Now, if the nose had been bent a little on the end, you would have noticed it, if it had been a crooked nose?
A. Well, I don't know whether I would or not.

Re-Direct Examination

By Mr. Green:

Q. I understood you to say you never saw the person whose picture is represented in Exhibit No. 34?
A. No sir, I don't believe I have ever seen him.

Witness excused.

1673 Henry Webber, a witness produced by the defendants, being duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Green:

Q. State your name, please?
A. My name is Henry Webber.
Q. Where do you reside, Mr. Webber?
A. I reside in Overbrook, Osage county, Kansas.
Q. Where were you residing in 1878?
A. Marion township, Douglas County.
Q. In what place?
A. On a farm in Marion township, Douglas county.
Q. Did you know a postoffice there by the name of Aladdin? A. Yes sir, it was my residence.
Q. Who was postmaster? A. I was.
Q. Now, did you ever meet a young man by the name of Frederick Adolph Walters? A. Yes sir.
Q. Where did you meet him?
A. I met him at my place, at my residence.
Q. About when was that?
A. It was along in the summer of 1878.
Q. Do you remember what part of the summer, Mr. Webber?
A. I could not say positively but I should judge perhaps it was along in August or perhaps September; I could not say positively.

Q. What was the occasion of your meeting him?
A. He came there for letters and to mail letters.
Q. State whether or not he received letters there at your place? A. Yes sir.
Q. At your postoffice? A. Yes sir.
Q. Mailed letters also? A. Yes sir.
Q. Did you ever observe from what place he received letters? A. He received letters from Medicine Lodge.
Q. Medicine Lodge?

By Mr. Hutchings: What State A. Iowa.

1674 Q. You mean Medicine Lodge?
A. I think it was Medicine Lodge.

By Mr. Hutchings: We object to the question as to where they came from. Objection overruled, the plaintiff excepts.

Q. Let me ask you to refresh your recollection, do you say Fort Madison?

The plaintiff objects to the question as leading. No ruling.

A. Excuse me; I was mistaken.

By Mr. Hutchings: How can this witness testify to that, your Honor?

A. I saw the postmark of the letter.

By the Court: My recollection is that I allowed similar evidence on behalf of the plaintiff with reference to a letter that was delivered to John W. Hillmon by the postmaster at Medicine Lodge. I thought it was competent then and I think it is now.

Q. About how long did he receive letters there, Mr. Webber?
A. Well, I should judge—I couldn't say positively, but I suppose it was six weeks or perhaps two months; I could not be positive with regard to the length of time.
Q. Did you meet him at any other place than your office?
A. Not at that time, sir.
Q. Now, how often was he at your place?
A. Well, he came there sometimes some two or three or three or four times a week for mail and left letters, but after that he was there pretty near every day when he was sick and stayed sometimes very near all day.
Q. Do you know where he was living at the time he was receiving letters at your postoffice?
A. He was living at Martin Metsker's.
Q. How far was Martin Metsker's from your place?
A. About three-quarters of a mile, sir.

Q. Do you remember about how many people received mail at your office?

A. Well, I could not say positively, but I suppose there was perhaps 25 or 30 families received mail there.

Q. Will you please describe this man Frederick Adolph Walters?

A. He was about 5 feet, 11, or 6 feet built in proportion with dark curly hair and dark mustache.

1675 Q. Was it long or short?

A. Now, I could not say with regards to that.

Q. How about his teeth?

A. As far as I could see—I never examined his teeth but only when he would speak his upper lip would curl somewhat and show his teeth.

Q. How, as to his nose, do you remember in regard to his nose?

A. Yes, sir, it was rather high, rather prominent here.

Q. Had a bridge? A. Had a bridge, yes, sir.

Q. His hands, do you remember his hands?

A. No, I don't.

Q. Now, do you remember the time he left there?

A. I think it must have been in October, sir.

Q. What year? A. 1878.

Q. Did you see him afterwards? A. Yes, sir.

Q. Where did you see him?

A. I saw him on Massachusetts street, Lawrence, right north of the Eldridge House.

Q. About how long after that was you saw him?

A. I should judge it was a month after he left our neighborhood.

Q. When was the last time you ever saw him?

A. That was the last time I ever saw him, sir.

Q. Did you ever hear from him afterwards? A. No, sir.

Q. Did any letters come to your postoffice for him afterwards?

A. I don't think there was any letters that ever came after that; I don't remember that there was.

Q. Did he leave any direction to which you were to forward letters? A. Not to my recollection, sir.

Q. Did you ever see him in any other position than erect?

A. Yes.

Q. Where was that?

A. I saw him one day lying on my porch as I came up to the house on the north side of my door reclining with his coat under his head for a pillow.

Q. What was the condition of his health, do you remember at that time?

A. It was very poor, sir; the man had been sick a long time and was sick then.

1676 Q. How was he built, Mr. Webber, his form?
A. I could not say; I supposed pretty near perfect for a man of his height; he stood very straight.
Q. What was his condition as to flesh?
A. He was poor, sir, at that time; very thin in flesh.
Q. Look at the pictures numbers 29 and 30 and state if they are photographs of a body you have known in life, and if so, state who that person was? A. Yes, sir, I saw that—
Q. Whom do you recognize it as?
A. As Walters, the very man that was lying on my porch in that same position.
Q. In which picture? A. The front view.
Q. No. 29? A. Yes, sir.
Q. What do you say of No. 30?
A. Well, that don't look so natural to me, the side view, for I never saw him in that position; I saw him in that front view, you know.
Q. Where were you when you saw him in that position, Mr. Webber?
A. I had been away from home and was returning, and as I opened my gate—I suppose my gate was about two rods from my house—
Q. Never mind the gate.
A. I am only explaining if you please.
Q. How far was your gate from your porch?
A. I guess about two rods.
Q. When you saw him what were you doing?
A I was walking up to the house.
Q. How high was the porch?
A. I should judge the porch was perhaps two feet from the earth. I had a gravel walk from the gate up to the porch and as I came up the gravel walk I saw a man lying there, and I thought he was a stranger.

The plaintiff moves to strike out what the witness thought. Motion sustained, the defendants and each of them duly excepted.

Q. Did you know John W. Hillmon? A. No, sir.

1677 Cross-Examination

By Mr. Hutchings:
Q. You say you saw Mr. Walters once after he went to Lawrence? A. Yes, sir.
Q. When was that?
A. That was in October, about the last of October, I think.
Q. Of 1878? A. 1878, yes, sir.
Q. You never saw him any more? A. No, sir.
Q. You were a witness in the first trial of this case and all the subsequent trials, were you not?

A. I think so, that is with the exception of one, I was in California at that time.

Q. At the time you saw the postmark on letters he got, did you make any memorandum of it?

A. I made no particular memorandum, sir, but handed him the—

Q. You handed him the letters? A. Yes, sir.

Q. You claim you took particular notice of the post mark?

A. Yes.

Q. You remembered that some four years afterwards when you were first called upon the witness stand in this case?

A. Yes, sir.

Q. There were other persons who received letters at your office? A. Yes, sir, a good many.

Q. Can you remember the postmark on any other letter you ever delivered? A. I think I can.

Q. Give us the postmark on any other letter you ever delivered in the year 1878?

A. I have delivered letters to several of my neighbors with postmarks that I remember.

Q. Well.

A. I have delivered letters to Martin Metsker with postmarks from Lawrence.

Q. In what year? A. Oh, I don't know.

Q. You know that because Martin Metsker lived there in the neighborhood and did business in Lawrence; you remember his getting letters from Lawrence?

A. Certainly I remember.

Q. This man was a stranger when he came to the post-office there the first time, was he not? A. Yes, sir.

1678 Q. And he came there how many times?

A. I couldn't say; he was there some three or four times a week for the mail at the time he was working but after that he was there very nearly every day at my place.

Q. You got some of these pictures of this cadaver and took them out in that neighborhood and exhibited them around?

A. I had them there.

Q. And you were about the neighborhood showing those pictures?

A. Only to people that I knew was acquainted with him.

Q. You did that at the request of the insurance companies?

A. At the request of Mr. Barker.

Q. Now, you remember testifying at the last trial of this case? A. Yes, sir.

Q. You remember that some photographs were shown you other than these two? A. Yes, sir.

Q. You remember being shown a picture of Mr. Walters in his life, do you not? A. Yes, sir.

Q. And you did not recognize it?
A. I told you I thought it was—
Q. When you were shown a picture that was represented to be Mr. Walters in his life, you did not recognize it at the last trial of this case? A. I think you are mistaken about that.
Q. Will you swear that you were not shown a photograph of Mr. Walters at the last trial of this case and said that you did not recognize to be a picture of any one you had ever known? A. I could not say.
Q. I will ask you if you did not say that you did not recognize that as a picture of any person you had ever seen?
A. I don't remember.
Q. You remember several pictures being presented to you, do you not, as being pictures of this cadaver? A. I do not.
Q. You don't remember that even?
A. Not that I remember.
Q. I thought you said in answer to a question put to
1679 you a little while ago that you did remember several other pictures were shown you?
A. No, I don't know as I did. I don't remember.
Q. Your memory is not very good, is it Mr. Webber?
A. Well, it is pretty good.
Q. You think it is pretty good? A. Yes, sir.
Q. You have testified in this case six times? A. Yes, sir.
Q. And you don't remember of ever having been shown a picture of Mr. Walters in his lifetime? A. I presume I have.
Q. What is your recollection? I will get you to state whether or not at the previous trials of this case you have not been shown pictures of Walters, and have testified that you did not recognize them as being the man you saw out there?
A. I don't know.
Witness excused.

The defendants and each of them move to strike out all the testimony of the witness with reference to pictures exhibited to him on other trials, as being incompetent, irrelevant and immaterial and because the pictures have not been exhibited to him upon this trial. Motion overruled, the defendants and each of them duly excepting.

1680 The defendant next offered in evidence the testimony of Mrs. Matilda C. Gilmore given upon the trial in 1896. It is admitted by the parties that Mrs. Gilmore is not within the jurisdiction of the court.

Said testimony was thereupon read to the court and jury and is in words and figures as follows, to wit:

Mrs. Matilda C. Gilmore, called on behalf of the defendants, being sworn, deposes and says:

Direct Examination

By Mr. Green:

Q. State your full name Mrs. Gillmore?

A. Matilda C. Gilmore.

Q. Where do you reside Mrs. Gilmore?

A. In North Topeka.

Q. Where were you residing in 1878?

A. Lawrence, Kansas.

Q. What was your name at that time? A. Mrs. Gilmore.

Q. You was? A. Yes, sir.

Q. You were married before 1878? A. Yes, sir.

Q. Where were you residing in 1878?

A. At the Central Hotel.

Q. Lawrence? A. Yes, sir, I was.

Q. Who was proprietor of that hotel?

A. My father, John Anderson—my step-father.

Q. Do you know how long he had been keeping the hotel at that time?

A. It seems to me about a year probably; I am not quite certain; I was not at home at the time he moved there.

Q. Do you remember a young man coming to the hotel there in the summer of 1878, by the name of Frederick Adolph Walters? A. Yes, sir.

Q. How did you ascertain his name?

A. Well I was told there was such a person, and then I walked out and met him in the hall, and asked him if he was the person.

1681 Q. About what time in the year was it, Mrs. Gilmore, that this young man was at your father's hotel?

A. Well he was there twice.

Q. He was? A. Yes, sir.

Q. When did he first come there, if you remember?

A. I am not positive; he was there in the spring and in the fall, but it has been quite a while ago and it is pretty hard to tell.

Q. What was the condition of his health at the time he was at your hotel? A. Well he was sick there.

Q. Do you know whether or not he was in the Dr's care at the time? A. I think he was.

Q. So he was there in the spring you think, and afterwards in the fall? A. Yes, sir.

Q. Do you know where he went to when he went in the spring? A. One time he went out in the country.

Q. Do you know whereabouts in the country?

A. No, sir, I have forgotten.

Q. And can you tell about the time he was there the second time?

A. Well it seems as though it was rather cool; it was a cool day when I saw him.

Q. The weather had become cool?
A. Yes, sir, and the first time the weather was very warm and the doors were open.
Q. Do you remember about how long he was there the first time?
A. No, sir, I didn't know anything about the boarders at all.
Q. And the second time? A. No, sir.
Q. And how often did you see him there, do you remember?
A. Well I saw him several times, but only two times that I recognized him or was interested in him.
Q. Did you have any conversation with him?
A. One time.
1682 Q. Did you notice anything in regard to his teeth at that time.
A. Yes, sir, I saw his teeth, more prominently than anything else.
Q. What was the character of his teeth?
A. They were good, large, yellowish white teeth, or rather creamy.
Q. Did you learn from him in any way where he was from?
A. He told me, but I couldn't tell whether I remember more than by what I heard afterwards so much.
Q. What is your recollection as to where he was from?
A. Well, it was somewhere east.
Q. Do you remember what state?
A. Well, I do not. He never mentioned any state; it was only the city, or whatever place he came from; I remember his mentioning a city or two.
Q. Do you remember the name of that city?
A. Not distinctly; I don't think I ever remembered it very distinctly, or paid any attention to it..
Q. Have you attended each of these trials, Mrs. Gilmore?
A. Yes, sir.
Q. The first one in Leavenworth? A. I think I did.
Q. Now you may look at these two exhibits C. and D. and state if you recognize these as pictures of anyone you knew in life? (Handing photographs to witness.)
A. I recognize the side view better than I do the front view --the mouth is more like—here I recognize the teeth in the front view; the side view is more the whole features or shape of the face.
Q. Whom do you say that is?
A. Well, it resembles Mr. Walters.

Cross-Examination

By Mr. Hutchings:
Q. That is, you think the side view does?

A. Yes, sir, I should recognize the side view quicker
1683 than the front view.

Q. And you say he came there first in the spring of 1878?

A. It was in 1878, and he was there twice; as to the exact time I couldn't be positive.

Q. What is your best recollection as to the season of the year that you first saw him?

A. Well it would be, it seems to be the first would be—it was windy I know and very hot and extremely windy, because he was not strong enough to go out anywhere.

Q. When he first came do you think it was spring—March or April?

A. May have been; on account of the weather I should judge.

Q. Early, about April; it was windy and somewhat inclement? A. No, sir; it was warm.

Q. Windy and warm weather? A. Yes, sir.

Q. And he at that time was sick? A. Yes, sir.

Q. How long did he stay there? A. I don't know.

Q. About how long?

A. I haven't any idea, because I never paid any attention to the boarders that came to the house?

Q. Do you remember how long he was gone before he came back? A. Might have been four or five months.

Q. Was he apparently in the best of health?

A. Well, may have been. He was better when I saw him the last time.

Q. You only saw him in the spring once?

A. That one time to recognize him.

Q. You don't remember now to have seen him, but one time when he was there? A. Two times.

Q. When he came there? A. Yes, sir.

Q. He was gone and then came back?

A. Yes, sir.

1684 Q. Do you remember how long he stayed the last time. A. I do not.

Q. Do you remember seeing him the second time?

A. I only remember seeing him as he was sitting at the table.

Q. You only remember seeing him twice. A. Yes, sir.

Q. You didn't see him any more after that? A. No, sir.

Q. The first time you saw these protographs was on the trial of this case at Leavenworth, in 1882? A. I think so.

Witness excused.

1685 Charles A. Walker, a witness, produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct

interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, testified as follows, to-wit:

Q. State your name and residence.
A. Charles A. Walker, Kansas City, Missouri.
Q. In what business are you engaged?
A. I am engaged in the insurance business.
Q. How long have you lived in Kansas City, Missouri?
A. Since last May.
Q. Where did you reside prior to that time; where were you living in 1878? A. Wichita, Kansas.
Q. In what business were you engaged?
A. Banking business.
Q. In what capacity? A. Cashier.
Q. Of what bank? A. The Wichita National Bank.
Q. How long did you continue to occupy that position?
A. Ten or twelve years.
Q. Did you go from Wichita to Kansas City, Missouri?
A. I did.
Q. Did you in the spring of 1878 become acquainted with one Theodore Wiseman, familiarly known as Major Wiseman?
A. I don't think it was 1878; I think it must have been 1880; no, it was 1879.
Q. You became acquainted with him in 1879?
A. I think it was it.
Q. Where? A. In Wichita, Kansas.
Q. Were you then in the banking business? A. I was.
Q. Where did you meet him? A. In the bank.
Q. During that time, say, 1879, did you meet him at Wichita, Kansas, more than once? A. Yes, several times.
Q. At any time in the spring, summer or fall of 1879, did you see him at Wichita when he had certain pictures with him of a dead body?

1686 The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. I did; I saw pictures that he showed me.
Q. Did he ever show you pictures of more than one dead body? A. I think he did.
Q. I do not mean more than one picture but whether they were not pictures of one body?

Objection.

Q. Do you think you would recognize those pictures?
A. Well, I don't know whether I would or not; I might, possibly.
Q. I will ask you to look at Exhibits G29 and G30 and state whether or not you recognize those as pictures you may have seen before?

A. I think they are the same pictures he showed me.

Q. Will you state as definitely as you can when you first saw these pictures or pictures similar to them?

A. In 1879.

Q. Who had them? A. Theodore Wiseman.

Q. I will leave that subject now, and ask you if you were at that time connected with any of the so-called secret orders and if so, in what capacity?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection sustained, the defendants and each of them at the time duly excepting.

Q. I will ask you if you know of any letters being received either by you or any one else from Iowa?

Same objection, ruling and exception as last above noted.

Q. Were you acquainted with the coroner of Douglas county in 1880? A. I was not.

Q. Do you remember of having any correspondence with the coroner of Douglas county, in 1880?

Same objection as last above noted; overruled, the plaintiff duly excepts.

A. I had.

Q. What, if anything, did you forward to the coro-
1687 ner of Douglas in 1880?

Same objection as last above noted. Overruled, the plaintiff duly excepts.

Q. What, if anything, did you enclose to the coroner of Douglas county besides your own letter?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. A letter.

Q. Do you know from what place that letter was received originally?

The plaintiff objects to the question as calling for secondary evidence; objection overruled, the plaintiff excepts.

A. My recollection is that it was Fort Madison, Iowa.

Q. Did you at the time that you forwarded that letter give any instructions, or make any request of the coroner of Douglas county as to whom he should deliver it to?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

Q. I instructed the coroner of Douglas county to turn the letter over to Major Wiseman.

Q. At that time were you acquainted with the coroner of Douglas county? A. I was.

Q. Were you acquainted with Theodore Wiseman?

A. I was.

Q. Are you able to state about the date of this transaction, that is, about the time that you forwarded this communication or this letter to the coroner of Douglas county?

A. My recollection is that it was in the spring of 1880, early part of 1880.

Q. You may state why you directed this letter to be turned over to Major Wiseman.

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection sustained, the defendant and each of the defendants at the time duly excepting.

1688 Q. There are two or three other questions that I would like to ask with the consent of the Court. I want to ask the witness at the time that Major Wiseman was in Wichita with these pictures, what he was doing, or what inquiries he was making; I do not mean what was the subject of his inquiries, or the matter of his business there at the time he showed the pictures.

The plaintiff objects to the question as incompetent, irrelevant and hearsay. Objection overruled, the plaintiff duly excepting.

A. He told me that he was trying to get information in regard to the disappearance of one Hillmon who had been in Wichita.

Q. Do you remember anything in regard to his inquiry about any missing man in Wichita?

The plaintiff objects to the question for the reason last stated. Objection overruled, the plaintiff duly excepts.

A. He exhibited these photographs to me and asked me if I had ever seen any one that they looked like.

Q. Well, the question was whether there were any inquiries made in regard to any man being missing, whether he inquired about any man being missing from Wichita?

A. Oh, I could not say as to that; he asked me a good many questions; I don't know whether he did or not; he possibly might have done so. I would not want to be positive about that.

Q. Now, I desire to renew my question, whether you requested the coroner of Douglas county to deliver the enclosed letter to Theodore Wiseman?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection sustained, the defendants and each of them duly excepting.

Q. Was there at any time any inquiry made of you as to one Frederick Adolph Walters who had disappeared and who had last been heard from from Wichita?

Same objection, ruling and exception as last above noted.

Witness excused.

1689 The defendants read in evidence, in succession, the depositions of Henry W. Howe, W. N. McKamey, H. B. Marshall, Julius Draves, which said depositions as read, are respectively in words and figures as follows, to wit:

1690 Deposition of Dr. Henry W. Howe taken before me W. T. Crittenden Consul General of the United States at the City of Mexico in the Republic of Mexico on the 31st day of August A. D. 1893, between the hours of ten o'clock a. m. and six o'clock p. m. of said day at said city in said Republic pursuant to the annexed notice to be read in evidence on behalf of the Defendant in said action. Dr. Henry W. Howe of lawful age being by me first duly examined, cautioned and solemnly sworn to testify the truth the whole truth and nothing but the truth deposeth and saith in answer to the questions:

Ques. 1. State your name, age, place of residence and profession.

Answer. My name is Henry W. Howe, age 51, residence City of Mexico, profession, dentist.

Ques. 2. Where were you residing the year of 1878 and spring of 1879? Ans. In Lawrence, Kansas.

1691 Ques. 3. Did you know a man by the name of John W. Hillmon?

The plaintiff objects to the reading of that part of the answer to the above question beginning with the word "I think," because the same is incompetent, irrelevant and immaterial and indefinite. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. I knew a man named Hillmon, I think his name was John W. or J. W. Hillmon I will not swear to it—that is to his initials.

Ques. 4. Where did you first meet this man Hillmon?

Ans. I first met him at or in my office in Lawrence, Kansas. My office was then over New Market Store.

Ques. 5. What was your business at that time?

Ans. I was a dentist.

Ques. 6. Did this man Hillmon come to your office?

Ans. He did.

Ques. 7. Did any one accompany him, if so state if you know who it was?

Ans. He was in company with another man whom I had seen before—a farmer over the river, if I remember aright—My impression he was a farmer from over the river.

Ques. 8. Did the man Hillmon inform you as to his place of residence and business, if so state what he said.

Ans. He told me he was a ranch-man from South Western Kansas—from near Medicine Lodge.

Ques. 9. Can you give a description of this man Hillmon?

Ans. From the best of my recollection he was about as tall as Mr. Green, I judge five feet 8 or 9 inches high—dark eyes, dark moustache and dark goatee, not blond.

Ques. 10. Do you remember anything as to his nose?

Ans. I do not.

Ques. 11. Do you remember anything as to his teeth?

Ans. I do.

Ques. 12. State what there was about his teeth that you remember?

Ans. There was missing the left lateral and central incisors, also first or second bicuspids, also on left side, all upper teeth.

Ques. 13. What was the purpose of Hillmon's coming to your office if you know?

Ans. To have a plate made and to have either a stump of one of his front teeth extracted or one filled, I do not remember which, but either one or the other, because I remember that was all he ever paid for.

Ques. 14. What work of any did you do for him at that time?

Ans. I took an impression and made a plate of three teeth, a rubber plate.

1692 Ques. 15. When did he next visit you if at all, after you did the work of taking the impression.

Ans. He never came back to the office again, he never received his plate.

Ques. 16. Can you state the year and about the time of the year he came to your office?

Ans. Think it was January or February, 1880, not positive.

Ques. 17. Do you remember whether you went to Colorado in 1879 or 1880? Ans. I do not.

Ques. 18. Witness here asked what year was it that President Garfield was killed.

Ques. 18. Do you remember the circumstance of a body of a man being brought to Lawrence from near Medicine Lodge, Kansas, which body was claimed to be that of one John W. Hillmon, who had been accidentally shot near that place. Said body being placed in Bailey and Smith's undertaking establishment on Massachusetts street? Ans. I do.

Ques. 10. About how much time had expired between the time you had made the plate for this man Hillmon and the time that that body was brought to Lawrence?

Ans. A few weeks—do not remember the exact time as it has been a long time ago.

Ques. 20. Did you see that dead body? Ans. I did.

Ques. 21. Was that the body of the man who had introduced himself to you as Hillmon and for whom you had prepared the rubber plate above mentioned a short time before?

Ans. It was not the body of the same man I had made the work for.

The witness here states he wishes to make a correction, which is as follows: I think I made the plate for him the latter part of the year, the last of the year, he had not come for the plate. In two or three months after that I met Hillmon on the streets of Lawrence with another man, whom I did not know. I called his attention to the plate waiting for him at my office, he promised to call for it, which he never did. It was a few weeks after that that body was brought to Lawrence.

Ques. 22. You stated that the man who introduced himself as Hillmon had lost certain of his upper teeth from the left side of his mouth; do you remember any circumstances why you state it was from he left side of his jaw?

Ans. I know it was his left side because I stood or worked from the right side of the chair on the opposite side of his jaw. It is further impressed in my mind it being fresh in my memory at that time. I naturally looked on the left side of the jaw of the corpse for the missing teeth.

Cross Examination

By S. A. Riggs:

1693 Ques. 1. Doctor, in what year did you remove to Lawrence, Kansas?

Ans. I moved there on the sixth or eighth day of June, 1875.

2 Ques. When after that did you first remove from Lawrence?

Ans. I went to Colorado in '79 or '80 I do not remember what year.

3 Q. In what month of the year did you go to Colorado?
Ans. I think in May, am not positive.
4 Q. To what place did you remove from Colorado?
Ans. To Lawrence, Kans.
5 Q. In what year did you return to Lawrence, Kansas from Colorado?
Ans. I think in November of either '82 or '83.
6 Q. How long did you continue to reside in Lawrence, Kansas after that time? Ans. Until May '87.
7 Q. To what place did you then remove?
Ans. To Mexico.
8 Q. You mean the City of Mexico then do you in the republic of Mexico? Ans. Yes sir.
9 Q. Have you resided here ever since? Ans. No sir.
10 Q. To what point did you remove from the City of Mexico?
Ans. I went to the mines in the state of Quetretaro, before that I lived in Colorado for a while.
11 Q. Was that the second time you had lived in the state of Colorado? Ans. Yes sir.
12 Q. Where in Colorado did you live the first time you were there and where the second time?
Ans. The first time I lived in Georgetown, Breckinridge, Ko Konio, Robinson, and a short time in Idaho Springs, and at the mines on the Chicago range. The second time I was up at Denver and Las Animas.
13 Q. What year and what month of the year did you live in Georgetown?
Ans. I don't remember, I was in Georgetown when Garfield was killed.
14 Q. In what year and what month of the year did you live in Breckenridge?
Ans. I don't remember, I was there twice.
15 Q. In what year and what month of the year.
Ans. I do not remember the months.
16 Q. Can you state the year you lived at Ko Komo?
Ans. No sir.
17 Q. Can you state the year you lived at Idaho Springs?
Ans. No sir. I was there but a short time about two weeks with my brother who was practicing medicine there at that time.
18 Q. Can you state the year you removed from Mexico to Colorado? Ans. I think it was in '89.
1694 19 Q. Are you sure of that?
Ans. No, sir, I am not.
20 Q. Did you testify at the Coroner's inquest in Lawrence held over the body of the person what you have spoken of in your examination in chief? Ans. No, sir.

21 Q. That inquest occupied several days time did it not?
Ans. I do not remember.
22 Q. Where in Bailey and Smith's undertaking establishment was this body lying at the time you saw it?
Ans. As I went into the door of the room it was on the left hand side as I went in.
23 Q. Of what room?
Ans. I do not remember, nor do I remember how many rooms I went through.
24 Q. Was it in the main store-room?
Ans. No, sir, I think not.
25 Q. Are you certain of that?
Ans. Yes, sir, because I went through at least one door besides the front door.
26 Q. For what purpose did you go in to look at that body?
Ans. To see if it was Hillmon I had fixed the teeth for. Partially through curiosity.
17 Q. There was a great deal of excitement and general interest in Lawrence at that time was there not, as to the identity of this body?
Ans. Yes there was some interest in it.
28 Q. Were not the insurance companies that had issued policies on the life of John W. Hillmon, denying that the body there was the body of John W. Hillmon?
Ans. I understood it so.
29 Ques. Did you not at that time understand that the question of identity was the principal question investigated by that coroner's jury? Ans. Yes, sir.
30 Ques. Did I understand you to say that body was brought to Lawrence a short time after you had last seen the man Hillmon for whom you had made the plate?
Ans. Yes, sir, a few weeks.
31 Q. The inquest that was held over the body, was begun and partially held while the body lay in Bailey and Smiths, was it not? Ans. I do not know.
32 Q. At whose request if at anybody's did you go to see that body?
Ans. No ones request. For my own satisfaction and curiosity.
33 Q. How long did you preserve the plate you had made for the man Hillmon?
1695 Ans. I do not remember. I destroyed it to use the teeth on other work.
34 Q. What was your charge for that plate?
Ans. I do not remember, I think about $10.00.
35 Q. Did you make a charge of it on your books?
Ans. I think I did.
36 Q. Have you now the book on which you made that charge? Ans. I have not.

37 Q. What became of that book? Ans. I do not know.
38 Q. Had you that book at the time of the coroner's inquest of which you have spoken?
Ans. If his name was on the book I think I had.
39 Q. Did you ever examine to see if his name was on the book? Ans. I never did.
40 Q. Did you not know that one of the important facts urged by the insurance companies to prove that the body there was not the body of John W. Hillmon, the insured, was the condition of Hillmon's teeth and the condition of the teeth of the body, as to whether or not any were missing?
Ans. Yes, sir.
41 Q. Did you at that time know Dr. J. D. Patterson, a dentist in the city of Lawrence?
Ans. I did but we were not friends, we were competitors.
42 Q. Did you at that time know of the circumstance of Dr. J. D. Patterson making a plaster cast of the teeth of that body? Ans. I heard that he had done so.
43 Q. When did you first hear it?
Ans. I do not remember.
44 Q. Was it about the time he made the cast?
Ans. I judge it was after he had made it.
45 Q. About how long after? Ans. I do not know.
46 Q. Was it within a few days? Ans. I think so.
47 Q. Were you at that time personally well acquainted wath James W. Green who conducted the coroner's inquest over that body? Ans. No, sir, I was not.
48 Q. Were you at all acquainted with him?
Ans. I think not: I knew he was Mr. Green when I met him on the street but that was all.
49 Q. Were you at that time personally acquainted with George J. Barker at Lawrence?
Ans. I knew hm about as I had known Mr. Green at that time.
50 Q. Had you at the time of this inquest the plate
1696 that you had made for the man Hillmon in your possession? Ans. I don't know.
51 Q. Your only purpose of destroying that plate was to get use of the materials used in the construction, was it not?
Ans. To get the teeth perhaps to match some others.
52 Q. At the time that body lay in Bailey and Smith's establishment, did you make any examination of your office to ascertain whether or not you then had in your possession the plate made by you for the man Hillmon, or any memorandum of that work on your books?
Ans. I don't remember that I did.
53 Q. Did you make any examination of the teeth of that body which you saw at Bailey and Smith's?
Ans. I looked at them, yes, sir.

54Q. Were the teeth in that body corresponding to the teeth of Hillmon which you say were missing, all present in that body?

Ans. The teeth in the body in front of the mouth were intact, there were none missing.

55 Q. You did not answer my question and I ask the notary to read it again to you for further answer?

Ans. In the front of the mouth they were.

56 Q. What tooth that was missing in the mouth of the man Hillmon for whom you made the plate as you say, was present intact in the mouth of that body?

Ans. The left central and left lateral incisors that were missing in the mouth of the man named Hillmon that I made the teeth for, were not missing in the body.

57 Q. When you made the teeth for the man Hillmon were his left central and left lateral incisors missing from his mouth?

Ans. They were. But I will not swear as to the stump, possibly there was a stump there which I extracted, but I am not sure.

58 Q. He paid you for all the work you did for him except the making of the plate which he did not get, did he not?

Ans. Yes, sir.

59 Q. Were the left central and left lateral incisors in the mouth of the body which you saw in Bailey and Smith's, the natural teeth of that body? Ans. I think they were.

60. Q. You so thought when you saw that body did you not? Ans. I thought so.

61 Q. You lived in the City of Lawrence at the time of the first two trials of this case did you not?

Ans. I think not.

1697 62 Q. You returned to Lawrence from Colorado in November, 1882, did you not?

Ans. In '82 or '83 I do not remember which.

63 Q. You remained there then until May, 1887, did you not? Ans. Yes, sir.

64 Q. From the time you left Lawrence in 1879 or 1880 until you returned in 1882 or 1883 you lived in Colorado did you not? Ans. Yes, sir.

Q. During that interval, I mean the interval which you lived in Colorado where did your family reside?

Ans. They lived in Lawrence.

67 Q. Lawrence, Kansas? Ans. Yes, sir.

68 Q. You were in frequent correspondence with them were you not during that time?

Ans. Not very frequent, we were not on pretty good terms.

69 Q. They were advised of your whereabouts were they not? Ans. Yes, sir.

70 Q. Have you ever before at any trial of this case or any other case testified to any of the facts of which you have testified in this deposition? Ans. Not that I remember.

71 Q. If you had so testified you would not have forgotten it would you Doctor? A. I think not.

72 Q. When did you first communicate to any one the fact that you had made a plate for a man at Lawrence who called himself Hillmon and who said that he was on a ranch near Medicine Lodge, Kans.?

Ans. Did not say he was on a ranch, said he was a ranchman. But I said it [publically] in front of the corpse in the presence of several people.

73 Q. Can you state the name of any one who was present when you made that statement? A. No, sir.

74 Q. You knew at that time that the memorandum in your book if you had made one of the work you had done for the man Hillmon, and the rubber plate containing three teeth which you had made for the man Hillmon were if they were in existence, absolutely conclusive as to the fact that the body you saw there, was not the body of the man Hillmon for whom you had done this work, did you not?

Ans. I did not realize the importance of the case at that time.

75 Q. You don't answer my question and I ask the notary to read it to you again for further answer?

Ans. I don't understand that question clear yet.

1698 (Witness after reading the question over.) Answers. Yes, sir.

76 Ques. Why then did you not make search in your office to find if possible the plate you had made for the man Hillmon and the charge upon your book if you had made one?

Ans. Because Patterson was doing the dental part of that and it was none of my business. I was given to understand so by some one, I don't remember who.

77 Ques. Why did you destroy the plate you had made for the man Hillmon, when you knew of its great value in determining in the pending controversies between Mrs. Hillmon and the insurance companies conclusively her right to recover on the policies?

Ans. I had probably destroyed it before I knew the value of it.

78 Ques. Doctor, how many times did you see this man who called himself Hillmon.

Ans. I saw him twice, once in my office; once on the street.

79 Ques. How long a space of time was there between these two occasions?

Ans. I do not remember exactly, but judge it was some weeks.

80 Ques. Was any one with him when he came to your office? Ans. Yes, sir.

81 Ques. Were you acquainted with that person?

Ans. No, sir.

82 Ques. Was any one with him when you saw him on the street? Ans. Yes, sir.

83 Ques. Were you acquainted with that person?

Ans. No, sir; it was not the same man that was with him in my office.

84 Ques. Have you ever seen either of the men who were with Hillmon on these occasions since?

Ans. Not to know them, or not that I know of.

85 Ques. How long was the man Hillmon in your office at the time you speak of. Ans. I do not remember.

86 Ques. What was the general character as to the soundness of the teeth that the man Hillmon had in his head?

Ans. They appeared to be good.

87 Ques. What was their appearance as to color?

Ans. What was their appearance as to color?

88 Ques. In order to make the plate for him did you make a plaster impression of his mouth?

Ans. I probably made a wax one.

89 Ques. What was the color of the man Hillmon's eyes?

Ans. It seems to me they were dark.

90 Ques. Describe the color of his hair as nearly as
1699 you can? Ans. I can not.

91 Ques. Was his moustache and goatee the same color as his hair. Ans. I do not remember.

92 Ques. Was his mustache the same color as his goatee?

Ans. I think so.

93 Ques. In what language or words did the man Hillmon state to you his name.

Ans. I do not remember the exact words except that he said his name was Hillmon.

94 Ques. Give his language as near as you can in which he stated to you his name and occupation?

Ans. It has been too long ago; I can not remember the conversation exactly.

95 Ques. Had the man Hillmon any black teeth when he was in your office? Ans. Not that I remember of.

96 Ques. Did the missing teeth of which you have spoken seem to have been lost by decay?

Ans. That I do not know. One, I judge, yes.

97 Ques. Was the man Hillmon a stout or a slender man?

Ans. It appears to me that he was neither stout nor slender, nearer slender than stout.

98 Ques. Had he high or low cheek bones.

Ans. That I do not know.

99 Ques. What in your judgment was his weight at that time?

Ans. I judge he was a man of 155 or 160 pounds. That is if I remember correctly.

Re-Examination

By James E. Green:

1 Ques. Did you examine the back teeth of the body you saw at Bailey and Smiths? Ans. I did not.

2 Ques. Doctor, what is the cause of what is commonly called a black tooth?

Ans. It is generally caused from the nerve having died from a blow or decay.

3 Ques. Will a tooth, the nerve to which has died, decay sooner than it would had the nerve lived? You may state from your knowledge and experience?

Ans. Yes, sir; I would judge that it would, although I have seen black teeth remain in the mouth many years. Make that dark, I never have seen black teeth in the mouth.

4 Ques. When the nerve in a tooth decays or dies will that tooth assume a dark color from that cause. Ans. Sometimes.

5 Ques. You may state if you were absent from Lawrence in the year 1877 or 1878, and if so in what direction were 1700 you?

Ans. In April or May of 1877 I went to Hays City, Kansas, at the solicitation of some army officers to do some dentistry for them, by request I went from there to Fort Wallace, from there back to Hays City and Fort Hays. I was sent across from there to Dodge City by ambulance and government escort. I remained there some weeks, was given government conveyance to Camp Supply, Indian Territory, with escort, where I remained some weeks; from there to Fort Elliott, Pan Handle, Texas, where I remained some time. I do not remember how long. From there to Fort Sill, about 200 miles east, with government escort, government conveyance and escort with letters of introduction to Gen. McKenzie from Gen. Hatch, where I remained two or three months in the practice of dentistry and hunting. From there I went north to Fort Reno, where I remained some weeks. From there horseback to Winfield, Kans., and from there to Lawrence, not horseback. I was absent nearly a year.

Recross Examination.

1 Ques. During this journey of yours of which you have spoken, in your last answer, you were largely engaged in hunting, were you not?

Ans. Not largely; I hunted some, my principal business was dentistry.

2 Ques. How long have you been acquainted with James W. Green, an attorney for the defendant in this cause?

Ans. I do not know.

3 Ques. State as near as you can?

Ans. Probably a year of two before I came here in '87.

4 Ques. How long have you been acquainted with George J. Barker, an attorney for the defendant in this action?

Ans. I do not know.

5. Ques. State as near as you can.

Ans. Perhaps a year longer than I have known Mr. Green.

6. Ques. When did you first learn that these gentlemen were the attorneys for the defendant, the insurance companies?

Ans. I first learned that Mr. Green was through a letter from him of not more than two or three months ago, and for Mr. Barker I have just learned that he is now. I have not heard his name mentioned in the connection before, that is, as I remember.

7. Ques. When you were in Lawrence did you read the Lawrence daily papers? Ans. Some times, not always.

8. Ques. How long have you known S. A. Riggs, one of the attorneys for the plaintiff in this action?

Ans. More or less for 17 or 18 years.

9. Ques. Did you ever make any attempt to communicate with either of the insurance companies that issued policies on on the life of John W. Hillmon, or to either of the at-
1701 torneys whose names I have mentioned or to any person connected with or representing either of such insurance companies or the beneficiary under the policies, the facts to which you have testified in this disposition or any of such facts? Ans. No, sir.

Witness here states that he desires to make a correction in his evidence as follows: In regard to the length of time that I have known Mr. Green was connected with this case, when N. J. Stevens of Kansas City, Mo., was down here three years ago he told me of it, and I had forgotten it.

10. Ques. This N. J. Stevens is a brother-in-law of Mr. Green, is he not? A. Ans. Yes, sir.

HENRY W. HOWE.

1702 Depositions of W. N. McKamy, taken before me, Geo. R. Harvey, a Notary Public in and for El Paso County, Texas, on the 27th day of July in the year 1896, between the hours of nine o'clock a. m. and six o'clock p. m., at the office of the Vendome Hotel in said county, pursuant to the annexed notice, to be read in evidence on behalf of the defendant in said action.

1703 W. N. McKamy of lawful age, being by me first duly examined, cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposeth and saith that:

Question. You may state your name?
Answer. W. N. McKamy.
Q. Where do you now reside?
A. In Guadalupe Calve, State of Chihuahua, Republic of Mexico.
Q. What is your business?
A. I am a mining superintendent.
Q. Where were you residing in January, 1878?
A. At Fort Griffin, Texas.
Q. What was your business if any at that time?
A. I was selling goods and buying buffalo hides.
Q. Where were you doing this business?
A. In Fort Griffin, Texas, and at a store on and at the head of the Pease river at the foot of the Staked Plains.
Q. Do you know a man by the name of John W. Hillmon?
A. Yes.
Q. When and where did you first become acquainted with him? A. At Fort Griffin, Texas.
Q. Did you know a man by the name of John H. Brown?
A. Yes.
Q. Where did you first become acquainted with him?
A. At Fort Griffin, Texas.
Q. Did you see these two men together and if so, when?
A. At Fort Griffin many times and at my store on Pease river; they were inseparable for about a year and a half that I knew of.
Q. When did you last see these two men and where?
A. At my store on Pease river in the month of June or July, 1878.
Q. Did you ever have any business transaction with these two men and, if so, where?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. I had business transactions with them first in selling them goods and supplies for buffalo hunting at Fort Griffin. Afterwards I sold them a train of oxen and wagons, consisting of nine wagons and thirty-three yoke of oxen, and sold them goods at various times after that up to July following this transaction.
Q. What was the date of this sale of the cattle and wagons?

1704 Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. January 10, 1878.

Q. What did they agree to pay you for these cattle and wagons?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. They agreed to pay me thirty-six hundred and twenty-three dollars and ninety cents ($3623.90).

Q. Was this a cash transaction or how did they agree to pay the consideration?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. They gave me three notes, one for $900.00 and two for $1361.95 each and secured these notes by a mortgage on the oxen and wagons which I sold them and certain buffalo hides which they represented that they had on Croton Creek in the Panhandle of Texas.

Q. Were these oxen and wagons your individual property?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. They were not; they belonged to the firm of McKamy & Anderson, of which firm I was a member.

Q. What was Mr. Anderson's full name?

Counsel for the plaintiff objects to the question as the same is incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. His name was L. B. Anderson.

Q. Where is he, if you know, at the present time?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. The last account I had of him, about six months ago, he was near Tuscon, Arizona.

Q. Look at the three notes now shown you by J. W. Green, the attorney here present representing the defendant, and which notes said Green requests the notary taking this deposition to attach his name and mark Exhibits A, B and C and also to attach his notarial seal, and state in whose handwriting the names of the payors of said notes is.

1705 Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. The names were written by John W. Hillmon, in the presence of John H. Brown and in my presence.

Q. Look at the notes marked Exhibits A, B and C and state if those are the notes which you have heretofore stated were given in consideration of the oxen and wagons sold by you to John W. Hillmon and John H. Brown?

Counsel for the plaintiff objects to the question as incompetent, irrelvant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. They are the same notes beyond question.

Q. Are these the notes given by John W. Hillmon and John H. Brown in purchase of the oxen and wagons sold by you to them?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted. A. They are.

Q. Look at the notes marked Exhibits A, B and C, and state whose notes they are and for what they were given?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. They are the notes of John W. Hillmon and John H. Brown and were given to me and my partner in payment for thirty-three yoke of oxen and nine wagons.

Q. Have those notes been paid, or any portion of them?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. Not one dollar of them.

Q. What arrangement, if any, existed or was made between Hillmon and Brown and yourself in the matter of paying these notes?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. The $900.00 note was to be paid from the sale of the buffalo hides that are expressed in the mortgage; and the other two notes wre to be paid from the proceeds of their freighting and hunting, and were to be paid at maturity.

Q. You may state whether or not the amount of the consideration of the three notes marked Exhibits A, B and C is still due and owing from Hillmon and Brown to the
1706 firm of McKamy and Anderson?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

A. It is; the entire amount.

Q. Look at the paper now shown you by J. W. Green, and to which he requests the notary taking the deposition to attach his name and notarial seal and mark Exhibit D, and state in whose handwriting the signatures of J. W. Hillmon and Brown are?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. I think the signatures are in the handwriting of John W. Hillmon. I know the signatures to the notes are, as they were signed in my presence.

Q. State what the paper marked Exhibit D is?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. It is the mortgage given to secure the payment for the thirty-three yoke of cattle and nine wagons sold to John W. Hillmon and John H. Brown.

Q. Did John W. Hillmon or John W. Brown ever transfer these oxen and wagons to you and Mr. Anderson in satisfaction of these notes?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action [action] and ruling of the Court the plaintiff at the time duly excepted.

A. No, and no portion of them.

Q. Do they, John W. Hillmon and John W. Brown, owe you anything over and above these notes?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. Yes; somewhere from one thousand to fifteen hundred dollars; it has been [been] a long time and I have not access to my books, and I speak from memory.

Q. How did this indebtedness arise?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. The greater portion of it arose from my furnishing them supplies to go out to the western edge of the Staked Plains to exchange them for Buffalo hides, they representing to me that the hunters were killing large numbers of buffaloes there at that time, they bringing to me a man by the name of W. H. West, who had just come from there, to confirm their statement.

Q. Where were these goods furnished them?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled
1707 the objection, to which action and ruling of the Court the plaintiffs at the time duly excepted.

A. At my Pease river store.

Q. Did they ever return to that place after you had furnished them these goods?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. No, they never did.

Q. Was it a fact that at that time the hunters were killing buffalo in the region in which they stated they were?

Counsel for he plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

A. No, there were no buffalo in that section of country, and there were no hunters in that section of country at that time, as I afterwards ascertained from personal observation and inspection.

Q. What did Hillmon and Brown do with the oxen and wagons which they purchased from you, if you know?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay.

By Mr. Barker: We offer this testimony for the purpose of showing not only the financial condition of John W. Hillmon, but to rebut the testimony offered tending to show that he was going down into Southern Kansas in 1878 for the purpose of buying a cattle ranch; that instead of that he was fleeing from the justice of Texas.

By the Court: It would have no bearing if he was trying to avoid arrest by the authorities of Texas. It runs in my mind that John Brown was asked in reference to this matter and this may be offered by way of impeachment of his testimony; but I think that whatever might be contained in the deposition of John Brown, beginning at the bottom of page 4, all of page 5 and the first line on page 6 should not be read.

To which ruling of the Court, the defendants at the time duly excepted.

(*4.) A. About two months after I had furnished Hillmon and (*5) Brown with these supplies I learned that they were pulling out with the teams for the Pecos River with the intention of beating me out of these teams and supplies. The boy came into the Pease River store and told my clerk to notify me immediately that Hillmon and Brown were pulling to the other side of the plains; that one of the drivers of Hillmon and Brown had told him to leave word at the Pease River store that Hillmon and Brown were pulling to the other side of the plains with the oxen, wagons and supplies with the intention of beating me out of them, and that the drivers were virtually their prisoners, as they had threatened
1708 to kill any one of them who attempted to leave them or give them away.

Q. What, if anything, did you do towards attempting to recover these oxen and wagons?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. The Court sus-

tained the objection, to which action and ruling of the Court the defendants at the time duly excepted.

(*5) A. As soon as I heard of their running away I wrote to the Chief of Police at Lawrence, Kansas, to look out for them there, knowing that Hillmon was correspondinig with a young lady there, and I figured that he would go there. Then I went to my Pease river store and struck out on the trail and followed the trail to near the Pecos river. It then became evident to me that they were going up the Pecos river, and I then left the trail and went up to Las Vegas, New Mexico. At Las Vegas I received notice from the Chief of Police at Lawrence that the men were there, and also found a lot of the supplies that I had furnished them at my Pecos river store, in possession of a person to whom they had sold them. I also learned that they had traded off a portion of the oxen at Las Vegas, New Mexico, for a span of horses. I then went up to Trinidad, Colorado, and on the road to Trinidad I found four yoke of the cattle which they had sold to a man who was working on the grade of the Atchison, Topeka and Santa Fe Railroad. At Trinidad I learned that they had sold the oxen and wagons in every direction. I stopped at Trinidad, Colorado, and wrote down to Texas to have papers sent to me at Trinidad so as to have Hillmon and Brown arrested in Kansas. Before the papers reached me I read a notice in the papers of the killing of John W. Hillmon in Barber Coun- (6.) ty, Kansas, and presuming that this was correct I returned to Texas.

Q. Look at the photograph now shown you by J. W. Green, and to which he requests the Notary to affix his name and notarial seal and attach the same to this deposition, and state if it is a photograph of any one you have heretofore known, and if so, whom?

A. It is the photograph of John W. Hillmon as I knew him in 1877 and 1878 at Fort Griffin, Texas, and on the plains hunting buffalo.

W. N. McKAMY.

1709 (The exhibit referred to is the small picture of Hillmon.)

*The defendants now offer in evidence the three notes and the mortgage identified by the witness. Said notes are marked respectively Exhibits U and N and Exhibit L, and the mortgage is marked Exhibit O. The plaintiff makes a separate objection to each and every one of said papers for the reason that they are incompetent, irrelevant and immaterial to any issue in the case, and objects specially to the mortgage because it adds nothing to the debt shown by the notes.

The Court overruled said objections, to which action and ruling of the Court the plaintiff at the time duly excepted.

Said notes and mortgage were then read in evidence to the jury and are, respectively, in words and figures as follows, to wit:

1710 $1361 95/100.

Fort Griffin, Tex., Jany. 10th, 1878.

Four months after date, for value received, we promise to pay to the order of McKamy and Anderson thirteen hundred and sixty-one 95/100 dollars.

HILLMON & BROWN, [Seal]

McKamy & Anderson.
[Seal] GEO. R. HARVEY,
Notary Public.

Exhibit B.
Exhibit "L" Nov. 99 W. C. H., Judge.

$1361 95/100.

Fort Griffin, Tex., Jan'y 10th, 1878.

Six months after date, for value received, we promise to pay to the order of McKamy and Anderson thirteen hundred and sixty-one 95/100 dollars.

HILLMON & BROWN, [Seal]

McKamy & Anderson.
[Seal] GEO. R. HARVEY,
Notary Public.

Exhibit C.
Exhibit M, Nov. 99. W. C. H.

$900 00/00.

Fort Griffin, Tex., Jan'y 10th, 1878.

Two months after date, for value received, we promise to pay to the order of McKamy & Anderson nine hundred dollars.

HILLMON & BROWN, [Seal]

McKamy & Anderson.
[Seal] GEO. R. HARVEY,
Notary Public.

Exhibit A.
Exhibit N. Nov. 99. W. C. H.

The State of Texas,
Shackleford County.

1711 Know all men by these presents that we J. W. Hillmon and J. H. Brown, doing business under the firm name of Hillmon and Brown, in consideration of the sum of Two dollars to us paid by W. N. McKamy and D. B. Anderson, doing business under the firm name of McKamy and Anderson, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant,

bargain, and sell unto the said McKamy and Anderson, the following described property viz: Nine wagans, thirty-three yoke of oxen branded H on left horn said wagons and oxen are better known as the "Billy Rhoades Train," Twenty-five hundred (2500) Buffalos, Bull, Cow and Kip hides, now piled on the banks of Croton Creek, near head of said Creek, to have and to hold all and singular the said goods and chattels unto the said McKamy and Anderson, their executors, administrators and assigns, to their sole use forever; and we the said Hillmon and Brown, for ourselves, and our executors and administrators do covenant to and with the said McKamy and Anderson, their executors, administrators and assigns, that we are lawfully possessed of the said goods and chattels as of our own property; that the same are free from all incumbrances, and that we will, and our executors and administrators shall, warrant and defend the same to the said McKamy and Anderson, their executors, administrators and assigns, against the lawful claims and demands of all persons; Provided, nevertheless, that if the said Hillmon and Brown their executors or administrators, shall on or before the date of maturity well and truly pay unto the said McKamy and Anderson, their executors administrators or assigns, the sum of the following promissory notes: One note for nine hundred dollars payable two months from date, One note for thirteen hundred and sixty-one 95 1-100 dollars, payable four months from date, one note for thirteen hundred and sixty-one 95 1-100 dollars, payable six months from date, then this deed, as also our said promissory notes, bearing even date herewith, signed by said Hillmon and Brown, whereby we promised to pay the said McKamy and Anderson the said sums at the times afore-

1712 said, shall be void; otherwise shall remain in full force and virtue: And provided, also, that until default by us the said Hillmon and Brown, our executors and administrators, in the performance of the condition aforesaid, or of some part thereof, it shall and may be lawful for us and them to keep possession of the said wagons and oxen and to use and enjoy the same; and to hold and keep possession and control over said buffalo hides, until a sale of same is effected when the proceeds of same shall be by us paid on the aforesaid promissory notes; but if said property or any part thereof shall be attached at any time before payment as aforesaid, by any other creditor or creditors of us the said Hillmon and Brown, or if we the said Hillmon and Brown shall attempt to sell the same, or any part thereof, without notice to the said McKamy and Anderson, their executors, administrators or assigns, and without their assent to such sale in writing expressed, then it shall be lawful for the said McKamy and Anderson their executors, administrators, or assigns, to take im-

mediate possession of the whole of said granted property to their own use.

In testimony whereof, we have hereunto set our hands this the 10th day of January, in the year of our Lord one thousand eight hundred and seventy-eight.

J. W. HILLMON & BROWN.

The State of Texas,
Shackleford County.

Before me, B. R. Webb, a Justice of the Peace in and for said County, personally came J. W. Hillmon, to me made known, and to me acknowledged that he executed the foregoing instrument of writing, dated 10 day of January A. D. 1878, and that he signed, sealed and delivered the same for the purpose, uses and considerations therein stated.

In testimony whereof, I hereby sign my name & affix my seal of office at office, in Fort Griffin, this the 15 day of January A. D. 1878.

B. R. WEBB J. P. & Ex officio Notary Public.

[Seal] S. C. T.

1713 The State of Texas,
County of Shackelford.

I, J. N. Masterton, Clerk of the County Court in and for said County and State, duly qualified and commissioned in terms of the law, do hereby certify that the within and foregoing attached Mortgage from J. W. Hillmon and J. H. Brown to W. N. McKamy and L. B. Anderson dated the 10th day of January, A. D. 1878 together with its certificate of authentication, was filed in my office for record the 14th day of January 1878 at 1 o'clock p. m., and was duly recorded on the 29th day of January, 1878, at 3 o'clock p. m., in book A on pages 339 and 340,

In testimony whereof, I have hereunto set my hand and affixed the impress of the Seal of said Court, at office in the town of Albany in said county, this, the day and year last above written.

[Seal] J. N. MASTERTON,
[Seal] Clerk County Court, Shackelford Co. Tex.
By THOMAS HALL, Deputy.

Exhibit O Nov. 99 W. C. H. Filed for Record Jany 14 1878 at 1 o'clock p. m. J. N. Masterton, Clk. Exhibit D. Geo. R. Harvey, Notary Public.

By Mr. Green: The three notes marked respectively Exhibits L M and N. W. C. H., and the mortgage Exhibits marked Exhibit O. W. C. H., are the four papers shown and exhibited to William Hillmon and the signatures to which were identified by him as having been written by John W. Hillmon.

By Mr. Green: We next offer in evidence Exhibits P
1714 and Q which are notes signed by John W. Hillmon. "P" being a note dated at Lawrence, Kansas, October 31, 1876, payable six months after date to the bearer, for $60.70, and Exhibit "Q" being a note dated Oskaloosa, Kansas, July 10th, 1871, to Keeler & Johnson for $50. The signatures to both of these notes have been identified by William Hillmon.

The plaintiff objects to the admission of Exhibit "Q" in evidence as having no bearing on the case by reason of the date.

By the Court: Is it not objectionable on another ground: There is nothing shown about the note except that Hillmon signed it. It may have been paid. The fact that it is produced here is not sufficient to show that it has not been paid.

By Mr. Green: The presumption of law would be that inasmuch as the note is not in the hands of Hillmon that it has not been paid.

By Mr. Atwood: Let it go in; we don't care; if you can fish up any other outlawed note we will let that in.

By Mr. Barker: I desire to have the remarks of counsel taken down and excepted to.

By the Court: The jury will pay no attention to remarks of counsel.

Said notes were thereupon admitted in evidence and read to the jury. They are respectively, in words and figures as follows, to wit:

"EXHIBIT P. Nov. 99 W. C. H. EX. R. C. H. N.
$60.70

Lawrence, Kansas, Oct 31 1876.

Six months after date value received, I promise to pay to the order of Bearer at Douglas County Bank Sixty and 70-100 Dollars, with interest at 12 per cent. after ..... until paid, to be paid annually interest in default to draw interest same as principal. Appraisement waived.

The drawers and endorsers hereof jointly and severally waive demand, protest and notice of non-payment of this note.

JOHN W. HILLMON.

No..... Due....."

"EXHIBIT "Q". Nov. 99, W. C. H. EX. Q. C. H. N.

Oskaloosa, Kansas, July 10th, 1871.

One day after date for value received I promise to pay Keeler & Johnson or order the sum of fifty dollars with 10 per cent interest. The same being for work & labor done at the request of said John W. Hillmon. JOHN W. HILLMON."

1715 The defendants offered in evidence Article 797 of the Criminal code of the State of Texas in connection with the deposition of W. N. McKamey, for the purpose of rebutting

the claim that John W. Hillmon went to Southwestern Kansas in the winter of 1878-9 for the purpose of establishing a cattle ranch and for the purpose of showing that he was a fugitive from the justice of the State of Texas.

The plaintiff objected to the introduction of said statute in evidence as incompetent, irrelevant and immaterial.

The Court sustained the objection to which ruling of the Court the defendants and each of them at the time duly excepted.

Said statute is in words and figures as follows, to wit:

"Art. 950—(797). Fraudulent Disposition of Mortgaged Property.

If any person has given, or shall hereafter give any mortgage, deed of trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the state, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

1716 Be it remembered, that on this 7th day of Sep. A. D. 1887, at 10 a. m. in the City of County of Los Angeles, State of California, before me, W. H. Seamans a Notary Public in and for the State and County aforesaid and duly commissioned and qualified under the laws of the United States to take depositions for use in the Circuit Courts of the United States, personally appeared H. B. Marshall witness of sound mind and lawful age, witness for the ..... in a civil suit now pending in the Circuit Court of the United States for the District of Kansas, wherein Sallie E. Hillmon is plaintiff and the Mutual Life Insurance Company of New York is defendant, and the said witness being by me first carefully examined and cautioned, and duly sworn to testify the truth the whole truth and nothing but the truth, did thereupon depose and say:

Q. State your name, age and place of residence?

A. H. B. Marshall, age 46 years, place of residence 835 Grand Ave., Angeles, Cal.

Q. Where were you residing in the winter of 1878 & 9?

A. Wichita, Kansas.

Q. What business are you engaged in now?

A. Contracting—grading.

Q. Were you acquainted while residing in Wichita with a man by the name of John W. Hillmon? A. Yes sir.

Q. Where did you make his acquaintance?

A. At the Globe Hotel, Wichita.

Q. About when did you first meet him?

A. Latter part of February or the 1st of March; must have been [the] somewheres near the first of March.
Q. Were you living at the hotel? A. Yes sir.
Q. About how long were you acquainted with him?
A. Must have been about two weeks near that.
Q. Was any one in company with him there at the hotel? A. Yes sir.
1717 Q. What was that person's name?
A. He registered his name as Brown; I have forgotten the initial.
Q. How often did you see Hillmon during your acquaintance with him?
A. From three to a half a dozen times a day and evening together.
Q. What was your business at that time at Wichita?
A. Veterinary and Sale Stable business.
Q. Will you describe this man Hillmon, giving his height &c.?
A. Hillmon was about five feet nine 1-2 or ten medium size, straight, whiskers and the mustache, light color, medium in heft, he shaved his cheeks down pretty well to his chin and left fair size chin whiskers; chin whiskers was a dark auburn or light brown.
Q. Can you give the color of his hair?
A. His hair was rather brown, darkish brown, between a brown and a black.
Q. What was the shape of his face?
A. Well, his face was a little bit on the picked order.
Q. How was his forehead, high or low, the shape of it?
A. Hard to remember so long ago.
Q. Did you notice the teeth of Mr. Hillmon? A. Yes, sir.
Q. You may state whether or not they were perfect?
A. They were not.
Q. In what respect were they defected?
A. He had one tooth out.
Q. In the upper or lower jaw? A. In the upper.
Q. When and under what circumstances did you observe?
A. Well, we played checkers in the Hotel in the evening and I noticed in his laughing over the victory of the game he showed his teeth very plain.
Q. Did you observe his hands? A. I did.
Q. What kind of a hand would you say he had its size or shape? A. Rather a very neat, small hand.
Q. Did you observe whether or not there were any scars on his hands? A. Yes sir.
Q. State whether or not there were scars on his hands?
A. There was.
Q. Whereabouts on the hands?

A. The scar running through the inside of his hand and back through between his thumb and finger.

Q. Was it on what you would call the ball of the thumb?

A. Yes sir.

1718 Q. How far back did it extend between the thumb and finger? A. About an inch and a half.

Q. On which hand was this scar?

A. I think the left, I am not positive.

Q. Did you notice his feet? A. Yes sir

Q. What kind of a foot did he have?

A. He had a very neat, small foot wear about a five and a half or six boot.

Q. What was Hillmon's business in Wichita if you know?

A. Well I don't know what it was.

Q. Who was keeping the Globe Hotel at that time?

A. It was either Draves & Bittell or Renolds; I don't remember which it was. I now remember it was Draves & Bittell they bought Renocas out in the fall.

Cross Examined

By S. A. Riggs, for plaintiff:

Q. How long have you lived in Los Angeles?

A. About two years.

Q. Where did you live next before you lived in Los Angeles? A. Pomona.

Q. How long did you live at Pomona?

A. About one year.

Q. What was your business there?

A. Ranching and teaming.

Q. Where did you reside before you came to Pomona?

A. Wichita, Kansas.

Q. How long did you reside at Wichita, Kansas?

A. Somewhere near five years.

Q. Where did you reside before you lived at Wichita, Kansas?

A. Well, I was on the road traveling some two or three years then my home was in Illinois prior to that.

Q. What were you traveling for?

A. I was traveling in the horse training and Veterinary business, principally horse training.

Q. Were you giving exhibitions in horse training?

A. Yes sir.

Q. What was your business when your home was in the State of Illinois?

A. It was kind of mixed, I was doctoring horses, teaming and anything to make bread and butter.

Q. Whereabouts in the State of Illinois did you reside?

A. Rock Island County.

Q. At what town or village if any?

1719 A. They called it Illinois City.

Q. From what time to what time did you live in Illinois City?

A. I believe I went to Illinois about '70. It is getting beyond my memory it has been so long I can't tell where I have been; I can come near telling where I aint been.

Q. Are you a married man? A. I am.

Q. When were you married? A. Married in '70.

Q. Where? A. San Diego, California.

Q. Were you living there at that time? A. Yes, sir.

Q. Where is your family now? A. City of Los Angeles.

Q. At what place or building did you first see John W. Hillmon?

A. I think it was at the Globe Hotel, Wichita, Kansas.

Q. There was no special intimacy between you and Hillmon was there?

A. In a few days after he came there he found out that I was a horse man and understood catching wild horses he made me a proposition to go out on the Range Western Kansas; he wanted to know how much I would take and go with him and show him the secret of catching wild horses. I believe I offered to take five or six hundred dollars; it was about that amount he told me that [that] he could pay me about three hundred dollars down. I told him that was no object to me; I also helped him to buy a pair of horses, wagon and camping outfit. I sold him part of it and helped him buy the balance.

Q. Does your answer to the last question indicate the character of the intimacy between you and Hillmon?

A. I think though the question I answered prior to that will be sufficient with regard to playing checkers, etc.

Q. I ask you again was there any special intimacy between you and Hillmon?

A. Well nothing more of any importance that I can remember of.

Q. He was simply a casual acquaintance with whom you were associated as you have indicated only for a few days was he not? A. Yes, sir.

Q. You have given testimony in this case at two trials heretofore had have you not?

A. Yes, sir; I believe it is two trials I'll be plagued if I can remember I think only one.

Q. You have been interrogated heretofor in relation to the same matters to which you have testified to-day have you not?

A. Only on the witness stand at Leavenworth.

1720 Q. When were you last examined as a witness in this case?

A. I don't think I ever was examined but once only at Leavenworth as I can remember of.

Q. When were you examined at Leavenworth as a witness in this case?

A. I believe it was in 1880 or '81 it might have been '82 I am not very good at keeping the dates.

Q. Who was the presiding judge on the trial at Leavenworth when you testified as a witness?

A. I don't remember, I don't know as I ever heard his name.

Q. Describe the appearance of the presiding judge at that trial.

A. I can't remember it, it appears to me like a man between forty and fifty with a light mustache if I ain't mistaken, pretty hard to remember only seeing a man about fifteen minutes.

Q. Do you mean to be understood that you were in the court room only about fifteen minutes while that trial was in progress?

A. Well, I said fifteen minutes, it was part of a half a day [it] might have been in the court room an hour or hour and a half.

Q. Which of the attorneys for the plaintiff in this action conducted your cross-examination on that trial?

A. I don't remember as I ever heard his name unless it was this gentleman here (pointing to Mr. Riggs). I think it was you.

Q. Do you know and can you tell whether the Mr. Riggs who is now examining you has any front teeth missing?

A. I have not noticed him close enough to see or tell.

Q. At the time you knew John W. Hillmon and were associating with him, there was no special reason why you should observe his teeth, was there?

A. Well, I can't say that there was.

Q. Was there any special reason why you should have observed his foot?

A. Nothing particular that I know of. I used to observe him walking up and down the street with me and I noticed he had a very pretty foot.

Q. Are you as observant of the teeth and feet of all your acquaintances as you were of Hillmon's?

A. Well, not generally, he was a man of rather fine appearance and who would attract attention; he was well dressed and made rather a fine appearance, his clothes look neat, fit him neatly, and a person would naturally notice him more than some people. I noticed him more particularly than some on account of the inducements that he held out to me to go with him.

Q. Why should the inducements he held out to you to go with him have made you notice him more particularly than you would others?

A. Well, it's natural for any one to notiice a party that he has any idea of doing any business with when he is with him ten days or two weeks or such a matter.

1721 Q. It was because you had an idea of doing business with Hillmon that you noticed his feet and teeth was it?

A. Well, [—] person naturally would notice them more than any other person.

Q. Why?

A. Well, that is a hard question to answer. I have answered that before, it is natural for a person to notice one who throws out inducements to him to do business where he has the money to put up for it.

Q. You have stated then the only reasons you had for noticing Hillmon's teeth and feet have you?

A. Well, I put another answer in there if you want it in regard to his teeth he used to eat at the same table at the hotel with us and I had to notice his teeth more than I would some probably.

Q. When did you first notice that Hillmon had a missing tooth?

A. It might have been three or four days or a week before I noticed it, it is pretty hard for a man to remember the exact date after seven or eight years.

Q. What circumstance first called your attention to the fact that he had a missing tooth? A. I can't remember now.

Q. Do you know Geo. J. Barker, one of the attorneys for the defendant in this case? A. I don't remember him.

Q. Do you know James W. Green, Esq., one of the attorneys for the defendant in this case?

A. I recognize [—] as the gentleman here in the room.

Q. You have had several conversations with him about this case, have you not? A. Well, nothing very particular.

Q. But you have had several conversations with him about the case, have you not?

A. No, sir. I asked him yesterday if he wanted my deposition in this case after I found out who he was and he said he did, and that is all the conversation we had in regards to the case. We talked about other matters.

Q. Had you never before yesterday had any conversations with Mr. Green about this case?

A. I answered no, sir, thinking he meant yesterday. Oh, yes.

Q. Have you at Los Angeles heard read or read yourself or heard stated your testimony given at any trial of this cause or any portion of such testimony?

A. I don't think I have, not here.

Q. Do you know, and can you state, whether or not J. W. Green, the attorney for the defendant here present has any front tooth out? A. I couldn't say.

1722 Q. You spoke of a scar on Hillmon's hand, on which hand was that scar?

A. I don't remember. I think on the left. I ain't positive.

Q. Can you state any special reason why you observed that scar? A. Yes, sir, I can.

Q. State it?

A. In moving the checkers on the checker board is how I noticed the scar in playing at the hotel.

Q. Can you state when you first noticed that scar?

A. Not the exact date.

Q. Was it a deep scar?

A. Well, so as to show a white streak.

Q. How long was that scar on the back of his hand?

A. About an inch and a half from the forks of his thumb and finger.

Q. Was the shape of his hand anywise affected by the injury which produced the scar?

A. I think the skin was drawed or contracted a very little.

Q. Have you any special reason for remembering the size or shape of Hillmon's foot?

A. I have answered that before plain as I can.

Q. Have you no other reasons than those stated by you heretofore? A. Not that I remember.

Q. Have you any other reasons for remembering the appearance or descriptive features of Hillmon than those you have stated in this deposition?

A. I should rather think I had.

Q. State them?

A. Well, after the occurrence came up of this man being murdered and knowing that Hillmon was trying to get me into the same trap it is natural for one to suppose that they would remember something about him more particular than others. I was also placed on the detective department to look after such matters to a certain extent, consequently I keep it more on my mind.

Q. Who placed you on the detective department?

A. Iowa Detective Association. I have still my credentials at the house to show for it.

Q. When were you placed on the detective deparament?

A. In Utah four years ago. Salt Lake City.

Q Who paid you for your services in that capacity?

A. No regular pay except in rewards; rewards were divided between the detectives and the association.

Q. Why should your being placed on the detective department of the Iowa Detective Association four years ago afford

you any reasons for remembering the descriptive features of John W. Hillmon whom you last saw in March, 1879?

1723 A. Well there were photographs and descriptive lists forwarded to detectives in different parts of the country.

Q. Did you while in that service have a photograph and a description of John W. Hillmon? A. I had his photograph.

Q. Did you have any description of him?

A. No, sir.

Q. From who did you receive his photograph?

A. I think his photograph was sent to me from Lawrence from whom I don't know.

Q. Was this prior to your testifying at Leavenworth in this case?

A. Must have been two or three years after I testified in this case.

Q. Where was your home at that time?

A. I was traveling at that time between Colorado and this country and New Mexico also.

Q. For whom were you traveling? A. For myself.

Q. On what business?

A. I was selling books, medicines, and operating on horses, veterinary work.

Q. Were you also looking for John W. Hillmon?

A. Not particularly so.

Q. Were you at all looking for John W. Hillmon?

A. Not particularly.

Q. Why did you have the photograph of John W. Hillmon at that time?

A. It was sent me along with a number of others.

Q. Were they all sent from Lawrence? A. No, sir.

Q. Were any others sent from Lawrence? A. No, sir.

Q. Who sent you Hillmon's photograph?

A. I don't know, it just came in an envelope to me.

Q. Did you write for it? A. No, sir.

Q. Did you have a photograph of one Frederick A. Walter of Fort Madison, Iowa?

A. I did have a photograph of what was termed the dead body the name I didn't know.

Q. Where did you get that?

A. I got it from Theodore Wiseman.

Q. When did you get it from Wiseman?

A. In April, 1879.

Q. Was this photograph the photograph of a dead body or was it the photograph of a living person?

1724 A. The photograph of a dead body I should call it.

Q. Was it a body lying in a box or coffin?

A. I think it was in a coffin.

Q. While you were in Utah, New Mexico and Colorado did you make any search or inquiry for John W. Hillmon?

A. I never made any search or particular inquiry I always had a lookout if I could see any such man.

Q. Who secured your appointment in this Iowa Detective Association?

A. I don't remember his name he was a special agent of that company.

Q. Where were you when that appointment was made?

A. In my room at the Cliff house in Salt Lake City.

Q. Did you solicit this appointment? A. No, sir.

Q. How long after you received the appointment was it that you received the photograph of Hillmon from Lawrence?

A. Some two or three months while I was at Salt Lake and I was there five months.

H. B. MARSHALL.

1725 United States of America in the District of Kansas.

State of Kansas,
County of Sedgwick.

Be it remembered that on this 18th day of May, A. D. 1881, at the office of H. G. Ruggles, in the City of Wichita, County of Sedgwick, State of Kansas in the District aforesaid before me A. T. Owen a Notary Public in and for the County and State aforesaid and duly commissioned and qualified under the laws of the State of Kansas to take depositions for use in the Circuit Courts of the United States personally appeared Julius Draves of sound mind and lawful age witness for the defendant in a civil suit now depending in the Circuit Court of the United States for the District of Kansas wherein Sallie E. Hilmon is plaintiff and the Mutual Life Insurance Company of New York is defendant and the said witnesses being by me carefully examined and cautioned and duly sworn to testify the truth, the whole truth and nothing but the truth did thereupon depose and say.

Julius Draves being called and duly sworn deposes and says.

Julius Draves:

Ques. 1. State your name age and residence.

Ans. 1. My name is Julius Draves my age is 26 years; my place of residence Wichita, Kansas.

Ques. 2. State where you lived in the winter of 1878 & 9? and what business you were engaged in?

Ans. 2. During the winter of 1878 I was farming in Iowa and came to Wichita, Kansas, in the winter of '79.

Ques. 3. Who kept the Globe Hotel when you came here in 1870? Ans. 3. Adam Bittel and H. C. Draves.

Ques. 4. State as definitely as you can the month and day of the month on which you arrived in Wichita in 1879?

Ans. 4. I will not be positive but it was somewhere along the 2d or 4th of January.

Ques. 5. How soon after your arrival at Wichita did you go to the Globe Hotel to board? Ans. 5. Right off.

Ques. 6. State that if in the winter of 1879 after your arrival in Wichita you became acquainted with one John W. Hillmon?

Ans. 6. It was the 20th of January the first I saw him.

Ques. 7. Where did you first see him?

7 Ans. At the Globe House in Wichita.

8 Ques. Did he board there?

8 Ans. He came there to board.

9 Ques. Were you boarding there at that time?

1726 9 Ans. Yes, sir.

10 Ques. During the time you and him were boarding at that hotel did you see him frequently?

10 Ans. Yes, sir.

11 Ques. State as definitely as you can how tall a man this man Hillmon was?

11 Ans. From 5 feet 8½ in. to 5 feet 9 in.

12 Ques. You may state who was present at the time Hillmon was measured?

Objected to by plaintiff as leading and as assuming that the witness has testified to that to which he has not testified and therefore incompetent. The defendant withdraws the last question for the present.

13 Ques. How did you happen to ascertain or find out Hillmon's height?

13 Ans. There were several of us outside of the Globe House and [go] to arguing about the height which was the tallest.

14 Ques. State what was done?

14 Ans. There were six of us that measured.

15 Ques. On what did you measure?

15 Ans. We stood up against a post in front of the Globe House.

16 Ques. Who was present at that measurement at that time?

16 Ans. Brown, Nichols, Bowman, Campbell, Hillmon and myself is all that I can remember.

Cross-examined

By Plffs Counsel S. A. Riggs:

17 Ques. Did you use any rule to measure with?

17 Ans. No, sir.
18 Ques. What was Brown's full name?
18 Ans. John Brown.
19 Ques. Did he live in Wichita?
19 Ans. He came with Hillmon.
20 Ques. Did you make a memorandum of the heights of the various parties? 20 Ans. No, sir.
21 Ques. What was Brown's height?
21 Ans. Brown's height was about 5 feet 8¼ in.
22 Ques. Did you use any tapeline or any other measure?
22 Ans. No, sir; not at the time.
23 Ques. Does the post you speak off stand on a pavement or on a board walk?
23 Ans. It stands on the pavement in under the porch.
24 Ques. Is that pavement of wood, brick or stones?
24 Ans. Wood.
25 Ques. Does the post by which you measured rest on the wood or has it some other foundation?
25 Ans. It rests on the wood.
26 Ques. What plan did you take to ascertain the height of the man standing against the post?
26 Ans. Had a straight piece of wood to hold across
1727 and made a mark with a knife.
1727 27. Ques. Who held the piece of wood over Hillmon's head?
27. Ans. If I am not mistaken it was Bowman.
28 Ques. Did he make the mark with the knife also at the time Hillmon was measured?
28. Ans. No Sir I made the mark.
29. Ques. Did you make all the marks?
29. Ans. No Sir.
30. Ques. What marks did you make?
30. Ans. Hillmon's Browns & Nichols.
31. Ques. What is Bowman's full name and where does he live?
31. Ans. Charley Bowman I can not tell you where he lives; the last I heard of him he was in Denver.
32. Ques. What was his height at that time?
32. Ans. I can not say exactly the mark was not made; he was the smallest man in the ought fit and we did not make his mark.
33. Ques. When did you first measure these heights?
33. Ans. I am not positive but I think it was in May.
34. Ques. Did you at the time you made the marks write the names of the persons opposite the marks? (Objected by Defendants' Counsel on the grounds that the Question has already been answered by the witness.)
34. Ans. No Sir.

35. Ques. Who requested you to make these measurements?

35. Ans. Really no one requested me to make the measurements.

36. Ques. What was your height on that day?

36. Ans. A little over 5 feet 8 in.

37. Ques. What was Nichols' height?

37. Ans. I have not measured his correct it is some over 6 feet.

38. Ques. You say you measured these in May. May in what year?

38. Ans. In the year 1879.

39. Ques. Is that the only time you ever measured them?

39 Ans. Yes sir, until I tried to measure them to-day and it is painted over.

40. Ques. You could not measure them to-day?

40. Ans. No sir.

41. Ques. At the time you marked the heights on the post was the post an old one or a new one?

41. Ans. It was not new but had never been painted. I will not be sure whether it was painted but if it was it was a drab color.

42. Ques. It was an ordinary awning post was it not?

42. Ans. Yes sir.

43. Ques. When you made these measurements in May what kind of a rule did you use?

43. Ans. A wooden two-foot rule a pocket rule.

1728 44. Ques. Whose was it?

44. Ans. I am not positive, but I think it was Campbell's.

45. Ques. Did you apply the rule to the post yourself?

45. Ans. Yes Sir.

46. Ques. State all the persons who were present when you made that measurement.

46. Ans. A detective Munn H. C. Draves Campbell and several others but I do not recollect their names.

47. Ques. Do you swear that Munn did not furnish this rule (objected to by the Defendant on the grounds that the question has already been asked and answered by the witness).

47. Ans. I would not because Campbell started upstairs after his rule and that was the only rule I saw there at the time.

48 Ques. Do you swear positively that Munn did not furnish the rule you used on that occasion.

48 Ans. I do not.

49 Ques. Did you make at the time you made these measurements any written memorandum of them.

49 Ans. No. sir.

50 Ques. Then you only testify now from your recollection of measurements made two years ago, do you?

50 Ans. Yes, sir.

51 Ques. This Mr. Munn was a stranger in Wichita wasn't he?

51 Ans. I don't know that he was in Wichita, he was a stranger to me.

52 Ques. Now [all] you mean to swear positively that John W. Hillmon's height at the time you have stated was not over 5 feet 9 inches.

52 Ans. It was not over that as near as I could get it.

53 Ques. Now do you mean to swear positively that John W. Hillmon's height at the time you have stated was not over 5 feet 9 inches.

53 Ans. That is a pretty hard question to answer; he was not taller than that according to what we measured him.

54 Ques. You are not willing then to swear to the accuracy of your measurement, are you?

54 Ans. I swear it is correct by the way we measured him at the time he was measured.

55 Ques. And you swear positively to the accuracy of your memory do you? 55 Ans. Yes, sir.

56 Ques. How is it then that you can not fix his height any nearer than to say 5 feet 8½ or 5 feet 9 in.

56 Ans. Well, it might not [—] been measured as particular as that but it is between that.

57 Ques. State whether or not one of the front teeth of John W. Hillmon was missing when you saw him in Wichita at the time stated.

1729 58 Ques. State what kind of teeth John W. Hillmon had at the time spoken of, whether good or defective in appearance.

58 Ans. They were good in appearance as far as I know.

59 Ques. How long did John W. Hillmon board at the Globe Hotel while you were boarding there?

59 Ans. I would not be positive, but all of two weeks though.

60 Ques. How frequently did you converse with him?

60 Ans. About every day more or less.

61 Ques. How long at a time state the extent and character of your association with him?

61 Ans. Sometimes two or three hours at a time.

62 Ques. Who started away from Wichita with John W. Hillmon when he went if you know.

62 Ans. Brown is the only one that I know of.

63 Ques. By what kind of a conveyance did they leave Wichita?

63 Ans. They had a double team with provisions.

64 Ques. What kind of a wagon and what kind of a team describe both as near as you can?

64 Ans. As far as the team I can not describe the color of the team, just saw the team as they went out, they were horses. They had a lumber wagon I think, a small size light.

65 Ques. State whether or not it had springs or cover; both, or either?

65 Ans. Can't say if it had springs, I don't think it had; there was bows on it for cover, the cover was not up.

66 Ques. State how they came to Wichita, by what kind of conveyance?

66 Ans. I did not see them as they came until they came into the door of the hotel.

67 Ques. State the date when you saw them come into the door of the hotel referred to?

67 Ans. It was the 20th day of January, 1879, I think.

68 Ques. On what date did they leave in the wagon as you have stated?

68 Ans. I do not know because I did not pay any attention.

69 Ques. State the month and the day of the month as near as you can.

69 Ans. I would not be positive what month, but I think about the first of March.

70 Ques. By what road did they leave town?

70 Ans. When I saw them they started west.

Redirect Examination

71 Ques. When you made the measurement of the post when Mr. Munn was present had it then been repainted.

71 Ans. No sir.

72 Ques. Did Mr. Munn produce a rule at that [—] or did he call for a rule?

1730 72 Ans. I think I spoke about a rule first.

73 Ques. What was done when you spoke about a rule by any of the persons present?

73 Ans. Campbell went up-stairs after one at the Globe house.

74 Ques. What did you do while he was gone if anything?

74 Ans. I went into H. C. Draves and waited on customers.

75 Ques. When you returned again was the rule present?

75 Ans. Yes, sir.

76 Ques. Was it the same rule with which you made the measurement?

76 Ans. I made the measurement after I came out of H. C. Draves waiting on customers I made the measurement with that rule after I came out.

77 Ques. What was Mr. Campbell's business?

77 Ans. Carpenter, by trade.

78 Ques. Where was Mr. Campbell the first time you knew of him?

78 Ans. I do not recollect the place he was in I heard of him last winter.

79 Ques. Has Mr. Campbell been in Wichita for some time past? 79 Ans. No, sir, not that I know of.

80 Ques. State to the best of your knowledge and recollection when he left Wichita?

80 Ans. He left Wichita the summer of 1879, I judge about the middle of the summer.

81 Ques. Do you remember who you gave this rule to when you got through measuring?

81 Ans. Yes sir, I gave it to Campbell.

82 Ques. You never noticed the teeth of Hillmon particularly, did you while you were boarding there?

82 Ans. Not particularly.

83 Ques. From any observation or examination which you made of Hillmon's teeth would you swear that the tooth next to the eye tooth on the left-hand side in the upper jaw in front in his mouth was not a broken or defective tooth?

83 Ans. I could not.

JULIUS DRAVES.

1731 P. V. Healey, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truthand nothing but the truth, in answer to direct interrogatories propounded to him by Geo. W. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. Where do you live, Mr. Healey? A. Wichita, Kansas.

Q. What business are you engaged in?

A. Real estate business.

Q. Where were you living in 1878 and 1879?

A. Wichita.

Q. In what business were you engaged at that time?

A. In the real estate business.

Q. Do you know such a place as the Globe Hotel?

A. Yes, I did know such a place.

Q. There was such a place in Wichita at that time?

A. Yes, sir.

Q. How far was your place of business from what was known at that time as the Globe Hotel, in Wichita, Kansas?

A. About 200 feet.

Q. I will ask you if in the winter of 1879 you became acquainted with a young man by the name of Frederick Adolph Walters? A. I did.

Q. About what time in the winter did you first make his acquaintance? A. I think in January or February, 1879.

Q. Did you have any business with him during that time?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

A. I did.

Q. State if in addition to your real estate business you did any other business? A. Yes, sir.

Q. What was the nature of that business?

A. I bought and sold railroad tickets.

Q. Now, you may state generally the character of the business which you had with Frederick Adolph Walters.

The plaintiff objects to the question as incompetent, irrelevant and immaterial; objection overruled, the plaintiff duly excepts.

1732 A. He sold some railroad tickets for me.

Q. Up to what time did you see him in 1879? Up to about what time?

A. Up to somewhere about the last of February or the first of March.

Q. About how often was he in your place of business, about how many times did you see him from the time you made his acquaintance until the first of March, 1879?

A. Not less than half a dozen times, maybe more.

Q. Could you give a description of Mr. Frederick A. Walters so far as height and color of his hair?

A. He had dark hair and I remember he was very near my height.

Q. What is your height?

A. I don't know as I ever measured, but I am 5 feet 10 and over.

Q. You say he had dark hair? A. Dark hair.

Q. Did you observe his teeth?

Q. Well, I don't remember as to his teeth; I don't remember anything peculiar about his teeth.

The plaintiff moves to strike out the answer of the witness as not responsive to the question. Objection overruled, the plaintiff excepts.

[A.] Did you during that time become acquainted with two men in Wichita by the name of Hillmon and Brown?

A. I did not become acquainted with them.

Q. Did you see them there in Wichita?

A. I saw two men that Mr. Walters told me were—

The plaintiff objects to the answer as not responsive to the question and hearsay, and moves to strike it out. Motion overrules, the plaintiff duly excepts.

Q. You can answer the question.

A. I saw two men that Mr. Walters told me was Hillmon and Brown.

The plaintiff moves to strike out the answer as hearsay. Motion overruled, the plaintiff duly excepts.

Q. Where did you see those men; I am speaking of the men called Hillmon and Brown?

1733 A. The first time I saw them on the street; passed them on the street with Mr. Walters.

Q. Do you remember about when that was with reference to the time Mr. Walters went away or you last saw Mr. Walters? A. It was a very few days before.

Q. Had you seen these men before that time? A. No, sir.

Q. Do you remember of seeing them after that time?

A. Yes, twice after that.

Q. I am speaking now about the men called Hillmon and Brown; where did you see them; you have spoken of seeing them once in company with Walters. I am asking you for the other occasions on which you saw them.

A. The other time they went by the office with Mr. Walters, and then one morning I went into the Globe Hotel or restaurant where they were, and they were shooting either coppers or dollars, I disremember which.

Q. Where was Mr. Walters at that time?

A. He was in the same room.

Q. What room was that, or what building?

A. I am not positive whether it was the Globe Hotel or the restaurant right alongside of it.

Q. You say the restaurant was close to the hotel?

A. Yes, sir, right on the east side adjoining. The three men were together there; they were all in the same room.

Q. About how many times would you say you saw the three men together in Wichita; I mean by the three men, Walters and the men called Hillmon and Brown?

A. I think only three times.

Q. You have stated that you saw Mr. Walters about the first of March the last time, did you?

A. Somewhere I think about the first of March, after the first of March.

Q. That would be March, 1879? A. Yes, sir.

Q. You may state if at that time he told you or said anything to you in regard to what he was going to do?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection overruled, the plaintiff duly excepts.

1734 A. He did.

Q. You may go on and state what he said in regard to that.

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and hearsay. Objection overruled, the plaintiff duly excepts.

A. He said he was employed by these two men to go west to superintend a cattle ranch, either in Barber county, or if they did not get a satisfactory location in Barber county, they might go on to New Mexico.

Q. Was anything else said by him in regard to that matter at that time; do you remember any further conversation?

A. Well, nothing only that—

Plaintiff objects to the statement unless it involved a declaration of intention.

By the Court: You mean anything respecting his plans for the future?

By Mr. Barker: That is what I mean. Did he make any statement in regard to what he intended to do?

A. No, I think not.

Q. Did you ever see him after that; did you ever see Mr. Walters after that statement? A. Yes, sir.

Q. How long after that did you see Mr. Walters?

A. Well, it might have been the next day or it might have been the same day.

Q. Under what circumstances did you see him?

A. He brought back a railroad ticket and he told me he was—

Q. He brought back a railroad ticket, did he?

A. Yes, sir.

Q. Did he say anything in that conversation about his intentions of going away or what he would do?

The plaintiff objects to the question as leading. Objection overruled, the plaintiff duly excepts.

A. He said he was about ready to go away; was going away.

Q. Anything further that he said in regard to his intentions at that time?

A. No, there was nothing in regard to his intentions only that he was going with these men.

1735 Q. Did you ever see him after that?

A. After that last time, after that day?

Q. Yes. A. No.

Q. Did you ever hear from him after that?

A. No, I did not.

Q. I will ask you to state if at that time you were acquainted with any party in Medicine Lodge? A. I was.

Q. I will ask you if at that time you were having business, doing business with any one at Medicine Lodge in Barber county?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

A. I wasn't exactly doing business with them; I had an acquaintance--

Q. Were you having any transactions, was there any one in Medicine Lodge who was doing business for you?

The plaintiff objects to the question as leading. Objection overruled, the plaintiff excepts.

A. Really he wasn't doing business for me; he was hauling—

Objection.

Q. You may state with the permission of the Court what he was doing that is, the nature of the work, if any, he was doing for you; I mean by he, the party in Medicine Lodge, Barber County, Kansas?

The plaintiff objects to the question as incompetent, irrevelant and immaterial. Objection overruled, the plaintiff excepts.

A. He was freighting between Wichita and Medicine Lodge; sometimes I helped him to sell some posts when he hauled them into Wichita.

Q. You need not state what the message was, but I will ask you if the last time you saw Frederick Adolph Walters, you sent any message by him to this party in Medicine Lodge?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and leading. Objection overruled, the plaintiff duly excepts.

A. I did.

1736 Q. That was a verbal message, was it? A. Yes sir.

Q. It was an oral message, was it? A. Yes sir.

And in answer to cross interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Your name is Healy? A. Yes sir.
Q. Live in Wichita? A. Yes sir.
Q. Ever live anywhere else in Kansas? A. No sir.
Q. Where did you live before you went to Wichita?
A. Illinois.

Q. When did you go from Illinois to Wichita?
A. March, 1876.
Q. Lived in Wichita ever since?
A. Yes, with the exception of a few months in Kansas City.
Q. Have you any [any] acquaintance with anybody connected with this trial, beyond the attorneys that have been questioning you?
A. Nothing, only I recognize Mr. Wheat as a man that I used to know when I was a boy.
Q. Are you acquainted with the jurors? A. No sir.
Q. Were you engaged in conversation with any of the jurors this morning? A. Not that I know of.
Q. When did you first testify in this case?
A. At the last trial at Topeka.
Q. That would be in 1896? A. Yes sir.
Q. 1896 and these occurrences were in 1879? A. Yes sir.
Q. You never testified relative to these matters until 17 years after they transpired? A. No sir.
Q. Did you make a memorandum or any note of any kind of this transaction at the time it occurred? A. No sir.
Q. Did Walters, Hillmon or Brown owe you any money at the time they went away? A. No, sir.
Q. Can you give us any reason why you should have
1737 remembered all these things so definitely for 17 years?
A. Yes sir.
Q. Now, let me ask you this: You say that you knew Walters and saw him on five or six different times; is that your statement? I want to get it correct. I understood you to say you met him 5 or 6 different times?
A. I said not less than six different times.
Q. Not less than six different times?
[—] Not less than that.
Q. Some of them might have been on the same day?
A. Yes, sir. It may be that I met him quite a number of times more.
Q. I understood you to say that he came to you to sell a ticket? A. No, sir. He was in my employ.
Q. Did he come to you to buy a ticket?
A. He came in my—
Q. Answer my question. Did he come to you to sell a ticket the first time you saw him? A. No, sir.
Q. You were a ticket scalper at the time? A. Yes, sir.
Q. Did he come there to buy a ticket the first time?
A. I don't think he did.
Q. Did he come to you to make inquiries relative to buying or selling of a ticket?
A. I don't know; he was in the office when I was trying to sell a ticket.

Q. Did he come to your office for the buying or selling of a ticket when you first saw him. A. No.

Q. Did he buy a ticket of you at any time?

A. I let him have a ticket without the money and he took it to the Occidental Hotel.

Q. Do you mean to sell to somebody else? A. Yes, sir.

Q. How long had you known him?

A. He had been in the office a few times before that.

Q. A few times means two or three or four or five or what?

A. May be more than that.

Q. Did he come [ti] you the first time with any letter of introduction? A. No, sir.

Q. You knew nothing as to who he was except what he told you? A. No.

Q. After you had met him in this way a few times,
1738 you entrusted him with a ticket to sell? A. Yes, sir.

Q. From what point to what point was the ticket and on what road? A. It was on the Santa Fe.

Q. From what point to what point?

A. It was the return portion of a ticket I think from Wichita to Bloomington.

Q. Bloomington, Illinois? A. Yes, sir.

Q. What was the value of the ticket?

A. Well, I wanted $10 for it and I got $10.

Q. And you gave him this ticket? A. Yes, sir.

Q. Did he come to you and tell you he knew of a customer and could probably sell it? A. Yes, sir.

Q. So you think the first time he came into your office, you were trying to sell a ticket to somebody?

A. No, sir, he had been in the office before that.

Q. You say he did not come to buy a ticket?

A. The first time I saw him?

Q. Yes. A. No, sir.

Q. Didn't come to sell a ticket? A. No, sir.

Q. He didn't come to buy real estate? A. No, sir.

Q. Didn't come to sell real estate? A. No, sir.

Q. He just came in the office? A. He came in the office.

Q. Where was your office with relation to the Globe Hotel?

A. It was about 200 feet east.

Q. Was it on the ground floor or second floor?

A. Ground floor.

Q. In a store room by yourself or with other persons?

A. It was in a store room by [iyself].

Q. You occupied this room? A. Yes, sir.

Q. And there was being conducted, the business of a real estate man and the business of a ticket scalper?

A. Yes, sir.

Q. And a little insurance thrown in?

A. I disremember whether there was any fire insurance at that time or not.

Q Have done insurance business in there?

A. Yes, sir, since.

1739 Q. Are you engaged in that business now?

A. Yes sir, I am.

Q. Are you a real estate man? A. Yes sir.

Q. Are you still a ticket scalper? A. No sir.

Q. What else have you done except scalping tickets, selling real estate and being in the insurance business?

A. I was in farming and the cattle business; had a farm.

Q. During the last 17 years? A. Yes sir.

Q. Farming, cattle business, real estate man, insurance and ticket scalper; now, what else?

A. Owned a farm; had both cattle and sheep.

Q. You didn't farm in a real estate office, did you? A. No.

Q. Have you kept up this real estate business all the time?

A. Nearly all the time, yes sir.

Q. Have you followed any other avocations beyond these five or six? A. No. During that time?

Q. Have you carried on any other business than the ones you have named, cattle farming, real estate, ticket scalping and insurance? A. No sir, I have not.

Q. Now, then, you say at the time we have been speaking of, you were only carrying on the business of real estate man and ticket scalper? A. Yes sir.

Q. When Mr. Walters came in the first time, he came neither to buy nor sell real estate nor to buy or sell a ticket; that is a fact? A. Yes sir.

Q. He had no letter of introduction to you? A. No sir.

Q. You had never seen him before and had no previous acquaintance with him; that is a fact?

A. That is a fact.

Q. How long after that did he come in again?

A. I can't remember; to the best of my recollection I saw him the next day.

Q. Of course, it might have been never; what do you think about it? A. It was a few days after.

Q. The next time did he come to buy or sell real estate?

A. No sir.

1740 Q. Did he come to buy or sell a ticket?

A. The next time he came there?

Q. Yes, after the first time; the second time?

A. The second time I don't think he came for that.

Q. The next time; how long a time intervened between the second and third visit as your recollection serves you?

A. I could not tell you.

Q. Of course you can't tell us to a day; you can give us some idea?

A. It might have been a day or so.

Q. That time did he come to buy or sell real estate?

A. No sir.

Q. To buy or sell a ticket? A. I think not.

Q. How long a time intervened between the third and the fourth visit? A. I could not tell you exactly.

Q. Of course not, but your best recollection, sir.

A. It is very hard.

Q. About the same length of time, do you think?

A. Maybe a day or two.

Q. At that time, the fourth visit, did he come there to buy or sell real estate? A. No, he never did.

Q. Did he come to buy or sell a ticket?

A. I don't know whether—

Q. Did you buy a ticket from him? A. No sir.

Q. Did you sell a ticket to him? A. No sir.

Q. Was there a fifth visit after that?

A. I think you said you saw him at least 5 or 6 times?

A. Not less than that; may have seen him more.

Q. The next time did he come there to buy or sell real estate, that is, as indicated by what he said?

A. I don't know as to that.

Q. You don't remember that he came to buy or sell real estate?

A. No, he never came to buy real estate.

Q. We can eliminate the real estate proposition?

A. Yes sir, he never came to buy real estate.

Q. Did he sell the ticket at that time?

A. The first time he came in?

1741 Q. No, the fifth time. Four times he has been there without buying or selling anything, as near as you can make out; how about the fifth time?

A. He never came there to buy or sell anything.

Q. Never came there to buy or sell? A. No sir.

Q. When was the last time that he was in your place as your recollection serves you?

A. Well, just before he departed, he came in to tell me he was going and brought back a ticket that he had.

Q. Now, won't you fix that date, Mr. Healy?

A. It was right about the first of March or after; it may be a day or two after.

Q. How was Mr. Walters dressed?

A. Well, he was dressed pretty fair for a working man; always dressed neat.

Q. He was dressed as a working man?

A. Well, he was dressed, not as a common laboring man, that you would meet every day on the street.

Q. In this country there is no distinctive dress for the laborer, and the office man, the insurance man, the real estate man and the ticket scalper, and so on?

A. He wore dark brown clothes.

Q. Were they fresh and new and evidently expensive or the reverse?

A. They were medium, he always dressed when he came around there, he always dressed, well, with the exception of once I seen him with overalls on; he was helping a carpenter; he was always dressed very neat.

Q. He was rather well dressed? A. Pretty well dressed.

Q. What was there about him that made you say he was dressed like a working man?

A. He was dressed like a working man.

Q. I understood you to say so.

A. He wasn't dressed like a dude; he was dressed pretty fair.

Q. What was there about his garments that caused you to say he was dressed like a working man; what was there in the dress of Mr. Walters that would distinguish him as a working man from a real estate agent, say?

A. I don't know that there [—] anything.

Q. Can you tell us why you said he was dressed like a working man?

1742 A. He was dressed pretty fair; that is all I can say.

Q. That is not quite the question?

A. What is the question?

Q. The question is: why you have stated to the jury that said that; I knew him to be a workingman.

say that?

A. No, I don't say I didn't say it; I don't know why I said that; I knew him to be a warkingman.

Q. By what he told you? A. Yes sir.

Q. That was the only means you had of knowledge?

A. Yes sir.

Q. He was not working in your office? A. No sir.

Q. He was not hired by you? A. No sir.

Q. You say on none of these occasions he came there to buy any ticket from you?

A. No sir, he never bought any ticket directly.

Q. The ticket with which you entrusted him, after you had seen him two or three times, valued at $10, he returned to you, I understood you to say? A. No, he sold it.

Q. Do you know what he was doing; was he following any trade or employment during those few days; was he following

any trade during those days that you knew him there; I don't know that you stated how many days?

A. No, he told me he was out of a job; he was looking for a job.

Q. Was he out of money?

A. No he didn't say he was but he said he didn't have ten dollars.

Q. He said he was out of a job? A. Yes sir.

Q. How many days did this acquaintance extend over?

A. My acquaintance with him?

Q. Yes.

A. I think I had met him, I had seen him or met him several times during two months; that is my best recollection at that time.

Q. Your best recollection would be that, beginning at the end, to speak, early in March, 1879, your acquaintance would run back a couple of months?

A. That is as near as I can tell; I might be mistaken in that; it is a long time for me to remember.

1743 Q. That is just what we think; it is a long time to remember. You made no memorandum or note of these transactions? A. No sir.

Q. Now, when did you call upon the insurance people, and give information to them, either personally or upon the witness stand? A. In 1896.

Q. Who was the fortunate man who discovered your information? A. Well sir—

Q. Which one of the insurance agents or attorneys? Do you know his name?

A. The first intimation that I had that I was wanted as a witness was a man by the name of Dent; he told me that A. W.—

A. No matter about Dent or what he told you. I am asking [to] which one of the insurance agents or attorneys you first told this tale to? A. None of them.

Q. When was the first time you talked, so far as you know, telling what you knew of this matter to any insurance agent or attorney? A. In 1896.

Q. Who was that insurance agent or attorney, what was his name? A. Baker, I believe.

Q. He was an insurance agent? A. Yes sir.

Q. Which one of the companies did he represent, if you know? A. I disremember now.

Q. He was an insurance agent though? A. Yes sir.

Q. You knew that? A. I was informed so.

Q. You recognized him as a member of the craft?

A. No sir, I was told to go and see him by Mr.—

Q. You went and saw him? A. Yes sir.

Q. You found him an insurance agent?

A. I think he was.
Q. Representing some of these companies? A. Yes sir.
Q. And that was in 1896, seventeen years after these things occurred? A. Yes sir.
Q. You told them to him just as you have here?
A. Told him what I know about the case.
1744 Q. Did he ask you about any memorandum you had made or anything of that kind? A. No sir.
Q. You saw Hillmon too; the man that was pointed out for Hillmon? A. Yes sir.
Q. The man whose death is involved in this controversy?
A. Yes sir.
Q. You saw that scar on his hand, didn't you? A. No sir.
Q. Didn't you see that his teeth were gone in front?
A. No sir.
Q. Did not? A. No sir.
Q. You saw him on the street? A. Yes sir.
Q. How many times?
A. I saw him twice on the street and once in a building.
Q. In what building?
A. Either in the Globe Hotel or restaurant adjoining it.
Q. How long were you in his presence on that occasion?
A. Very few minutes.
Q. Talk with him? A. No sir.
Q. Was he talking in your presence?
A. I don't know whether he talked in my presence or not.
Q. Well, the group; were you in the group of which he was one? A. I stood very close to him.
Q. As close as you and I are to one another?
A. Yes sir.
Q. Closer perhaps?
A. Well, maybe as close and maybe a little closer.
Q. Were you talking with this man Walter?
A. No sir, I talked with the landlord.
Q. They were close by you? A. They were close by.
Q. Did you go in there with a view of seeing Walter?
A. I went in there with a view of having Walter introduce me to have those two cattlemen.
Q. And he did do it didn't he? A. No sir.
Q. You went in there knowing who they were by sight?
A. Yes sir.
Q. And you saw them again when you went in there?
A. Yes sir.
1745 Q. You were in their presence some time?
A. Well, a very short while.
Q. You think they might have been talking to somebody at the time you were there?

A. They were engaged in throwing in some kind of a game, crackloo or something.

Q. What was that game?

A. I don't know just exactly; I have engaged in different games throwing coppers myself, called crackloo.

Q. You have been engaged in a number of games; this is not one of them you are engaged in now?

Question objected to and withdrawn.

Q. What was this game, Mr. Healy, as your recollection serves you; you remefber there were dollars or coppers?

A. There was dollars or coppers, and they were throwing them to see who could strike nearest a crack in the floor.

Q. Did you take a hand in the game? A. No sir.

Q. Do you mean to say that you as an insurance man would let a game go by involving dollars or coppers?

The defendants objected to the question as improper Objection sustained, the plaintiff duly excepting.

Q. How long were you watching them engaged in this game? A. A very short while.

Q. Did you see Mr. Hillmon engaged in it?

A. I couldn't tell which was engaged in it.

Q. Is it your recollection that Hillmon was engaged in it?

A. My best recoilection is that he was.

Q. That game involved the use of the hand in the throwing of the copper or dollar? A. Yes, sir.

Q. Were they pitching at a mark to see how close they would come?

A. They were throwing them up and letting them fall down on the floor.

Q. Heads or tails? A. Something of that character.

Q. And this man was indulging in it too?

A. At the time I think he was.

1746 Q. You didn't se any scar on his hand? A. No sir.

Q. Did you see him laugh there during the course of this game? A. I don't remember that I did.

Q. You think he spoke to the other man; he talked some?

A. I presume he did.

Q. You didn't see anything wrong with his teeth?

A. No, I didn't notice anything wrong.

Q. Well, you and the man were so close together that you would have had an opportunity to notice if he had, wouldn't you? A. I might; I don't know.

Q. Don't you rather think you would?

A. No, I don't hardly think I would.

Q. You remember what Walters said to you on these different occasions?

A. Very well; I was paying attention to that.

Q. When you were watching the game, you were not paying attention to that? A. No sir.

Q. When you were listening to Walters you were paying attention paying such attention that you remember it after 17 years and finally told it to an insurance man?

A. Yes sir.

By the Court: Do I understand you to say that Walters claimed to be a carpenter?

A. No sir, he did not; he worked a day or two with a carpenter; a day and a half.

By Mr. Atwood: Mr. Hutchings desires me to ask another question as to the length of time you were acquainted with Walters. I understood you to say it was two months, that it concluded the first part of the month of March; am I right about that?

A. I am not positive as to the length of time.

Q. You did not fix your attention upon that?

A. A great many would drop into my office, and I wouldn't know just when the time was.

Q. The fact is that you did quite an extensive business there at that time, did you not; things were pretty active in Wichita in that year? A. Yes, sir.

1747 Q. Your office was on one of the main streets of the city and a great many people would visit you in one day?

A. A great many people.

Q. You did a great deal of business? A. Yes, sir.

Q. Now, having refreshed your recollection in the way you have, how long would you say your acquaintance, extended, over how long a period of time?

A. Well, my recollection is that he was in my office once or twice, and then after he came and took the ticket he was in there frequently, and stayed there; he wrote letters in my office, and we had conversations about those letters.

A. The question is how long you knew him, in days, weeks or months? A. Well, that I could not—

Q. Do you think you were right when you said a few moments ago that you knew him two months; what is your best recollection as to the time intervening between the first time that he came into your office to buy or sell either real estate or railroad tickets, from that time until you last saw him, what would be your recollection as to the length of time?

A. My recollection is that it was,—that I seen him in January, and got better acquainted with him; got better acquainted with him—

Q. Won't you tell us about— A. February.

Q. A couple of months? A. About two months.

Q. That would be your best recollection?

A. Yes, sometime.

Q. Do you think your recollection is fairly accurate upon that point?

A. Well, it may not be on that point.

Q. It is or is not?

A. I say it may not be on that point.

Q. Of course, I don't know anything about it; you have to tell me; it may or it may not be entirely inaccurate.

A. That is my opinion that I knew him in January.

Q. When you say your opinion, that is what you believe to be the fact? A. Yes, sir.

Q. That is your best recollection of the occurrence?

A. Yes, sir.

1748 Q. And your recollection extends over the months of January and February; is that right?

A. That is true.

Q. Embraced enough of those months to make it practically two months? A. Well, no.

Q. How long?

A. That would not be what I mean; I think I met him in January, and then again he was there in February; he might have been gone from there; I can't say, while I didn't see him, he might have.

Q. What time in January was it that you first met him?

A. I could not say as to that.

Q. What is your recollection as to its being early or late in the month?

A. It may have been about the middle of the month.

Q. What would be your best recollection; of course, it might not have been at all.

A. My recollection is that I met him in January, the first time I ever met him at all. That is a long time ago for me to state.

Q. It is not too long for you to remember these things. Do you remember the circumstance of meeting him the first time?

A. No, I don't.

Q. I thought you said something to the jury about his coming to [you] your office?

A. That was not the first time.

Q. Now, the first time he came, he didn't buy or sell anything.

A. The first time I remember of speaking to him—

Q. I am not asking you that. I am asking what your best recollection is as to the first time you saw him. Now, Mr. Healy, as intelligent a man as you are certainly knows what that question is. Please be so good as to answer it.

A. I could not tell you as to that.

Q. I do not ask for the exact date, but your best recollection, whether it was the 1st or the 15th of December, the end of December or from the 1st to the 15th of January, or so on.

A. It was somewhere from the first to the last of January; maybe the 6th to the last; I could not tell.

1749 Q. Why do you think it was in January at all?

A. It was quite a while from the time that he came in until I got real well acquainted with him.

Q. Your mind runs back, as you say, but why do you fix it as January that you first met him?

A. I know it was after Christmas.

Q. Do you think it was much time after Christmas?

A. Might have been two or three weeks.

Q. What is your best recollection as to whether it was two or three weeks?

A. I haven't got any definite recollection.

Q. You have no recollection as to how long your acquaintance lasted, then, whether it was a week, or two weeks or three weeks or six?

A. I think this, that he came into my office first in January and then I got better acquainted with him the last of February.

Q. I did not ask you that. Won't you go back—you have the intelligence to know, with your remarkable memory, to find out when was the first time, as your recollection serves you, you first got acquainted with him; you must have some recollection of having met him the first time?

A. It was in January.

Q. That is as near as you can fix it?

A. That is about as near.

Q. Why do you fix it in January?

A. I know that I met him quite a while before he came into the office and took this ticket.

Q. How long is "quite a while" in your vocabulary?

A. What I mean by that is it was two or three weeks.

Q. Before you got so well acquainted with him?

A. Got acquainted with him, yes sir.

Q. How long did this intimate acquaintance with him last?

A. That didn't last more than eight or ten days.

Q. Possibly two weeks? A. Yes, sir.

Q. You knew him then about five weeks; is that right?

A. That would be very near the length of time I knew him.

Q. That acquaintace terminated early in the month of March? A. About that.

1750 Q. And the acquaintance extended backward from that time about five weeks? A. Yes, sir.

And in answer to redirect interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. You have said that you were in the insurance business among other things. What is it, fire or life insurance?

A. Fire insurance.

Q. They asked you if there was any circumstance or anything happened that fixed this matter upon your mind, that is, the matter of having seen Walters, and you said there was. You may state what that circumstance was, now.

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff duly excepts.

A. What was that question?

Q. I undestood you were asked if there was any circumstance or anything that happened which made you remember your acquaintance with Mr. Walters, which made you recollect the fact that you were acquainted with him, and I understood you to state that there was; you may state what that circumstance was.

A. That circumstance was my sending word by him to Tom McKnight to Medicine Lodge to bring in—

The plaintiff objects to the answer and moves to strike it out as hearsay and immaterial. Motion overruled, the plaintiff excepts.

Q. I will ask you if you received any reply to the message which you sent by him?

The plaintiff objects to the question as immaterial, and as a repetition. Overruled, the plaintiff duly excepts.

A. No, sir.

Q. You may state; if you remember, when you heard of the circumstance of a man being killed out there in Barber county?

1751 The plaintiff objects to the uqestion as incompetent, irrelevant and immaterial and leading. Objection overruled, the plaintiff duly excepts.

A. Do you remember when you first heard of that matter?

A. Why, yes.

Q. About when was it?

A. It was only two or three weeks after Mr. Walters left.

Q. I will ask you about hese transactions about the tickets; they have ask you concerning them. You may state the first transaction you had with him in regard to a ticket and the character of it, what it was?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

Q. You may go on and state what it was?

A. I was trying to sell a ticket to a man that dropped into the office and Mr. Walters was there and after the party went out—he didn't take the ticket; he told me that he thought he could sell the ticket to a man at the Occidental Hotel who was going back east. I told him that he might have it for $10, and sell it, and have what he got over that; he told me he didn't have ten dollars.

Q. Then what did you do?

A. I let him take the ticket; trusted him with it until he could sell it, and he sold it, and brought back the money.

Q. How long was it from the time he took the ticket until he sold it, and brought the money? A. It was not an hour.

Q. You have spoken of other transactions in regard to tickets; you may state briefly what they were, from that time on?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

A. Well, after he sold, well, two or three tickets, I let him go to the drawer and take tickets out any time he wanted.

The plaintiff moves to strike out the latter part of the answer as not responsive to the question. Motion sustained, the defendants and each of them duly except.

1752 Q. You may state if he sold tickets? A. Yes, sir.

Q. You may state what he did in reference to paying for them? A. He always paid for them.

Q. Do you remember when you had the last transaction with him in regard to a ticket, when it was with reference to the last time you saw him?

A. The last time he brought a ticket back and bade me good-bye.

Q. Was that a ticket he had had to sell? A. Yes, sir.

Q. Now, in regard to this St. Louis matter; who do you say was the first party who [say] you in regard to this matter of your testimony? A. Robert Dent.

Q. How did you happen to see him?

A. I met him on the street.

Q. Were you acquainted with him? A. Yes, sir.

Q. Did you have any conversation with him in regard to this matter? A. He told me—

Q. You may go on and state what was said in regard to it; I want to know how you happened to be a witness in this case?

A. He told me that A. W. Oliver had a telegram for me and to go to his office and see about it.

Q. That is the first time you have ever conversed wit any insurance man except Wiseman in regard to this matte

By the Court: He never said anything about Wiseman.

Q. I will ask you if that was the first time you ever talke with any one in regard to this case?

A. No, I had talked before to parties in regard to th case ten years before.

Q. I will ask you now just to state what took place dow there at St. Louis, and how you happened to come up here t testify on that occasion?

A. Well, I went up to see Mr. Oliver and there was a tel gram from C—

Objection.

Q. There was a telegram there?

A. Yes, and for me to come and testify in the Hillmo case.

Q. You came up and testified, did you?

A. Mr. Oliver told me to go and see an agent for the in surance company; told me who they were and I wen

1753 and told Mr. Baker all I knew about the case and Mr Baker took me to an attorney and I made the state ment to him and he thought that there was—

Q. What did they do? A. What did the attorney do

Q. What did you do?

A. I left, not intending that I was to come—

Objection.

[—] I left and I went away and attended to me—

Q. You went away, did you from there?

A. I went away in two or three days.

Q. Go on and state the next thing that took place in r gard to it?

A. Two or three days, a couple of days afterwards, the were hunting me up again, and Mr.—

Objection.

Q. Go on and state what was done?

A. Mr. Baker then found me and had me to come up t Topeka to testify in the case.

Q. And you testified in 1896? A. Yes, sir.

Q. Now, I will ask you if you hunted anybody up or the hunted you up for the purpose of coming here?

A. I didn't hunt anybody up I didn't want to come.

Q. Did you know Mr. Marsh Murdock? A. Yes, sir.

Q. Did you ever have any conversation with him in rega to this transaction?

The plaintiff objects to the question as hearsay. Objection sustained, the defendants duly excepts.

And in answer to recross-interrogatories propounded to him by Jno. H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Whom did you say Mr. Oliver was?
A. Mr. Oliver used to be president of the Wichita National Bank.
Q. Well, what was he when you were told to go up to his office in St. Louis?
A. Why, his office was in the Wainwright building
1754 in St. Louis and dealing in stocks and bonds, I think and mortgages maybe.
Q. What was he doing there at this time in 1896?
A. He is the one I spoke of to whom Bob Dent sent me.
Q. He sent you to Oliver's office? A. Yes, sir.
Q. Had you any business with Bob?
A. No, just met him on the street.
Q. Had you any business with Oliver? A. No, sir.
Q. When you got to Oliver's office, where did he send you?
A. He sent me to Baker's.
Q. Baker a lawyer?
A. No, he is an insurance agent.
Q. Don't remember which one of these companies he represented?
A. I believe it is the Connecticut; I am not sure; I would not be positive.

By the Court: In St. Louis?

A. Yes, Baker Brothers.
Q. Mr. Barker asked you where Mr. Baker took you?
[—] Mr. Baker took me to an attorney; I think he was the insurance company's attorney.
Q. That was on the same day? A. Yes, sir.
Q. When did you next see Baker again; the next day?
A. No, not the next day. The next day I was busy at the stock yards.
Q. How many days intervened between?
A. It was inside of three days, I think; I think so.
Q. Did you go anywhere with Mr. Baker after you met him on this third day? A. When I met him the last time?
Q. Yes. A. No, he came down—
Q. You have answered the question. Did you see anybody else in connection with this business besides Baker in St. Louis on this third day? A. No, sir.
Q. From Baker, at St. Louis, you came to Leavenworth for the purpose of— A. To Topeka.

Q. For the purpose of testifying? A. Yes, sir.
Q. You said you didn't want to come? A. I did not.
Q. Any subpoena served on you? A. No, sir.
Q. What made you come? A. Well, he asked me.
1755 Q. If you didn't want to come, I mean, of course, you had a perfect right to come if you wanted to.
A. I didn't want to come.
Q. But not wanting to come, you came? A. I came.
Q. When you got to Kansas City who met you?
A. There was a fellow met me there; I think Mr.—
Q. Whom of these gentlemen on the other side, or were then on the other side, met you; lawyers or agents?
A. I believe I met either on the train or at Kansas City, Mr. Ware.
Q. Mr. Eugene Ware, one of the lawyers in the case?
A. Yes, sir.
Q. He came down with the idea of meeting you?
A. I don't know.
Q. Didn't he say he did? A. No.
Q. Did you know him before that? A. Oh, yes.
Q. You knew him? A. Knew him well.
Q. You knew he was connected with this case?
A. Yes, sir.
Q. Knew him well, and knew he was connected with the Hillmon case? A. Yes, sir.
Q. Did he mention the Hillmon case to you when he met you on the train? A. Yes, sir.
Q. Was the trial in progress at that time? A. Yes, sir.
Q. Instead of being in the court-room attending the trial, he was down there on the train with you; is that a fact?
A. I think he told me they had adjourned the court and was waiting for me to get there.
Q. He came down to Kansas City where you were and met you?
A. In Kansas City probably or on the train; I think I got right on the train as soon as I got into Kansas City, and he got right on the train.
Q. Did you know whom you were going to meet there?
A. No, sir.
Q. Did you know you were going to meet any of the insurance people there? A. No, sir.
Q. But when you did meet him, of course, you talked this matter over? A. Yes, sir.
1756 Q. How many days intervened between that and the time you testified? A. A few hours.
Q. Now, is it not a fact that you received a communication by telegram that Ware or somebody for the insurance company would meet you at Kansas City? A. No, sir.
Q. But as a matter of fact he did meet you?

A. Yes, sir.

Q. Did you know of any other purpose that Mr. Ware had except of meeting you? A. No, sir.

Q. You talked this case over and went right up and within a few hours you testified. Mr. Ware overcame your disinclination so far as to induce you to do so?

The defendants object to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. I am not positive that we even talked anything about the case only that they wanted me to come.

Q. Is it not your recollection that you did not talk about the case other than the mere fact that you were going up there to testify; is that your best recollection?

A. No, my best recollection is I was surprised why they had me to testify in the case.

Q. Well, eliminate your surprise; the only thing I want to know now is whether or not it is not a fact that you simply told Ware whom you had known a long time, that you had been requested to come up to Topeka to testify for the insurance people, that you did not want to come, but you had come and that you were going up there to testify; is not that substantially what you told him? A. No, I don't think it was.

Q. Did you tell him what you were going to testify to?

A. I don't think I did.

Q. That is your best recollection of that and that is only back here three or four years; that was in 1896?

A. My recollection is that it was in 1896.

Q. Only three years ago? (No answer.)

1757 Q. Did you go directly upon the witness stand when you arrived at the court house? A. Yes, sir.

Q. Mr. Barker didn't talk this case over to you before you got to the court house? A. No, sir, I don't think so.

Q. Nor Mr. Green? A. I don't think so.

Q. The fact is you went upon the witness stand, Mr. Healy, without these gentlemen having been told by you what you knew about the case? A. Yes, sir.

Q. Is it also a fact, is it not, that you remember these occurrences between yourself and Mr. Walters because shortly after he went away, he didn't deliver your message, and that there was somebody killed at Medicine Lodge? A. Yes, sir.

Q. You associated that death with your acquaintance with Walters? That is a fact? A. Yes, sir.

Q. You had this connection between the two, the fact that he had gone away as he did, telling you with Hillmon and Brown, in your mind from the time that you heard that somebody had been killed at Medicine Lodge; that is a fact, is it not? A. Yes, sir.

Q. But you never informed the insurance people interested in this matter until 1896, that is a fact, is it not?
A. I tried to.
Q. Kindly answer the question; is that a fact?
A. I tried to.
Q. Is that a fact, that you, until 1896, never informed the insurance people, their agents or attorneys, or anybody helping them in this conection, of this matter you have just stated? A. I tried to tell—
Q. Will you kindly state whether you did or not. Please answer the question yes or no. The question is this: Is it not a fact that while you associated in your mind the disappearance of Walter and the going away with Hillmon after hearing of the killing at Medicine Lodge, you never imparted this information to any representative of the insurance company until 1896; is not that a fact? A. No.
Q. Who was the representative of the insurance
1758 company that you imparted this information to?
A. Major Wiseman.
Q. You met Wiseman, did you? A. Yes, sir.
Q. You did not mention that, did you, to-day? A. No, sir.
Q. Your acquaintance with brother Wiseman: Where did you meet him; at Wichita? A. Yes, sir.
Q. You met him there in 1879? A. Yes, sir.
Q. When he was down there trying to find out about this business? A. Yes, sir.
Q. You knew that that was his mission down there?
A. I was informed.
Q. He informed you? A. No, he did not.
Q. Didn't he tell you? A. No, sir.
Q. Didn't you talk with him?
A. Well, just a few words.
Q. Didn't he show you some pictures? A. No, sir.
Q. Didn't you talk with him? A. No, sir—
Q. Didn't you tell him—
A. Just a minute. I just talked to him—I was introduced to him and shook hands with him and started to tell him—about Mr. Walters and he turned—
Q. You told him, didn't you? A. No, I did not.
Q. Didn't you say a moment ago you knew what his mission was? A. Yes.
Q. And you told him?
A. I did not; I started to tell him.
Q. That is paradoxical; which way is it, you did or did not?
A. A man might start to tell something and not get through and he wouldn't tell it.
Q. You did start, did you? A. Yes, sir.
Q. How much of it did you tell Wiseman before he refused to listen to you It was not polite of Wiseman, was it? How

much did you tell to Wiseman; did you tell him you knew Walters? A. Yes.

Q. Did you tell him you had given a message to him to take down to Medicine Lodge? A. No, sir.

Q. Did you tell him you had seen Hillmon? A. No.

1759 Q Did you tell him that Walters told you he was going off with Hillmon? A. No.

Q. How much of it did you tell Wiseman?

A. I told him that I knew a man that had disappeared from there by the name of Walters and I thought he was the man.

Q. You told Wiseman that?

A. Yes sir. And he told me he was, they were after the right man; he was after the right man.

Q. That Wiseman was after the right man? A. Yes sir.

Q. Did he tell you which one it was, whether Berkley or Nichols?

A. I don't know as I understood from him it was Nichols.

Q. You found it out somehow?

A. Yes, I found it out right away.

Q. You told Wiseman back in the spring of 1879 that you had known Walters, that Walters had gone away with Hillmon, and that you thought the man that was killed down in Barber county was Walters; you told him that?

A. No, I didn't get that much told.

Q. I misunderstood you then. You were introduced to him? A. Yes sir.

Q. Shook hands with him? A. Yes sir.

Q. Then you told him you knew Walters?

A. I don't know as I mentioned the man's name.

Q. You told him you knew a man? A. Yes sir.

Q. That is probably right; you knew a man? A. Yes sir.

Q. And that man had gone off with Hillmon? A. No.

Q. The man had gone off?

A. The man had disappeared.

Q. And you believed that the man who had disappeared was the man who had been killed in Barber county?

A. I don't know whether I even got that far; he straightened up in his dignity and walked off. I felt kind of insulted and never bothered any more with him.

Q. You told him you knew somebody? A. Yes sir.

Q. And that somebody had disappeared? A. Yes sir.

Q. You think that was as far as you got?

A. That is as far as I got, he whirled and went away.

1760 Q. Leave that out. Then the fact remains that Wiseman was down there in search of Berkley, or Burgess or Nichols, or Walters, whatever his name was, whoever the person was, and that you told him that you knew a man

who had disappeared that you believed was the man that was killed in Barber county, and he rather rudely left you; if I get it straight, that is about the substance of it?

A. I didn't get half that much told when he whirled around.

Q. Let me find out again how much you told Wiseman before he was rude to you. You told him you knew a man who had disappeared? A. Yes sir.

Q. And you thought that that was the man killed in Barber county. Did you get that much told to him?

A. About that much.

Q. Before he got discourteous and went away from you? That is a fact?

A. He just whirled around; he didn't go away; he said he had the right man.

Q. You told him that much? A. Yes sir.

Q. What was the date of that as near as your recollection serves you?

A. Well, it might have been, I believe somewhere along about April.

Q. That is your recollection, when you say it might have been. That is, of course, your best recollection. That would be April, 1879, of course?

A. 1879; it was not very long—

Q. After the occurrence in Barber county?

A. Not very long.

Q. Would you think it as late as May; of course, no man could be positive, but I want your best recollection?

A. It might have been as late even as May.

Q. When you say as late as May, do you mean as late as any time in May or only the early part of May?

A. It would be pretty hard for me to tell.

Q. I know, but I want your best recollection?

A. I think it was in April.

Q. It possibly might have been in May?

A. Might possibly.

1761 Q. But if it was in May, it was probably the early part of May? A. I should judge.

Q. After telling this to Wiseman, the part you have related to the jury, to wit, that you knew a man who had disappeared, that you thought was the man killed in Barber county, from that time, you never told the insurance men,—I don't mean that,—you never told anybody connected with the defendant companies, anything about these occurrences until 1896; that is a fact, is it not? A. Well, there was—

Q. Please answer yes or no? Until 1896?

A. I don't think I did, with the exception that—

Q. You said, I think a little while ago that you had lived in Wichita practically all the time since 1876; that you were absent a little time. Do I get that right or am I wrong about it? A. Yes sir.

Q. How long were you absent, continuously, I mean?

A. Continuously, I mean.

A. Continuously about eight months.

Q. Was Wichita your home during those eight months?

A. Yes sir.

Q. You were simply temporarily absent? A. Yes sir.

Q. Where were you during those eight months?

A. Part of the time in Kansas City and the balance in St. Louis, Mo. I was from the 25th of August, until the 7th of January near Centralia, Missouri.

Q. All this absence at that time embraced a period of eight months? A. Yes sir.

Q. The balance of the time you have resided in Wichita, Kansas, continuously with a few days' absences that a man occasionally is from home? A. Yes sir.

1762 By Mr. Barker:

Q. You spoke about a man who lived in St. Louis who formerly lived in Wichita, who was connected with a bank; I don't remember his name A. A. W. Oliver.

Q. Did you know Mr. Oliver when he lived in Wichita?

A. Yes sir.

Q. You knew him also in St. Louis? A. Yes sir.

Q. There is one question I omitted to ask you. You spoke about going up to the Globe Hotel and seeing these men Hillmon and Brown and Walters there; you may state your purpose in going to the Globe Hotel at that time, what you wanted to see them for?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff duly excepts.

A. Why, I wanted to be introduced to them learning that they were wanting to buy a cattle ranch; I didn't know but what I could sell them something; I waned to be introduced to them; I told Mr. Walters to bring them to the office but he didn't do it, and I thought I would go up and he would give me an introduction.

Q. But you were not introduced to them? A. No sir.

Witness excused.

1763 George Edward Harris, a witness produced by the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination by Mr. Barker.

Q. Where do you live, Mr. Harris? A. Wichita.
Q. What is your business?
A. I am a park commissioner.
Q. How long have you resided in Wichita? A. 28 years.
Q. Were you living in Wichita in 1878-9? A. I was, sir.
Q. You may state what your business was at that time?
A. Well, I was in the ice business, and manufacturing aerated waters, and soda waters, agent for the Philip Best Brewing Company; I had all those things at that time.
Q. Were you acquainted at that time with a man by the name of Holsnider? A. Yes, sir.
Q. In what business was he engaged?
A. Manufacturing cigars.
Q. Whereabouts was his place of business in 1878 and 9?
A. On the corner of 2nd and Main, in the building known as the Occidental Hotel.
Q. What was his business? A. Cigarmaker.
Q. Was there a saloon close to his place of business?
A. Yes, sir, the store adjoining south.
Q. His cigar manufactory adjoined the saloon, did it?
A. Yes, sir.
[—] I will ask you if in 1879 or about that time [—] became acquainted with a young man by the name of Fred or Dolph Walters? A. Yes, sir.
Q. You may state where and under what circumstances you became acquainted with him?
A. I became acquainted with him in the saloon that was kept by Nugent; we used to call him the old man; Nugent and his son John kept the saloon.
Q. Was that the same saloon that you have described as being situated next to Holsnider's cigar factory? A. Yes, sir.
Q. Do you remember about what time in the year it was that you became acquainted with him?
A. Well, I think it was in the winter. I should judge in February, of 1879, the latter part of January and Feb-
1764 ruary.
Q. Do you know what he was doing at that time. I mean at the time you made his acquaintance?
A. Working for Holsnider I believe at that time.
Q. What means have you of knowing for whom he was working at that time?
A. Holsnider introduced me to him as one of "our boys"; "this is one of my boys," he said; "Mr. Walters, one of our boys, Mr. Harris.
Q. What did you understand by that?
A. I supposed it was a young man that was working for him.

The plaintiff objects to the statement as to what he supposed. Objection sustained, the defendants and each of them duly excepted.

Q. You may state by what name he was called at that time, whether it was Walters or whether it was Dolph Walters?

The plaintiff objects to the question as leading.

Q. State by what name?
A. Walters; he introduced him to me.
Q. Did you hear him called by his name after that?

The plaintiff objects to the question as hearsay. Objection overruled, the plaintiff excepts.

A. Yes, sir, Dolph.
Q. What was he called? A. Dolph.
Q. Do you remember at the time you made his acquaintance how he was dressed, in what garb?
A. No, dressed naturally like an ordinary mechanic, dark clothes, sack coat, I believe.
Q. Do you know from what place he came, that is, when you saw him; from what building or room, or anything of that sort?
A. He came from the room where the cigars were made.
Q. How often do you think you saw him?
A. Oh, I don't know, five or six times, perhaps more; I don't know; I don't remember.
Q. Do you remember about the last time you saw him, and where it was, Mr. Harris?
A. I don't remember to have met him any other place but at this saloon.
1765 Q. Did you meet him more than once? A. Oh, yes.
Q. About how many times would you say you met him there?
A. I could not remember, probably five or six or seven or perhaps a dozen times; I was in there often on my business and saw him occasionally in that way.
Q. You are not able to state when was the last time you did see him?
A. No, the 16th of February I remember to have seen him; I don't remember whether I saw him after that; I might have done so.
Q. Do you recollect having seen him since that time?
A. No, sir.
Q. You have lived in Wichita during all those years have you not?

A. With the exception of six months, I was in Europe in 1886, I have been there ever since.

Q. You know he went away from that place out there?

A. I don't know; I haven't seen him since.

Q. I say, you have not seen him? A. No, sir.

Q. I understood you to say you were a park commissioner?

A. Yes.

Cross-Examination by Mr. Hutchings.

Q. When did you go to Wichita?

A. I went there in 1871, sir.

Q. In 1879 you were an agent for a brewery? A. Yes, sir.

Q. There was a saloon there in Wichita? A. Yes, sir.

Q. Several saloons were there not?

A. Yes, quite a number.

Q. You sold beer to all those saloons? A. Yes, sir.

Q. Did you sell beer to this particular saloon?

A. Yes, sir.

Q. And you were in that saloon frequently? A. Yes, sir.

Q. You saw a man in the saloon there every time you went there, did you not? A. Yes, sir.

Q. Twenty years ago? A. Yes, sir.

Q. You say you remember seeing a man by the name of Walters in that saloon? A. Yes, sir.

Q. In what month of 1879?

A. February, sometimes, and in January, but February I remember more particularly.

1766 Q. Can you give me the name of any other man who was in that saloon in February, 1879? A. Yes, sir.

Q. Who else was in the saloon 20 years ago when you saw Fred Walters there? A. Mr. Holsnider.

Q. Who? A. Joseph.

Q. He was the proprietor of the saloon, was he?

A. No, sir.

Q. Who else was there? A. John Nugent.

Q. Who else? A. Ed. Ascott. (?)

Q. Who else? A. I don't remember; quite a number.

Q. That was the first time that you saw him in there was it? A. The first time that I remember.

Q. Now, who was in there the second time that you saw him in there? A. I could not tell you.

Q. Who was in there the third time you saw him in there 20 years ago? A. Nugent was there; I don't know who else.

Q. Now, the fourth time he was in there, do you remember?

A. No, sir.

Q. That is in '79? A. Yes, sir.

Q. It was in the spring of 1879? A. Early spring.

Q. More than 20 years ago? A. Yes, sir.

Q. You remember the first time that you saw Mr. Walters in there and you remember these three persons that you saw in there after these 20 years? A. Yes, sir.

Q. You were in the saloon every day, were you not?

A. No, I couldn't say I was every day; I was in there frequently.

Q. Several times a week? A. Sometimes.

Q. Every time you were in there you would see men in there? A. Men in there.

Q. These men in that saloon?

A. Oh, yes, it never was empty.

Q. And now after the expiration of 20 years you remember of seeing Walters in there and the other persons who were there on that particular day, do you? A. Yes, sir.

1767 Q. Who do you say was the cigar-maker that you knew there, the manufacturer?

A. Holsnider. Joseph Holsnider.

Q. You were in his factory one day and were introduced to Fred Walter? A. No, sir.

Q. Where were you introduced to Mr. Walters?

A. That was in the saloon.

Q. Every time you would be in there Walters would be in the saloon? A. Oh, no.

Q. Didn't you say he was in there eight or ten times when you were in?

A. I said five or six times [of] not more.

Q. How long was he in Wichita altogether?

A. I could not tell you.

Q. What month was it you say you first saw him in the saloon? A. Either January or February.

Q. He was introduced to you by Mr. Holsnider?

A. Yes, sir.

Q. Mr. Holsnider said, "This is Mr. Walters, one of our boys?" A. Yes, sir.

Q. And then whenever you would be in the saloon after that you would see Walters in there?

A. I didn't say so. I saw I have seen him, I saw him in there some times afterwards; I didn't say every time.

Q. Didn't you say in your direct examination that you never saw him any place else except in the saloon?

A. Yes, sir.

Q. That is the only place you ever did? A. Yes, sir.

Q. That is the place you were introduced to him?

A. Yes, sir.

Q. And the man who introduced you said simply, "This is Mr. Walters, one of our boys?" A. Yes, sir.

Q. You didn't know anything about what his first name was? A. Not at that time, no sir.

Q. He didn't say anything about what his first name was; Mr. Holsnider didn't say anything about what his first name was? A. No, sir.

Q. Did you ever learn his name except Walters?

A. No, sir, I don't know any more than they called him Dolph.

1768 Q. Who called him Dolph?

A. When they would come up to drink; the boys would come up. It was customary when I would go to make my collections to call everybody to come up and take a drink; and he was there and among the rest was Dolph.

Q. You remember that from 20 years ago? A. Yes, sir.

Q. You noticed this particular man? A. Yes, sir.

Q. What did they call them, the men that came up to drink 20 years ago? A. By their names, Harry, Jim, etc.

Q. Now, do you remember any other man that they called by him name?

A. Well, it wasn't necessary; they used to come up pretty quick when they were asked.

Q. They always called him Dolph?

A. I have heard them call him that; I don't know whether they always called him that.

Q. How many times do you think you heard them call him Dolph, 20 years ago? A. I never kept track of it.

Q. Do you think you did more than once?

A. I think likely, yes.

Q. Probably twice? A. Yes, sir.

Q. That was on those occasions when as a brewer's agent you would go in there and somebody would say, "Come up and take a drink?" A. Yes, sir.

Q. On those occasions, they said to him, "Dolph, come up and have a drink? That is the language they used?

A. Yes, sir.

Q. Can you remember somebody else that was in there that they called by his name and asked him to come and take a drink? A. No, there might be lots of them.

Q. That was a common occurrence for years was it not, Mr. Harris? A. Yes, sir.

Q. In going into a saloon, being the brewery agent, the whole crowd would be asked to come up and take a drink?

A. Yes, sir.

Q. And you remember that they called him Dolph nearly 21 years ago you remember that circumstance?

A. Yes, sir.

1769 Recross-Examination

By Mr. Barker:

Q. They have asked you in regard to this man being called up to drink; I wil ask you if there was any peculiarity in re-

gard to Mr. Walters that attracted your attention; you may state what there was in regard to that?

A. I noticed that this young man—he seemed a very quiet man, nothing like the rest who drank; he would say, "I will take a cigar." That is what I particularly noticed of him.

Recross-Examination

By Mr. Hutchings:

Q. You remember that 21 years ago that this young man whom you never saw anywhere else except in a saloon, when the crowd were asked to come up and take a drink, was temperate, and said, "I will take a cigar?" A. Yes, sir.

Q. You have remembered that 20 years? A. Yes, sir.

Q. That is the man you remember they called Dolph. It was peculiar? A. Yes, sir, it was peculiar.

Witness excused.

1770 The defendants and each of them next offered in evidence the deposition of D. E. Sheldon, taken at Medicine Lodge Kansas, Oct. 27, 1881. Said deposition was read to the jury, and is in words and figures as follows, to wit:

D. E. Sheldon deposes and says:

Question 1. State your name, age, residence and occupation?

Answer 1. D. E. Sheldon, residence Medicine Lodge, Barbour county, Kansas; occupation merchant, age 38.

Ques. 2. Where were you residing in the months of March, April and May, 1879, and in what business were you engaged?

Ans. 2. Residing in Medicine Lodge, Barbour county. Engaged in mercantile business.

Ques. 3. You include in the mercantile business the keeping of lumber for sale? Ans. 3. Yes, sir.

Q. 4. Did you, during the months last above mentioned, keep a lumber yard and lumber for sale in Medicine Lodge?

Ans. 4. Yes, sir.

Q. 5. Do you remember the circumstance of a dead body being brought to this place and buried, and afterwards taken up and removed in that spring,—to wit, the spring of 1879?

A. 5. I remember the circumstance of a dead body being brought here, buried, and afterwards removed, of the exact time I am not positive.

Ques. 6. Do you remember the circumstance of the alleged friends or relatives of deceased coming here to Medicine Lodge after the body was buried, and being here at the time of its removal? Ans. 6. I do.

1771 Ques. 7. Do you know who those persons, or any of them, were? Ans. 7. Only from report.

Ques. 8. Do you remember their names?

Ans. 8. I do not.

Ques. 9. Would you remember the names, you you think if you should hear them? Ans. 9. I don't think I would.

Ques. 10. Do you remember the names of any of those persons? Ans. 10. I do not.

Ques. 11. Do you know where it was reported they came from? Ans. 11. I do not.

Ques. 12. Did you have any conversation with any of those parties? Ans. 12. I did.

Ques. 13. Where was it?

Ans. 13. At my store in Medicine Lodge.

Ques. 14. Did you have a conversation with more than one of them?

Ans. 14. I had a conversation with the one who had remained there from the time of burial of body until its removal, and with two who came here at or about the time of the removal of the body.

Ques. 15. State if either of the persons last above mentioned said anything to you about obtaining or purchasing from you lumber with which to fence the grave where the body was buried?

Ans. 15. To the best of my recollection they did.

Ques. 16. State which one it was, or if they all were present at the time of this conversation?

Ans. 16. I think it was the party that was here at the time of the burial of the body; I am not positive whether the others were present, but think this was before they arrived.

Ques. 17. Did you have more than the one conversation about lumber? Ans. 17. I am not positive.

Ques. 18. What is the best of your recollection?

Ans. 18. My recollection is that they came to see me about the lumber, and then afterwards concluded to remove the body.

1772 Ques. 18. Was this conversation last mentioned on the day on which the body was removed?

Ans. 18. I could not say.

Ques. 19. When was it with reference to the removal of the body? Ans. 19. I am not positive.

Ques. 20. State as near as you can?

Ans. 20. My best recollection is that it was the day before the removal of the body.

Ques. 21. Now you may state what was said about purchasing the lumber; state that conversation as near as you can?

Ans. 21. Firstly, to see if they could obtain the material for a fence around the grave of the deceased; lastly they didn't need it.

Ques. 22. Did this conversation occur the same day?

Ans. 22. I think not.

Ques. 23. When did the first one occur?

Ans. 23. The first, it is my impression, was a day or two after the burial of the body; I don't recollect how many days they were here.

Ques. 24. Was this first conversation while the alleged friends of the deceased were here from abroad?

Ans. 24. I am not positive.

Ques. 25. Did you not have a conversation with the tallest of the three men who were here claiming to be the friends or the relatives of the deceased, being a tall, spare-faced man, with dark hair, known or called as Levi Baldwin, in regard to the purchase of lumber with which to fence the grave, where deceased was buried?

Ans. 25. To the best of my recollection you have described the person, but I could not say as to the name.

Ques. 26. Now you may state what was said between you and the person above described as to the purchase of lumber?

Ans. 26. He wanted to ascertain whether they could get material to build a fence around the grave of the deceased, and the cost and expense of the same.

1773 Ques. 27. Now state if the same person did not come to your store the next day and tell you in substance that they did not want the lumber as they had concluded to remove the body?

Ans. 27. I could not say whether it was the next day or not. It might have been the same day.

D. E. SHELDEN.

1774 The defendants and each of them next read in evidence, the deposition of Jacob Frazier, taken at Medicine Lodge, Kansas, Oct. 27, 1881. Said deposition is in words and figures as follows, to wit:

Direct Examination of Jacob Frazier.

Ques. 1. State your name, age, occupation and residence?

Ans. 1. Jacob Frazier, residence Elm Creek, Barbour County, Kansas; aged 57 years [old]; occupation farming.

Ques. 2. State if you were present where a dead body was found the 18th or 19th day of March, 1879, in the vicinity of the residence of P. B. Briley, in this Barbour County?

Ans. 2. I was present on one evening, and also the next morning.

Ques. 3. Do you remember the date? Ans. 3. I don't.

Ques. 4. Do you know of more than one occasion where a dead body was found in that neighborhood?

Ans. 4. None except the body of my child.

Ques. 5. About how far was this body found from the residence of P. B. Briley?

Ans. 5. About 3-4 of a mile.

Ques. 6. Any stream in that vicinity?

Ans. 6. There was a small stream running close by where the body lie.

Ques. 7. Are you familiar with the locality where the body was found and the country immediately surrounding?

Ans. 7. I am.

Ques. 8. You may state how far this body was from any traveled road?

Ans. 8. I think it was about half a mile from any traveled road.

Ques. 9. What road was that?

Ans. 9. A road leading from Medicine Lodge to Hutchinson.

Ques. 10. You may state if at the place where this body was found there was a camp consisting of a team and wagon?

Ans. 10. There was a team and wagon.

1775 Ques. 11. Was there any timber in the vicinity of this camp, if so state how close?

Ans. 11. There was timber three or four hundred yards south from the camp.

Ques. 12. You may state if this camp could be seen from what you called this road running from Medicine Lodge to Hutchinson?

Ans. 12. It could not be seen from the road.

Ques. 13. You may state the condition of the country between this Hutchinson road you have described and this camp where the body was found?

Ans. 13. It was very rough.

Ques. 14. You may state if there was any traveled road in the vicinity of this camp from which a person traveling thereon could see this camp?

Ans. 14. There was not any road in that vicinity in any direction from which the camp could be seen.

Ques. 15. You may state if you know whether or not the timber growing along this stream you have described could be seen from this Hutchinson and Medicine Lodge road, and if it could not be seen state the reason why?

Ans. 15. The timber closest the camp could not be seen. The timber by P. Briley's house could be seen. The ground about the upper timber was very rough and about the camp

Ques. 16. State why the timber closest the camp was not observable from this Hutchinson and Medicine Lodge road?

Ans. 16. It was in low bottom on the creek, and in a kind of a bend of the creek, and the hills hid the timber.

Ques. 17. Describe briefly the character of these hills between this Hutchinson and Medicine Lodge road and the camp?

Ans. 17. Well, they were rough hills, very broken from the road to the creek; there was no way you could drive down

from the road with a wagon until you got opposite P. B. Briley's coming south, down the road.

1776 Ques. 16. Do you remember the kind of weather we were having in March, 1879, at this time, the time the body was found?

Ans. 18. I remember the kind of weather the evening we found the body. It was cold, northwest wind blowing.

Ques. 19. You may state if you were used to camping out?

Ans. 19. I have been used to camping out.

Ques. 20. You may state if there was, in your judgment, in that vicinity, a more suitable place for camping out, particularly at that season of the year?

Ans. 20. There was a more suitable place, or would have been for me, three or four hundred yards down the creek, as there was plenty of timber there, and good water.

Ques. 21. How would this place have been with reference to Briley's house, would it have been nearer to or more remote from Briley's house than the one where the camp was?

Ans. 21. It would have been closer to Mr. Briley's house.

Ques. 22. Do you know who was living nearest to this camp where the body was found at that time?

Ans. 22. Mr. P. B. Briley.

Ques. 23. State in what direction P. B. Briley's house was from this camp?

Ans. 23. I should judge it was south or near south.

Ques. 24. You may state how far you reside from this camp where the body was found, and how far you live from Mr. Briley's, and how long you have resided there?

Ans. 24. I lieved about a mile and a quarter from Briley's; a little west of south; it would be about two miles from the camp. I have lived at that place four years last spring and still reside there.

Ques. 25. You may state who was living nearest this camp in a northerly direction from the camp?

1777 Ans. 25. I could not tell who was. It was 15 miles in that direction to the nearest settler.

Ques. 26. You may state who was living nearest this camp, in a westerly direction from the camp and how far from the camp?

Ans. 26. Ambrose Denton; about two miles in a westerly direction from the camp.

Ques. 27. You may state who was living nearest this camp in an easterly direction from the camp; and how far from the camp?

Ans. 27. I could not tell in an easterly direction how far it would be; it would be twenty miles any way; I don't know any names.

Ques. 28. You may describe the condition of the country lying in a westerly direction from this camp?

Ans. 28. It is broken, rough with the exception of a small bottom near the camp.

Ques. 29. You may describe the condition of the country lying in a northerly direction from this camp?

Ans. 29. In a northern direction it would be very rough, that the hills extended farther west than the camp was located.

Ques. 30. You may describe the condition of the country lying in a southerly direction from this camp?

Ans. 30. I would consider it all rough. There is some bottoms south; the creek is so crooked you cannot see more than three or four hundred yards in any direction.

Ques. 31. You may describe accurately as you can this stream, known as Crooked Creek, its course, the width of the valley through which it runs, particularly in the vicinity of this camp?

Ans. 31. Where it empties into Elm Creek, the valleys are tolerably wide; it comes from a northern direction. From the camp down three-fourths of a mile the camp is very crooked; the valleys are narrow. The valley is from 50 to 100 yards wide, while the broadest places would not be over two hundred yards wide.

Ques. 32. Now on either side of the valley are there
1778 bluffs?

Ans. 32. There are bluffs on both sides of the valley.

Ques. 33. In your description of the country in the various directions from the camp where the dead body was found, do you include the country surrounding that camp and in its vicinity? Ans. 33. Yes, sir; I do.

Ques. 34. Taking into consideration the character of the country surrounding the camp, how would you regard that spot as a camping place at that season of the year?

Ans. 34. Well, I should not consider it a proper place to have camped, at least for me to have camped.

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and as calling for the conclusion of the witness. Objection overruled; plaintiff excepts.

Ques. 35. You may state from your knowledge of this country, and that portion of it where the camp was, whether that camp was in an ordinary place for camping or in a secluded position?

Ans. 35. I would not consider it an ordinary place to camp, when there were much better places near by.

The plaintiff objects to the question as incompetent, irrelevant and immaterial, and as calling for the conclusion of the witness. Objection overruled; plaintiff excepts.

Ques. 36. You may state briefly how this camp was situated with reference to the hills immediately surrounding it?

Ans. 36. Well, the hills on the north and east and southeast all hid the camp from any view; from the west the camp could be seen from the top of the bluffs on the west side. On the northeast and southeast the bluffs were near by the camp. The hills on the north of the camp extended west of the camp. The hills on the east are directly up to the camp, and the hills on the south extend west of the camp to the bottom; then the ground west of the camp is a small bottom with the creek running through it; then the hills on the west extend near the creek, I suppose 100 yards from the camp.

The camp was on the east side of the creek.

1779 Ques. 32. You may state what opportunity you had for observing the body of this dead person which was found at the camp?

Ans. 32. I was there about dark in the evening; stayed there until 12 o'clock that night; I saw the body lying there by the camp fire that night.

Ques. 33. When did you next see the body?

Ans. 33. I saw it the next morning about eight o'clock.

Ques. 34. How long did you remain there on that occasion?

A. 34. I think I remained until about eleven o'clock that day.

Ques. 3. During that time was the body in plain sight where you could see it?

Ans. 35. Yes, sir; it was where I could see it.

Ques. 36. Was an inquest held during this time?

Ans. 36. Yes, sir; it was in the morning. I was one of the jurymen.

Ques. 37 You may state if during the time you have mentioned you did see and examine this body and its features?

Ans. 37. I did examine the body. I didn't observe the features very much.

Ques. 38. Did you see the face of the body?

Ans. 38. I did see the face, I examined the face and whole body. I saw where the wounds were; I saw the face of the body on the evening when I got there, and saw it several times during the next morning. You could not look towards the body without seeing the face.

Ques. 39. Examine the photograph here handed the witness by George J. Barker, one of the attorneys for the defendant, and which photograph he asks to have the notary identify by writing on the back his name and the date, and state

whether or not that is the photograph or picture of the person whose dead body you saw at the camp or place you have described?

Ans. 39. It doesn't look like the face of the person; my judgment is that is not the picture of the person I examined.

1780 Ques. 40. After you returned to this camp the next morning, did you see and examine a gun at that camp; was it loaded, or was there an empty shell in it; state the condition of the gun in that respect?

Ans. 40. I saw a gun there; I examined the gun; there was no shell in it or no load at the time I examined it.

Ques. 41. Did you see more than one gun or rifle there?

Ans. 41. I did not see but one gun there.

Cross-examination of Jacob Frazier, by J. W. McNeal, Esq., Attorney for Plaintiff.

Question 1. How far from Medicine Lodge is this camp?

Ans. 1. I should consider it betwixt 12 and 15 miles. I could not tell you the exact distance.

Ques. 2. State in your judgment the entire length of the stream called Crooked Creek?

Ans. 2. I should judge it to be something near four miles.

Ques. 3. How far was it from Mr. Briley's to Elm Creek, at the mouth of Crooked Creek?

Ans. 3. I should guess it to be about a mile and a half.

Ques. 4. In what business was Mr. Briley engaged at that time?

Ans. 4. I suppose the cattle business, more than anything else.

Ques. 5. How many crooks were there in that creek between this camp and Mr. Briley's?

Ans. 5. I could not tell how many.

Ques. 6. State as near as you can?

Ans. 6. We crossed it only twice in going up from Mr. Briley's, but I could not tell you how many crooks,—probably a dozen.

Ques. 7. How far were these crooks apart? State as near as you can? Ans. 7. I couldn't give you any idea.

Ques. 8. Were they a rod apart?

1781 Ans. 8. Well I should think they were a rod or more than a rod; some were four or five. It would be hard to tell the distance, I could not.

Ques. 9. Were any of them more than five rods apart?

Ans. 9. I couldn't say.

Ques. 10. Was there any springy or marshy ground where this camp was?

Ans. 10. There was a kind of springy, marshy ground.

Ques. 11. Had the grass commenced to grow on that ground? Ans. 11. I did not see any green grass.

Ques. 12. What was the condition of the range at that camp? Ans. 12. It was dead grass, there was plenty of it.

Ques. 13. Was the range eaten off close?—close to Mr. Briley's?

Ans. 13. I don't think it was. It might have been close to the house.

Ques. 14. Did Mr. Briley's cattle range close to his house?

Ans. 14. I don't think they did.

Ques. 15. In which direction from Mr. Briley's house did his cattle range?

Ans. 15. They ranged most of the time in an eastern direction, on the head of Spring creek.

Ques. 16. How far from Mr. Briley's was this camp?

Ans. 16. I should think it to be about three-quarters (3-4) of a mile.

Ques. 17. Could you see Mr. Briley's house from this camp?

Ans. 17. I could not see it from the camp.

Ques. 18. If the wind was blowing in a southerly direction, could not the report of a gun such as you saw in that camp have been heard at Mr. Briley's house?

Ans. 18. Yes, sir, I think it could have been heard.

Ques. 19. Was the wind cold enough to induce a camper to seek shelter behind a bank on that evening?

1782 Ans. 19. I should think it was.

Ques. 20. Could the wind strike that camp from the direction in which it was blowing that evening?

Ans. 20. It did strike it, for I found it very cold while I was there.

Ques. 21. How far was the camp from the hill north?

Ans. 21. Well, I suppose it was north or northwest four or five rods from the foot of the hill.

Ques. 22. Did you see the team these campers had?

Ans. 22. I did see the team.

Ques. 23. What was their condition in regard to flesh?

Ans. 23. They were rather thin in flesh.

Ques. 24. Was the grass any better between that place and Mr. Briley's than it was at the camp?

Ans. 24. I don't know that it was any better.

Ques. 25. How far was it from this camp to the foot of the hills on the east?

Ans. 25. It was right at the foot of the hills. I don't know that it was a rod.

Ques. 26. Do corpses always present the same appearance as a person in life? Ans. 26. I don't know that they do.

Ques. 27. Could you identify, ordinarily the photograph of a living person by having seen the corpse?

Ans. 27. I could not say that I could identify it positiv to be the man or not the man.

Ques. 28. Might you not very easily be mistaken about identity of a corpse by only having seen the photograph of person when living?

Ans. 28. A person might be mistaken, but that pict didn't look like the man who lay there dead.

1783 Re-examination of Jacob Frazier, by George J. Bark one of the Attorneys for the Defendants:

Question 1. State if from the peculiar circumstances und which you first saw the dead body, the oportunities which had for seeing and observing its features and appearance, a your connection with the inquest you would be likely to mistaken in regard to the features and appearance of th person?

Ans. 1. Well, sir, I don't think I would be mistaken. looked natural for a dead man. His face was not drawn changed in any way.

JACOB FRAZIER.

1784 W. R. Smith, sworn for the defendants.

Direct Examination

By Mr. Barker:

Q. State your name and residence?

A. William R. Smith; I live in Kansas City, Kansas.

Q. What, if any, official position do you hold?

A. I am one of the justices of the Supreme Court.

Q. I will ask you if you were formerly one of the attorne in this case?

A. For two trials I represented—helped to represent—t defendants in these two cases.

Q. Were you present at the trial of this case before Jud Thomas in Topeka? A. Yes, sir.

Q. Were you also present at the trial of this case bef Judge Williams in Topeka, in 1895? A. Yes, sir.

Q. I will ask you if, during that time, to await the trial these cases, you became acquainted with one Levi Baldwin?

A. Yes sir, I met him several times during the trial of t cases.

Q. I will ask you if he was examined as a witness on ea of those occasions?

A. I think he was; I think he was present both times.

Q. Do you remember of seeing, or measuring Mr. L Baldwin, seeing him measured or measuring him someti in the spring of 1896 during the trial before Judge Willian

A. Yes, sir.

Q. You may state where that measurement took place?

A. The measurement took place in the Throop Hotel at Topeka on the second floor, I think it was room 12.
Q. Did you see him measured on that occasion?
A. Yes, sir.
Q. You may state what his height was?
A. From the measurement there he was 5 feet, 8½ inches, about; a little short of that.
Q. You may state whether there was any mark made there of his measurement, that is if, his measurement was marked on the door?
A. Yes, sir, the measurement was marked on the wall; on the wall paper.
Q. After his measurement what words or letters ap-
1785 pear? A. "Bal" right after the mark.
Q. Since that time have you verified the measurement which was then made?
A. Yes, sir, I went down there the other day and looked at it; the mark is still in room 12 of the Throop Hotel.
Q. What is that measurement?
A. It is 5 feet eight inches and a half; a little bit short of half an inch.

Excused.

1786 Samuel W. Jones, a witness produced by the defendants, being duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Barker:
Q. You may state your name and residence?
A. Samuel W. Jones, Wichita, Kansas.
Q. How long have you lived in Wichita, Kansas?
A. Since the 11th day of May, 1874.
Q. What official position, if any, have you held?
A. Just now I hold no official position except that I am one of the Regents of the University of Quindaro, Kansas.
Q. What other official positions have you held?
A. I was for two years a constable at Wichita, and for two years on the police force; and then I served as a captain in the 23rd Kansas Infantry in the war in Cuba.
Q. Where were you living in 1878 and 9?
A. On Main street, Wichita, Kansas, opposite the Occidental Hotel.
Q. What was your father doing at that time?
A. Father was porter at the Occidental Hotel.
Q. For how many years did he act as porter of the Occidental Hotel?

The plaintiff objects to the question as immaterial; objection overruled, the plaintiff excepts.

A. As near as I can remember, about eight years.

Q. When should you say his connection with the hotel ceased?

A. I think it was along in the latter part of 1883.

Q. Did you know a man in Wichita by the name of Holsnider? A. I did, yes sir.

Q. In what business was he engaged?

A. He was in the cigar making business; ran a cigar store and manufactured cigars.

Q. How far was his place of business from the Occidental Hotel in 1878 and 9?

A. It was in the southwest corner of the Occidental Hotel.

[—] On the ground floor, corner of 2d and Main streets.

Q. Did he carry on that business for some time, Hol-
1787 snyder? A. Yes.

Q. I will ask you if in the winter of 1878 or 9, you became acquainted with a man by the name of Walters?

A. I did, yes, sir. I became acquainted with him; it was along I think about the latter part of October or November; that was the first time I saw him; I learned his name a short time after that.

Q. Where was he at that time?

A. He was standing in front of the cigar parlor or store at that time.

Q. What were you doing at that time?

A. I was going to school at that time and helping my father at the hotel.

Q. Did you perform any duties about the hotel

A. Yes, the hotel was lighted entirely with coal oil lights at that time, and I assisted father in filling the lamps and filling the water pitchers in the bed chambers.

Q. Did you spend much or little of your time about the hotel?

A. I spent all of my time, that is, during the day except what time I was at school.

Q. Now, from that time on how long did you know this Frederick Adolph Walters?

The plaintiff objects to the question for the reason that the witness has not given the name.

Q. I will ask you by what name he was known.

A. Dolph Walters, but around the cigar factory they called him Fritzey.

Q. I say about how long did you continue to know him?

A. Until as near as I can tell about the latter part of January or first of February 1879.

Q. During that time, from the time you made his acquaintance until that time, what was he doing so far as you know?

A. Working at the cigar trade making cigars; I have seen him at work there at the south window in Mr. Holsnider's factory many a time because that was on my way to school.

Q. How many times do you suppose during that
1788 time, that is from the time you first saw him until you saw him last, how many times do you suppose you saw him?

A. I guess there were very few days that passed by but what I saw him once or twice because as I said I went by there on my way to school, and I passed there at least two or three times a day going to school.

Q. You spoke about the last time you saw him. I will ask you if you can give a general description of Adolph Walters at that time so far as height, color of hair, etc.?

A. I couldn't say just to his height, but I should judge he was a man that I should judge would stand about between five feet six and five feet eight inches high; his hair I remember as being a very dark brown, almost black and slightly inclined to curl; his mustache was just starting out at that time; he was very proud of his hair because he used to take a great deal of pains in combing his hair. I have seen him at the barber shop in the hotel many a time combing his hair, and the beard if it had grown, if it had been allowed to grow would have grown thin back on the cheeks and thick along on the chin.

Q. How old were you at that time?

A. I was in my 12th year at that time.

Q. As to his height, you never saw him measured?

A. No, sir.

Q. It is just an estimate in regard to that? A. Yes, sir.

Q. Did you have any conversation with him about the time he went away in regard to his leaving, where he intended to go? A. No, sir, I didn't.

Q. Of your own knowledge, you don't know what his intentions were in regard to that?

A. All that I know of him going away, I heard him telling other parties he was going away but I didn't hear him say where.

Q. From that time, that is, from some time in February, 1879, up to this time, have you seen or heard from Adolph Walters?

A. No, sir, I have not since along about the latter part of February, 1879.

1789 Q. Do you remember him well enough to state his nationality, whether he was a German or whatever his nativity might be; could you say in regard to that?

A. No sir, I could not.

Cross-examination

By Mr. Atwood:

Q. What is your name? A. Samuel.

Q. At the time that you knew him, that is, Walters we are talking about, of course, as I understand, he was working in this cigar factory; what is the man's name that ran the factory? A. Joseph Holsnyder, a German.

Q. And this young man worked in there as a journeyman cigarmaker, I suppose? A. Yes sir, as a cigarmaker.

Q. You saw him in the window as you went by?

A. Yes sir.

Q. When was it that you last saw him as your recollection serves you?

A. About the latter part of January or the first of February, 1879.

Q. Now, at that time, and up to that time you last saw him, was he in that employment? A. Yes sir.

Q. How long had he been in that employment prior to the time that you last saw him the last of January or the first of February? A. Close onto a year.

Q. This cigar factory was not in the hotel that you worked in, was it? A. It was part of the hotel.

Q. So that in going back and forth to your school from your home and to the hotel, between those places, you would go right past the window where this young man worked?

A. Yes sir, unless I went over the street.

Q. That would be out of your way? A. Yes sir.

Q. That would not be the way that you would naturally go? A. No sir.

Q. That necessitated your going by this window and in that way it becomes fixed in your memory that you saw him as you have explained to the jury? A. Yes sir.

1790 Q. You think he was working in a room in this building; it was all under one roof? A. Yes sir.

Q. You were in and about the hotel assisting your father, and he worked in a room covered by the same roof as the hotel was, but in a separate room, as a cigarmaker? A. Yes sir.

Q. You think his employment there extended over as much as a year? A. About a year, yes sir.

Q. Would your recollection carry you clear black— Let us see; the last of January or the first of February, 1879—the year preceding would be the last of January or the first of February, 1878?

A. Yes, sir, because the first time that I ever saw [—] in the neighborhood of the cigar factory was in October or November, 1878; I didn't know his name at that time but I learned that rather than less? A. Yes sir.

Q. It was not a year that you saw him there; January, then the preceding December would be two months, and November three months; so that if you first saw him in October, 1878, it was only three months that you knew him?

A. I saw him the first time the latter part of October, or the first of November, 1878; the last time I saw him was about the latter part of January or the first of February, 1879.

Q. Then it was not a year that you knew him there; it was only the time intervening between the latter part of October and the fore part of February?

A. I used to pass there every day.

Q. Yes, I understand, but I understood you to say Mr. Jones, that it was something like a year that he was working there? A. Yes sir.

Q. Now, the last you saw of him was, we will say, the last of January or the first of February, 1879? A. Yes sir.

Q. January, 1879, would be one month? A. Yes sir.

Q. And then the preceding month would be December, 1878? A. Yes.

Q. And then the month preceding that would be November, 1878; that bring you to October, when you saw him first?

A. Yes sir.

Q. That was only three months? A. Yes sir.

1791 Q. Well, then, it was not a year that you knew him?

A. Well, now, let me see. Yes, I am wrong in that; I am wrong in that.

Q. It was 1877?

A. No, it was not in 1877; the first time that I saw him was about as I said in October, or November, 1878; it was in 1878 that I saw him.

Q. Well—

A. I will tell you, what fixes it in my mind was the opening and closing of the school.

Q. Then it is a fact that it was about three months that you knew him rather than a year?

A. Yes, sir, three months or more that I knew him.

Q. Your recollection serves you that it [—] more than that rather than less? A. Yes, sir.

Q. That would carry it back into the early part of October or September that you first saw him?

A. Yes, it was October or November.

Q. Were you working with your father there in the hotel during the summer vacation of 1878? A. Yes sir.

Q. That would be one way of getting at it. To refresh your recollection was he working there at the time you were working at the hotel during your vacation, which concluded, I suppose, in August, didn't it?

A. School took up in September; school began the second week in September.

Q. Now, for the purpose of refreshing your recollection, what is the fact as to whether or not he was working there at that place at the time you worked there during vacation time?

A. He was not there during that time at all.

Q. He was there after school took up?

A. Yes sir, after school took up.

Q. How long after school took up, would you think; shortly or a long time?

A. Well, it was a short time after school took up that I saw him. The first time that I ever saw him he was standing on the corner talking to some young men that I associated with.

1792 Q. Who were they?

A. One of them was Dick Dimes; he lived just across the alley from me; he—

Q. No matter about that. Then you began school there at that time about the second Monday in September?

A. Yes sir, second Monday in September.

Q. Would your recollection be that it was within a month or six weeks after school took up? Of course, you can only approximate it at this distance of time; what I want is your best recollection?

A. My best recollection would serve me that it was a month or possibly more than a month.

Q. That would bring it down in the latter part of October that you first saw him?

A. Yes, sir, just about the latter part of October that I saw him.

Q. From that time he was steadily employed in the cigar factory until at least the last part of the following January and possibly the first of February? A. Yes sir.

Q. And at that time you say you heard him say to some persons that he was going away? A. Yes sir.

Q. Did he go away?

A. I guess he did because I have not seen him since.

Q. You never saw him there after that? A. No sir.

Q. Where was the Globe Hotel with relation to the Occidental; you know what I mean; what relative position did they occupy in the town? A. The Globe Hotel?

Q. Yes. A. I don't know any Globe Hotel in the town.

Q. At that time?

A. No Globe Hotel there; none that I know of.

Q. You were connected with one of the hotels yourself?

A. Yes sir.

Q. The Occidental? A. Yes sir.

Q. That naturally gave you [come] knowledge of the other hotels in the town; you knew what other hotels there were in the town?

A. I knew of four hotels in the town at that time,
1793 the Occidental Hotel, the Douglas Avenue Hotel, the Ritchie House and the Valley House; there was the Elks Hotel directly opposite the Douglas Avenue on the corner of Water and Douglas street; it was called the Elks Hotel. Those are the five hotels that I knew of at that time.

Q. What would your opinion be as to whether or not there was a hotel called the Globe Hotel?

A. I would not know anything about it. I don't know of any such hotel in the city.

Q. What I am getting at is this: If I were asked what hotels there are in Leavenworth, I should say that I knew them all. What I mean to get at, do you think you knew all the hotels in Wichita at that time?

A. Oh, there might have been—No, I don't think I knew all of them; those five were the prominent hotels that I stated; I knew of them.

Q. But you never heard of any Globe Hotel?

A. No, sir.

Q. Neither at that time nor any subsequent time?

A. No, sir.

Q. Did you know a man at that time named Healey?

A. Yes, sir.

Q. P. V.? A. Patrick V. Healey, yes, sir.

Q. He is here to-day and you may have seen him?

[—] I saw him on the street.

Q. Did you know where his office was? A. Yes, sir.

Q. At that time A. Yes, sir, as near as I can—

Q. Where was his office?

A. On Douglas Avenue, I think on Douglas Avenue between—It was on Douglas Avenue, but I don't now remember whether between Main and Market or whether it was further east.

Q. I don't care much about it; I want to know its relation to the Occidental?

A. As near as I can remember, it was two blocks from 2nd street down to Douglas avenue, and his office was on Douglas avenue.

Q. Do you know where his place of business was?

A. Not exactly, no, sir.

Q. You knew about where it was?

A. Yes, sir, it was on Douglas avenue.

1794 Q. Did you have occasion to go there at any time? He was a ticket scalper then among other things.

A. No, sir.

Q. Never had anything to do with him in that way?
A. No, sir.
Q. Now, at the time you last saw him or about he time you last saw him, which you fix as late in January or early in February, as I understood, you expressed the intention of going away? A. Yes, sir.
Q. Was he a well-behaved steady workman? A. He was.
Q. A decent sort of a fellow A. Yes, sir, he was.
Q. Did he quit of his own accord, or was he discharged, if you know? A. I don't know.
Q. Never knew of any differences between him and his employer? A. No, sir.
Q. You know, however, that he did cease working there, and that he expressed the intention of going away and disappeared, and then you did not see him any more? A. Yes, sir.
Q. That you think was late in January or early in February, 1879?
A. Yes, sir, and I remember that I asked Mr. Holsnider if he had gone away and he said he had.
Q. That was about the time?
A. Yes, sir, a short time afterward.
Q. The man who told you he had gone away was his employer, the cigar manufacturer? A. Yes, sir.
Q. Is it not a fact, Mr. Jones, that that was as late as the first of March, 1879? A. No, sir, it was not.
Q. You are quite sure about that?
A. I am quite sure and I can give my reasons for being sure.
Q. That is the best way?
A. Because Dolph Walters had a habit of throwing water on me when I went by, he would throw water on me; and among other things, the first cigar that I ever smoked in my life Dolph Walters gave to me; I remember how sick it made me. I stopped there at the cigar factory and talked with him and Dolph Walters promised to give me a watch on my birthday in March; he promised to give me a birthday present; he was to give me a watch for a birthday present and I
1795 was looking out for that watch and I never got it.
Q. So that makes you very sure that he left there considerably before March, as early, you say, as early as February? A. Yes, sir.
Q. Now, as to his description which you have given quite clearly, I didn't quite understand what you said about the color of his mustache?
A. His mustache was a lighter brown than his hair.
Q. And his hair was about what color?
A. Very dark brown, almost black.
Q. Almost black? A. Yes, sir.

Q. And his mustache would be lighter than that, or was lighter than that? A. Was ligher brown.

Q. Well, now, of course, it was quite perceptibly, was it, or you would not have remembered it; can you give us some idea whether it was considerably lighter or only a little lighter?

A. My opinion would be,—Well, I know it was quite a good bit, quite a few shades lighter than his hair.

Q. In other words, there was a contrast between his mustache and his hair? A. Yes, sir, somewhat of a contrast.

Q. No man would call his mustache black, while they might call his hair black? A. Yes, sir.

Q. Now, as to his height. Will you kindly stand up, Mr. Jones, down on the floor with me. What is your height?

A. Five feet 10¾ inches in my bare feet.

Q. You would not undertake to say that that man was as tall as you, would you?

A. He was not as tall as I am, no, sir.

Q. You are pretty confident of that? A. Yes, sir.

Q. Then there was enough difference between his height and mine—I am five feet ten, I think, exactly five feet ten; there was enough difference between his height and mine for you to remember that there was a difference?

A. Yes, sir; because I remember the size of Dick Dimes; I remember the difference between his height and Dick;
1796 there was some difference between his height.

Q. Was Dick shorter or taller? A. Dick was taller.

Q. What was Dick's height? A. I don't know his height.

Q. Walters was shorter than Dick? A. Yes, sir.

Q. And Dick was shorter than you or was he the same height or somewhat taller or how? A. I don't know just.

Q. You are 5 feet 10¾ I think you said?

A. Five feet 10¾, yes, sir.

Q. You say he was not as tall a man as you are?

A. Yes, sir.

Q. You know that?

A. I know that because I have been measured and I know I have seen men of my height.

Q. In fact, you know it. You have been a police officer, Mr. Jones? A. Yes, sir.

Q. And as such you were obliged to pay some attention to the descriptions of men, more perhaps than a person who had another kind of business?

A. Yes, sir, I was a uniformed policeman for one year and an ununiformed detective for one year.

Q. As a detective, as such officer, you were frequently called upon in the course of your duty to read descriptions of men who were fugitives from justice? A. I was.

Q. Looked at men with a view of seeing how they compared with descriptions? A. Yes, sir.

Q. And in that way you skilled yourself so that you are able to form a tolerably accurate idea of a man's height by looking at him? A. Well, I could in some cases.

Q. You feel very confident he was not as tall a man as you and I? A. Yes, sir.

Q. You would fix it between 5 feet 6 and 5 feet 8 inches?

Q. About that; as near as I can remember.

Q. You are pretty positive not to exceed 5 feet 8. Might not be 5 feet 9?

A. He might have been but I would not have guessed him at that.

1797 Q. Might he not have been five feet nine?

A. No sir.

Q. You are very positive on that point, that he was not 5 feet, 10? There is no use bandying words with you.

A. It would be of course simply a matter of guess work with me but my opinion would be he was not over 5 feet, 8 inches; between 5 feet 6 and 8.

Q. Your memory seems to be pretty good; you have distinct recollection of him? A. I have, yes sir.

Q. As your mind goes back to that time, you can see him in your mind's eye, so to speak, quite clearly, can you?

A. Yes sir.

Q. You are quite positive he was not as tall as you and me? A. Yes sir.

Redirect Examination

By Mr. Barker:

Q. After Walters left the Occidental Hotel, did you continue to work there? A. I did.

Q. For how long?

A. Until the spring of 1883; until March of 1883.

Q. Do you know whether he merely left the hotel or whether he left the town; do you know in regard to that?

A. Mr. Holsnider told me—

Q. I am not asking you what Mr. Holsnider told you; I want to know if you have any knowledge of his going away from town or simply that he was not there at the Occidental Hotel after that.

By the Court: That is leading, Mr. Barker.

Q. I am asking what you mean by going away from there; what do you have reference to?

A. I had missed him; did not see him around there at the hotel where I had been accustomed to see him.

Q. Do you know where he went when he left there?

A. I do not, no sir.

By Mr. Atwood: You only knew that he said what he was going to do and what Mr. Holsnider said he had done?

A. Yes sir.

Witness excused.

1798 E. B. Good, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name? A. E. B. Good.
Q. Where do you live, Mr. Good? A. Topeka, Kansas.
Q. How long have you lived in Topeka?
A. About ten years.
Q. Where did you live before you moved to Topeka?
A. Lawrence, Kansas.
Q. How long did you live in Lawrence, Kansas?
A. From 1866 until about 1890.
Q. In what business were you engaged in Lawrence?
A. Grocery business.
Q. Were you engaged in that business during all the time that you lived in Lawrence? A. Yes sir.
Q. Then of course you were living in Lawrence in 1878-9?
A. Yes.
Q. Do you remember the fact of a dead body being brought to Lawrence claimed by some to be the body of one John W. Hillmon? A. I do.
Q. Do you remember of an inquest being held over that body? A. I do.
Q. Were you a member of the coroner's jury? A. I was.
Q. Do you remember where that body was situated; what place in the city of Lawrence?
A. Smith & Bailey's undertaking establishment.
Q. Whereabouts? I mean by that where was their undertaking establishment, on what street?
A. On Massachusetts street.
Q. You said you were a member of the coroner's jury that held the inquest over that body? A. Yes sir.
Q. Do you remember the fact of Mrs. Hillmon testifying at that coroner's inquest? A. I do.
Q. The plaintiff in this case? A. Yes sir.
1799 Q. Do you remember of her being asked in regard to the height of [—] husband at that time of the coroner's inquest? A. I do.
Q. Do you remember what reply she made to that question? A. She said she didn't know; couldn't say.
Q. Do you remember of her being asked in regard to the condition of her husband's teeth at that inquest? A. Yes sir.

Q. Did we inquire in regard to the character of her husband's teeth and what did she say?

A. She said she couldn't say.

Q. Do you remember of her being inquired of at that inquest in regard to the kind and color of her husband's hair? A. Yes sir.

Q. To that question what reply did she make?

A. She said she could not say.

Q. Do you remember of her being asked whether that was the body of her husband, and what reply did she make to that question? A. Yes sir.

Q. What did she say in regard to that?

A. She says, if it is not my husband, who can it be; who is it then?

Q. Do you remember in regard to her demeanor on that occasion? A. Yes sir.

Q. I will ask you what her demeanor was on that occasion, whether it was light and trifling or whether she appeared serious and sad?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

Q. You may state what her demeanor was on that occasion?

A. Well, it was trifling; she didn't seem to feel the loss of her husband; she was very trifling and jolly, laughed at jokes that occurred during the trial.

Q. Were you acquainted with one Arthur Judson?

A. Yes sir.

Q. How long had you known him at that time?

A. Oh, I couldn't say how long I have known him; he had traded at my store there a good deal; have known him a good many years.

Q. When I asked you how long you had known him,
1800 I meant how long had you known him in 1879?

A. I had known him several years in 1879.

Q. Do you remember of his being examined as a witness on that occasion? A. Yes sir.

Q. I will ask you if he was inquired of as regards the height of John W. Hillmon? A. Yes sir.

And in answer to cross-interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Did you crack any jokes with Mrs. Hillmon?

A. No sir.

Q. Who did?

A. Mr. Barker and her had it back and forth.

Q. Mr. Barker and she indulged in jocularity? A. Yes sir.
Q. Do you remember any of the jokes?
A. Yes, when Brown was testifying; questions asked Brown.
Q. Was he sitting beside Mrs. Hillmon? A. Mr. Barker?
Q. Yes. A. No.
Q. Was this proceeding had in the court room?
A. Yes sir.
Q. It was to determine the identity of that body?
A. Fact.
Q. The inquest was held for the purpose of determining the identity of that body? A. Yes sir.
Q. You say that Mr. Barker was there? A. Yes sir.
Q. In what capacity?
A. He was there with Mr. Green investigating as to who was the body.
Q. In what capacity; one of the attorneys of the insurance companies? A. I don't know.
Q. Do you know as whose attorney? A. No sir.
Q. Mr. Green was there all the while? A. I think so.
Q. And Mr. Barker was there all the while? A. Yes sir.
Q. And during the course of those proceedings, Mr. Barker attorney for the insurance companies and Mrs. Hillmon exchanged jokes; is that a fact?
1801 A. Well, didn't exchange jokes particularly, but something would occur; there was always something occurring at the inquest, some question asked a witness, and she was mirthful.
Q. It was some question that excited her risibility; will you tell one?
A. Mrs. Hillmon was asked about the quantity of hair he wore, and she made the remark that she didn't know but that he had more hair on his head than Mr. Green has got there; kind of jocular and laughed over it.
Q. Who laughed over it? A. All of us.
Q. You? A. I guess so.
Q. How about the other jurymen?
A. I couldn't tell you about them.
Q. You were right there and heard and saw it all?
A. Yes, sir.
Q. That is what you mean by her light conduct?
A. Kind of mirthful. It was a rather cute remark, kind of joke, and Mr. Green seemed embarrassed, and he turned around and smiled and she did with the rest.
Q. That is what you mean by her light conduct?
A. Yes, sir.
Q. What else was said and done there?
A. I couldn't tell you.

Q. You remember what she said about her husband's height? A. I do, sir.

Q. And you remember what she said about her husband's teeth? A. Yes, sir.

Q. And you remember what she said about her husband's hair? A. Yes, sir.

Q. What other jocular remark did she make?

A. She didn't make any more jocular remarks that I know of.

Q. Do you remember any other jocular remarks?

A. No, sir.

Q. So the jocularity was all confined to Mr. Barker?

A. Not at all.

Q. Was Mr. Green engaged in being funny there?

A. I don't remember him laughing at all.

Q. I thought you said you all laughed. Now, what else?

A. In the examination of Mr. Levi Baldwin, I remember.

Q. Who examined him? A. I think Mr. Barker did

1802 Q. Mr. Barker made some jokes with Mr. Baldwin didn't he?

A. He questioned him pretty seriously about his financia condition and Mr. Barker, says, "You are enough to provok a saint," or something of that kind.

Q. Is that your notion of a witticism? A. Part of it.

Q. Mr. Barker's utterance that the witness was enough t provoke a saint is a witticism? A. Yes, sir.

Q. You laughed?

A. I don't know that I laughed; I probably smiled.

Q. The others did?

A. Well, some of them; I couldn't see all over the room I was sitting facing the witness. I couldn't say they a laughed.

Q. What other witty thing did Mr. Barker say?

A. I don't know that I can recollect any more.

Q. What other funny or witty thing did anybody else say

A. I don't remember now.

Q. Now, then, Mrs. Hillmon smiled or laughed, which wa it, when Mr. Barker said that Levi Baldwin was enough to pr voke a saint.

A. I don't know as she laughed at all.

Q. Don't know that she laughed at all? A. No, sir.

Q. Then what other joke was there beside the one relati to the hair that caused Mrs. Hillmon to laugh?

A. I don't know of anything else at all.

Q. Then, that is the sum of the lightness of conduct on h part, that Mrs. Hillmon, when she was asked about the qua tity of her husband's hair, she said he had more than M Green had, who was nearly bald; is that it?

A. That was the most; I remember her laughing more than anything else.

Q. What other thing did she laugh at [all]?

A. I just told you about Baldwin's conduct.

Q. Yes, but you said she didn't laugh at that.

A. I said she might have smiled.

Q. You say she smiled on that occasion?

A. You can call it what you please.

1803 Q. Do you say she smiled on that occasion?

A. Well, yes, she smiled.

Q. You remember that? A. Yes, sir.

Q. And you remember it well about the hair?

A. Yes, sir, I remember that distinctly.

Q. What other thing is it that occasions your calling her conduct light and frivolous?

A. Just her look and manner; I didn't see her weep any; she seemed to be kind of lively.

Q. Your idea was that she had to be drow-ed in tears, in order to have her conduct not denominated light?

A. She didn't show any seriousness.

Q. You were sitting as a juror in the inquest over that body? A. Yes, sir.

Q. And you were indulging in laughter and jokes?

A. Well, we didn't indulge in jokes.

Q. Mrs. Hillmon was the only one that indulged in jocularity?

A. I didn't say so; it was not necessary to be joking all the time; she just made that remark; she appeared to be lively.

Q. She didn't seem dead; I suppose that is the antithesis of lively. A. You can call it what you please.

Q. It is not what I please; it [—] what you please; what is the truth, that is what we want?

A. I am telling the truth.

Q. So, we have your assurance. Will you kindly give us the names of some of the other jokers there. Mr. Barker seems to have been the head joker on that occasion.

A. We were there about four days, if I remember, five days I think; there was a good many things that excited a little mirth during that five days; some answers to questions the witnesses wouldn't understand exactly and would answer awkwardly and make us smile.

Q. Give us an instance.

A. I can't give you one; not the name.

Q. But you remember the circumstances?

A. Yes, sir.

Q. And the consequences of it? A. Yes, sir.

1804 Q. That laughter came every time?

A. I saw smiling around the room, but I couldn't tell you after ten minutes who did the smiling.

Q. But you could tell what the occasion of the smiling was if you remember the fact that there was laughter?

A. Yes, sir.

Q. You remember the fact that there was laughter; now, give us the occasion of that laughter?

A. I have, all I remember of.

Q. I have asked you for an instance where some witness answered awkwardly? A. I couldn't tell you of any.

Q. How many witnesses were examined?

A. I couldn't tell you that.

Q. Well, do you know approximately; was it more than one?

A. Oh, yes, probably, I don't know, probably 25 to 50 to 100; I don't know in the five days.

Q. What would be your best recollection?

A. I wouldn't pretend to say.

Q. Mr. Good— That is your name? A. Yes, sir.

Q. You have a very acute recollection of various of these transactions. A. Yes, sir.

Q. Try and exert it so as to help us in these other particulars. Now, I will ask you to strain your recollection and give us your best knowledge as to the number of witnesses that [there] examined there? You were there as jurors?

A. Yes, sir.

Q. You were there for the purpose of listening to the witnesses? A. Yes, sir.

Q. And of weighing their testimony, and of determining the verdict; that is right? A. Yes, sir.

Q. Now, what is your best recollection as to the number of witnesses that were there?

A. Well, probably between 25 and 50; I wouldn't try to give it any closer than that.

Q. Your best recollection in that particular is that you can make sure of between 25 and 50, as to the number of persons that were sworn and testified?

A. No, I couldn't say; I have seen all the witnesses here to-day but I couldn't tell you the number because—some
1805 of the witnesses are prominent, that I could remember, but there are others that I never seen before or since that I know of.

Q. How many times have you testified at the Hillmon trial? A. Every time it has been tried; six times, I guess.

Q. Where have you resided in the last ten years? In Topeka, I think you said? A. Yes, sir.

Q. What is your business? A. Broker business.

Q. Whom do you break? I beg your pardon.

A. I break anybody I can find green enough to break.

Q. You as one of the jurors, of course, observed closely the transactions of that inquest? A. Well, yes.

Q. The testimony was taken down, was it not, in shorthand? A. I think it was, yes.
Q. Do you remember the name of the man who took the testimony down?
A. I think his name was Baldridge; I think that is the name.
Q. Do you know who occasioned his being there?
A. No, I don't.
Q. Did he seem to be under the direction of Mr. Green the county attorney, or Mr. Barker?
A. No, I think the coroner had more charge of him than any one else.
Q. Those notes were taken down during the trial?
A. I presume they were.
Q. During the time that Mrs. Hillmon testified?
A. I presume so.
Q. When you speak of their being taken down, you mean by the stenographer? A. Yes, sir.
Q. Just as these people are engaged in the work now?
A. Yes, sir.
Q. You think your recollection is quite good about these things you have testified to, but you would not think it as good as shorthand extended notes, would you? A. No.
Q. In other words, Baldridge's notes, if they had been produced, would be more accurate than your recollection, wouldn't they? A. Yes, sir.

1806 Q. Is it not a fact that a part of your business is the discounting of witness and juror's fees?
A. Yes, sir.
Q. And have you a little side business in that connection with this case? A. Oh, no, no sir, I only came yesterday.

1807 And in answer to redirect interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:
Q. I will ask you if you were acquainted with one R. J. Borgolthaus? A. Yes, sir, well acquainted with him.
Q. What was his business at that time, I mean in the city of Lawrence; what was he? A. He was an attorney.
Q. A practicing attorney? A. Yes, a practicing attorney.
Q. Living there in 1878 and 1879? A. Yes, sir.
Q. Do you remember of his being present at the time of the coroner's inquest?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

A. I do, yes, sir.

Q. Do you remember what he did, so far as asking que tions and objecting to them is concerned? A. Yes, sir.
Q. From his conduct on that occasion, what would yo say for whom did he appear?

The plaintiff objects to the question as incompetent, irrel vant and immaterial. Objection sustained, the defendan and each of them at the time duly excepting.

Q. You may state what he did so far as objecting to que tions is concerned, if you remember?
A. He objected to questions and I—
Objection.
Q. Do you remember whether or not he asked any que tions of the witnesses? A. Yes, sir.

Witness excused.

1808 O. D. Pickens, a witness produced by the defendan being duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Barker:
Q. State your name? A. O. D. Pickens.
Q. Where do you live, Mr. Pickens?
A. Lawrence, Kansas.
Q. How long have you lived in the city of Lawrence?
[—] About 33 years.
Q. Do you live in the city of Lawrence now? A. Yes. s
Q. What business are you engaged in?
A. I am a coal dealer and wood dealer.
Q. Were you living in the city of Lawrence in 1878 and
A. Yes, sir.
Q. Do you remember of a body being brough: to Lawre at the undertaking establishment of Bailey & Smith's in t spring of 1879 claimed by some to be the body of John Hillmon? A. Yes, sir.
Q. Did you see that body? A. Yes, sir.
Q. I will ask you if you were one of the coroner's jury?
A. I was.
Q. On the occasion of the inquest held over it?
A. Yes, sir.
Q. Were you acquainted with the plaintiff in this ca during that time, Mrs. Hillmon?
A. Not acquainted with her, merely saw her.
Q. At what time did you see her with reference to the quest?
A. From the start until the trial was through, I rememb
Q. Did she testify as a witness on that occasion?
A. Yes, sir.

Q. Do you remember a question being asked her at that coroner's inquest in regard to her husband's height, and what answer she made to that question? A. Yes, sir.
Q. What did she say in regard to her husband's height?
A. She said she did not know; she never measured him.
Q. Do you remember of her being inquired of at that time concerning the teeth of her husband?
A. I have some remembrance of it, yes, sir.
1809 Q. What did she say in regard to his teeth?
A. She could not tell.
Q. Could she tell what kind of teeth he had?
A. She did not.
Q. Do you remember of her being inquired of in regard to the character, color and texture of her husband's hair?
A. It was spoke of but I don't remember the answer she made.
Q. Do you remember substantially what was said?
A. I remember she pointed to the attorney and said he had more hair than you have got.
Q. That is the only portion you heard of the answer to that question that you remember? A. Yes, sir.
Q. Did you know at that time one R. J. Borgolthaus?
A. Simply acquainted with him.
Q. In what business or profession was he engaged in Lawrence at that time? A. Attorney at law, I believe.
Q. Do you remember of his being present at that occasion, I mean the occasion of the coroner's inquest?
A. He was there, I think.
Q. Do you remember of his being present at the time Mrs. Hillmon testified? A. I am not positive.
Q. Do you remember of his asking questions or making objections to questions at that time, I mean at the time of the coroner's inquest?

The plaintiff objects to the question for the reason the witness has already stated that he did not know that he was there. Objection overruled, the plaintiff duly excepts.

A. Yes, sir, I remember his asking questions during the trial.

Cross-examination

By Mr. Hutchings:
Q. What is your business, Mr. Pickens?
A. I am a coal dealer; coal and wood.
Q. Over in Lawrence? A. Yes, sir.
Q. How long have you been engaged in that business?
A. 12 or 14 years.

Q. And incidentally came to these trials and testified in the meantime?

1810 A. No, sir. Haven't ever testified but have been subpoenaed twice; I don't think I have been on the stand since the inquest. Well, I don't think I have ever been a witness on the trial of the case.

Q. Never have testified at these Hillmon trials?

A. No, sir; I am not positive but what I was called, but hardly a question was asked me at one time; I am not positive [—] that; I have not been a witness in the case right along at all.

Q. These trials have all been since the inquest?

A. Yes, sir.

Q. You say that you don't remember of having been a witness before this time?

A. I have been subpoenaed but bot—

Q. I understand; but you don't remember being a witness before?

A. It seems to me that I was called on in Topeka, but there wasn't hardly a question asked me.

Q. I will ask you if, as a matter of fact, you did not testify in 1896 in this case, as a witness in this case on behalf of the insurance companies?

A. That was at Topeka it seems to me I was called on the stand at the time, if I was; it seems to me I was called on the stand but hardly questioned.

Q. I will ask you if you don't remember of testifying in substance as follows: That you were a member of the coroner's jury; that you remember the inquest; that Mrs. Hillmon was examined as a witness; that the question was asked her as to whether or not that was the body of her husband and she said that she said if it was not the body of her husband, who could it be; you also said that you remembered an interrogatory that was directed to her as to his height and that she answered that she did not know his height; that there was something said within your hearing about a measurement but you didn't recollect the exact words; you said there was something said about hair but you couldn't remember what; you also said that she said at that trial that his hair was brown, and that she didn't say she didn't know the color of his hair, and you remember that there was

1811 something said about his having been measured but you could not remember exactly what? Did you not among other things, testify in substance to that?

A. I guess that is correct; I think I did.

Q. This thing occurred three years ago? A. Yes, sir.

Q. You could not remember it until I read it, could you?

A. It had escaped my mind.

Q. And yet you undertake to tell this jury what Mrs. Hillmon said 20 years ago?
A. My impression was as I stated, sir,—
Q. I understand, sir.

By Mr. Barker:
Q. Do you now remember of her being asked if that was the body of her husband, and what answer she made to that question? A. I do.
Q. What did she say in regard to that?
A. She said "If it is not him, who can it be?"

By Mr. Atwood:
Q. You remember that well?
A. Yes, sir; I will remember that to the day of my death.

Witness excused.

812 Charles C. Emery, a witness produced by the defendants, being first duly sworn, testified as follows, to wit:

Questions on Direct Examination

By Mr. Green:
Q. State your name? A. Charles C. Emery.
Q. Where do you reside, Mr. Emery?
A. I reside now in Lawrence, 504 Louisiana.
Q. How long have you resided in Lawrence?
A. I am on my 5th year.
Q. Where were you residing in 1879?
A. I was residing on my farm three-quarters of a mile north of the California road and about five miles west.
Q. Did you know a person by the name of Alva Baldwin?
A. I have known him ever since he has been in Kansas; a near neighbor.
Q. Where was Alva Baldwin living in 1879 in reference to your place?
A. I could not say whether he was living at home at that time or not; I could not say.
Q. What do you mean by at home?
A. At his father's place.
Q. Now, where was his father's place; how far distant from yours?
A. The south end of my place is about two or three feet over and above three-quarters of a mile from the California road, and theirs is south of the California road, I couldn't say just the distance south.
Q. Do you remember the circumstance of a dead body being brought back to Lawrence in the spring of 1879 claimed to be that of John W. Hillmon?
A. I heard of it; I didn't see it.

Q. Now, did you see Alva Baldwin at or about that time?

A. I saw him shortly after; I think the body was brought back when he came from the south.

Q. Do you know what, if anything, was being done in reference to that body at that ime you saw Alva Baldwin?

A. I think a trial or coroner's inquest was going on in the court house.

1813 Q. Where did you see Alva Baldwin at that time?

A. I saw him on Henry Street, I should judge just across Vermont street on the crossing on Henry street on the east edge of Vermont street.

Q. About how far was that from the court house where the inquest was being held?

A. Just across Vermont street, probably 80 or 100 feet.

Q. Did you have a conversation with him there at that time? A. I did.

Q. You may state if you asked him at that time how he reconciled the difference between the man's height, his hair and his teeth and if he answered you at that time that he could not?

The plaintiff objects to the question because no proper foundation has been laid. Objection overruled; the plaintiff excepts.

A. He said he could not account for it; the height and the hair or teeth.

By the Court: The answer should be yes or no.

[—] Your question to him was how he accounted for the difference between the height, the hair and the teeth, and he said he could not. He answered the question that Mr. Baldwin said as you recited it in your question.

Cross-examination

By Mr. Atwood:

Q. This is your first time as a witness in this case, Mr. Emery? A. Yes, sir.

Q. Have you been subpoenaed as a witness at any time?

A. No, sir; I could not be.

Q. Could not be? A. Not in this case.

Q. Why? A. Because I cannot give hearsay evidence.

Q. Would that prevent you from being subpoenaed?

A. That would prevent me being a witness.

Q. I asked you if you had been subpoenaed, you know.

A. No, sir.

1814 Q. To whom did you first relate the conversation that you claim you had with Alva Baldwin?

A. I could not say; I think it was to a—I could not say positively but I rather think it was—a certain friend casually asked me the question.

Q. When? A. Some time afterwards.
Q. How long afterwards? A. I could not tell you.
Q. A year? A. I could not tell you anything about it.
Q. Two years? A. I would not say.
Q. Three years? A. I cannot give dates?
Q. Four years? A. I think it was less than that.
Q. Now, will you kindly locate the place where this conversation occurred again for me as you did for counsel, in feet, etc.?
A. It was across the walk, the east side of Vermont street about 25 feet from the corner of the east side near the Fuller lot.
Q. 25 feet? A. 20 or 25 feet.
Q. You would not think it was 50? A. No sir.
Q. You are positive it was not?
A. I know just exactly where it was; it is probably just outside of where the curb is now.
Q. It is not less than 20 nor more than 25 feet?
A. I should think it was not over 25 from the lot; it was on the cross walk at that time.
Q. When did you first talk about the matter of which you have spoken to anybody representing the insurance companies?
A. I told Mr. Barker; he has been a neighbor of mine; I think I told him once.
Q. When? A. That was a year or so ago, I think.
Q. A year or so ago?
A. I think it was more than that; it was four or five years ago; it must be.
Q. You told this to George Barker about four years ago?
A. Yes sir, I think so.
Q. And did you tell it to any other representative or attorney of the insurance company before that time?
A. I think not; I have told Mr. Green since.
1815 Q. Four years ago would bring it back to 1895; that was some 25 years after these occurrences? A. 25?
Q. Yes; what is the length of time?
A. I could not tell.
Q. How long after these occurrences was it that you first told any attorney or representative of the insurance company?
A. I couldn't say.
Q. When as your recollection serves you was the first time you told this tale to an insurance agent or attorney representing the company?
A. I never told it to an insurance agent.
Q. Or to any other attorney than Mr. Barker, and Mr. Green? [Q.] I have no recollection.
Q. You think the first time you did that was in 1895?

A. I could not tell.
Q. That would be 16 years after these occurrences.
A. I could not say as to that; I don't think I have spoken of it to a lawyer.
Q. Between the time that it occurred and 1895?
A. I don't remember.
Q. And then you did tell it to George Barker?
A. Yes sir.

Witness excused.

1816 G. W. E. Griffith, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name and residence?
A. G. W. E. Griffith.
Q. Where do you reside? A. Kansas City, at present.
Q. Where were you residing in 1878 and 1879?
A. Lawrence, Kansas.
Q. How long did you live in Douglas county at that time?
A. About fifteen years.
Q. In what business were you engaged?
A. I was engaged at that time in the banking business.
Q. Any other business in connection with it?
A. Well, I was doing some loaning business and business of that nature.
Q. Representing any insurance companies?
A. I was acting as local agent of the Mutual Life Insurance Company of New York.
Q. Whereabouts was your office at that time?
A. It was in the banking building belonging to Mr. Theodore Poehler on the corner of Massachusetts and I don't know whether that is Quincy or—
Q. On Massachusetts street in the city of Lawrence?
A. Yes sir.
Q. I will ask you if during that time, that is, in 1878, you became acquainted with one John W. Hillmon? A. Yes sir.
Q. Where did you meet him and under what circumstances?
A. He came into my office and asked me about insurance.
Q. What kind of insurance, fire or life?
A. Life insurance.
Q. Was any one with him on that occasion?
A. I think not.
Q. Do you remember the conversation which you had with him on that occasion the substance of it?
A. Well, I remember that he came in and asked me about life insurance and I immediately referred him to Mr. Theo-

dore Wiseman who was then in my office at the same time, and introduced him to Mr. Wiseman, who was the general agent of the insurance company and I left them talking.

1817 Q. Did you hear the conversation between them?

A. Only in a general way, that they were talking about life insurance, he wanted life insurance.

Q. Did you see him after that? A. Yes sir.

Q. When?

A. Well, I think it was the same day, or a day or so afterwards.

Q. Where? A. He came in there again to my office.

Q. Was any one with him on this occasion, the second occasion?

A. I think Levi Baldwin was with him at that time.

Q. I meant to have asked you whether Levi Baldwin was with him on the first occasion of your seeing him?

A. I think not.

Q. What was the substance of their conversation at that time, that is, the time that Levi Baldwin and Hillmon came in together.

A. Well practically the same, on the life insurance question, and on the question of collecting the life insurance in case of death.

Q. Do you remember what was said by either of them on that subject; what questions, if any, they asked in regard to the manner of collecting?

[—] We were arguing, of course, in favor of insurance, and they were raising the question—

The plaintiff moves to strike out the answer as not responsive to the question. Motion sustained, each of the defendants duly excepting.

Q. State the substance of what was said?

A. The substance of the questions was to ascertain the method of collecting the insurance.

[Q.] The plaintiff moves to strike out the answer as not responsive to the question. Motion overruled, the plaintiff duly excepting.

Q. Go on and state the substance of what was said on that occasion?

[Q.] Mr. Wiseman and myself were assuring him that there was no difficulty to collect the insurance.

Q. Did you explain to him how it would be done?

A. Yes sir.

1818 A. He was raising objections and pointing out questions that might arise; there was a good deal of conversation on that point.

Q. Mr. Wiseman was present on that occasion?

A. Yes sir.

Q. Did you see them after that, either one of them?

A. You have reference to Mr. Hillmon.

Q. Mr. Hillmon and Mr. Baldwin on the subject of life insurance?

A. Yes, I think I saw them three or four times, but I don't remember distinctly in regard to the subject only that the conclusion was to take out a policy of ten thousand dollars, and he made an application.

Q. Of course, it is already shown that he did take out a policy. Did you deliver that policy? A. I did.

Q. To whom? A. To Mrs. Hillmon.

Q. When was it, as near as you can recollect? Let me put the question a little differently. How long was it after Hillmon and Levi Baldwin were in your place of business talking in regard to the manner of making proofs?

A. Well, I think it was two or three weeks afterwards that I received the policy and delivered it.

Q. Was the premium paid by her, or had it been paid before? A. It had been paid at the time.

Q. You may state if after that you saw Mrs. Hillmon and had any talk with her, or she with you, in regard to life insurance?

A. Yes, sir, some time after that she came into my office.

Q. Can you tell about when it was, when Mrs. Hillmon came to your office?

A. I could not only that it was after Mr. Hillmon had gone south and returned, and gone a second time.

Q. What was the subject of her conversation; what did she want you to do?

A. She said she had received a letter from her husband, Mr. Hillmon, asking her to call and see me in regard to his vaccination and inform me that he had been vaccinated, that his arm, that the vaccination had taken, and requested me to inform my company of that fact.

1819 Q. What reply did you make to that?

A. I told her that she had her insurance policy delivered, the matter was all closed up and it was not necessary to do that.

Q. When, and on what occasion, did you next see her?

A. As near as I remember, I saw her next after the reported death of her husband.

Q. Where was she on that occasion?

A. She was in my office; that I remember now at any rate; and I think that I saw her at her house; I wouldn't like—I don't know positively about that, I think I did.

Q. You remember seeing her at your office?

A. Yes sir, distinctly.

Q. When was that with reference to being before or after the body had been brought to Lawrence?
A. It was just before the body arrived; I think perhaps in the afternoon and body arrived that night.
Q. Do you know how she came there? A. Yes sir.
Q. Did you drop her a note to call at the office?
A. Yes sir, I did.
Q. Do you remember about what time in the day it was she came there? A. I think it was afternoon.
Q. Was there anybody present at that occasion except Mrs. Hillmon? A. Yes, I think Mr. Selig was present.
Q. Mr. A. L. Selig? A. Yes sir.
Q. Did you have a talk with her then in regard to the appearance of her husband, ask her to give a description of him? A. Yes sir.
Q. Did you ask her in regard to the height of her husband?
A. Yes, I believe I did.
Q. You may state what she said in regard to the height of her husband? A. She said she couldn't say.
Q. How? A. She could not state.
Q. Was she inquired of in regard to the character of her husband's teeth? A. Yes sir.
Q. What did she say in regard to that?
A. She could not state definitely.
Q. Do you remember what reply she did make when
1820 she was asked concerning the character of her husband's teeth?
A. Yes, sir, she said she thought he had good teeth; then she said she didn't know certainly, but he might have had some defective ones, she wasn't certain.
Q. Do you remember of asking her in regard to the color of his hair, either you or Mr. Selig, in your presence?
A. I remember that question was asked.
Q. What did she say in regard to the color of his hair?
A. She said she thought it was black or brown; she wasn't certain which.
Q. Did she know the color of his hair?
A. Didn't appear to, no, sir.

The plaintiff moves to strike out the answer of the witness as not responsive to the question. Motion susained, the defendants and each of them at the time duly excepting.

Q. Did she tell you the color of his hair at that time?
A. No sir.
Q. How long did she remain there?
A. Well, it might have been 15 minutes or it might have been half an hour; I think it was half an hour at least.
Q. Was Mr. Selig present during all of this conversation?
A. Yes sir.

Q. Was that the last conversation you had with her?
A. I think so.
Q. I will ask you if on that occasion she stated that her husband was five feet, 11½ inches high?

The plaintiff objects to the question as leading.

By the Court: It is leading. I think on your objection I excluded everything that was asked Mrs. Hillmon on this subject.

Q. By Mr. Barker: I think the Court is correct; I will withdraw that question.

And in answer to cross-interrogatories propounded to him by Mr. Wheat, counsel for the plaintiff, the witness testified as follows, to wit:

1821 Q. Mr. Griffith, did you write this letter to the plaintiff? A. I guess I did.
Q. I don't want a guess; are you certain about it?
A. I should say I did.
Q. Put it in the mail and delivered it to her, did you?
A. I have no recollection now specifically in regard to it.
Q. Will you read that letter now; I want to ask you some questions about it.

"Lawrence, Kansas, April 1st, 1879.

Mrs. S. E. Hillmon:

If you will call at my office to-day or as soon as you receive this, I will make out your application. Bring that paper and your letters along. Yours truly,

G. W. E. GRIFFITH."

Q. What was referred to here as that paper?
A. My recollection is that I had been at her house previously and she had shown me a copy of a newspaper and a letter that she had received; that is as near as I can remember; I don't know what letters I could have reference to.
Q. Did you leave word at her house for her to call and see you? A. Probably I did.
Q. Was that on the same day you wrote this letter?
A. I don't remember.
Q. You don't know whether you wrote the letter first or went there? A. No sir.
Q. State whether she called at your office the same day that you wrote this letter?
A. That I could not remember either.
Q. Who was in your office at the time she called?
A. Mr. Selig.
Q. Mr. A. L. Selig? A. Yes sir.
Q. He is an insurance agent there? A. Yes sir.

Q. At that time? A. Yes sir.

1825 Q. State whether Mr. Selig was there by appointment with you or not?

A. That I don't remember, whether he was there accidentally or whether it was by my request.

Q. Did you not testify on the last trial of this case, on this occasion—Haven't you testified at every trial of this case?

A. I think so.

Q. Did you not testify at the last trial of this case that he was there by accident?

A. That Mr. Selig was there by accident?

Q. Yes?

A. If I did, that was probably correct, but I say now I don't remember it.

Q. What do you remember now about it after refreshing your memory, what you swore at the last trial?

A. I don't remember a word about it, Mr. Wheat.

Q. In this letter, with reference to these words, "I will make out your application," what do you have reference to by those words; what did you mean by the use of those words?

A. I wanted to make out a preliminary affidavit for her to sign to send on to the company, and in that affidavit I desired—

Q. I want to know what you meant by "application."

A. I intended to make out an affidavit and send it to the company.

Q. You knew that the corpse was on the road at that time, did you not? A. Yes, sir.

Q. You knew that?

A. Yes, I supposed it was; I didn't know it.

Q. You so understood? A. I heard it was.

Q. Hadn't Theodore Wiseman sent you a telegram that you had received before you wrote this letter?

A. He sent me a telegram and I think I must have received it before I wrote that letter, but I don't remember.

Q. Have you that telegram with you? A. No, sir.

Q. Will you please state to the jury the contents of that telegram?

A. Well, as I remember it, it was for me to make some inquiry in relation to the description of Mr. Hillmon, and especially as to his teeth.

1823 Q. Didn't he ask you to see Mrs. Hillmon on that subject?

A. He might have done so but I can't remember that distinctly now, whether it was to see Mrs. Hillmon or some one else.

Q. He wanted you to get a description of her husband, of Hillmon?

A. Yes, and I think he wanted me to get Mrs. Hillmon's description.

Q. There wouldn't have been any object in getting a description from anybody else, would there, that you can think of? A. I might argue the case with you on that score.

Q. I say, that you can think of; I want to know if you can think of any one? A. Yes, sir.

Q. Mr. Wiseman; it was Theodore Wiseman, was it not?

A. Yes, sir.

Q. The same Wiseman you have spoken of before?

A. Yes, sir.

Q. You knew he had gone down to Medicine Lodge to see the corpse, did you not? A. I knew he said he was going.

Q. How long before the time that you wrote this letter was it that he said he was going?

A. I don't remember; I have no recollection as to whether one day or five, but it must have been five or six days.

Q. You were both of you agents for the Mutual Life Insurance Company, the defendant here, at that time?

A. Well, I wasn't much of an agent; I was simply taking applications when anybody wanted to be insured; he was the agent of the company.

Q. You were taking the money to pay for them?

A. Yes, sir.

Q. And delivering policies; you took the money for this insurance, didn't you? A. That is my signature.

Q. You took that $121. odd dollars and some cents?

A. Whatever that says I took; I don't remember how it states.

Q. And turned it over to the company?

A. Well, perhaps I kept it.

Q. I want to know if you didn't turn it over to the company? A. I expect I did, settle with them.

Q. In due time? A. They haven't made any claim to it.

Q. Did you turn it [—]?

A. I will admit I turned it over to the company.

1824 Q. Can you tell me whether you had turned the money over to the company that you received that was mentioned in the receipt, whether you turned that over to the insurance company before the time of this interview with the plaintiff that you spoke of?

A. I settled with the company the first of every month for all the business done during the previous month.

Q. So that now you can recollect you must have turned it over to them before that time?

A. I recollect nothing only that I settled with the company the first of every month; and of, course, I had settled with them at that time.

Q. There was nothing said about returning her this money?
A. No, sir.
Q. You don't know of the money having been sent back?
A. No, sir.
Q. It has never been returned through you? A. No, sir.
Q. The company has kept it so far as you know?
A. Yes, sir.
Q. This telegram that you received from Mr. Wiseman, how long after you received that telegram before you went to the place where she lived?
A. Well, now, Mr. Wheat, I don't know.
Q. Wasn't this just the very day before the corpse got there?
A. I think it was.
Q. The very day?
A. The day before. The corpse got there the next morning.
Q. It got there in the morning? A. Yes, sir.
Q. It got there the next morning? A. I think so.
Q. At the time of this interview, you used a pen and ink, didn't you? A. Yes, sir.
Q. In writing down something? A. Yes, sir.
Q. On a piece of paper? A. Yes, sir.
Q. Were you sitting down or standing up during this interview?
A. I don't remember, but of course I think I was sitting down, because I wouldn't stand up to a desk like that, or table.
Q. Did you do the writing on a desk? A. Yes, sir.
1825 Q. Where was the desk situaed? A. In my office.
Q. How was your office; did you have a part of the room railed off from any other part of the room, or was it—
A. No, sir, we were all in common.
Q. Was this in front of the bank or back of it?
A. In the back.
Q. In the back part of the bank? A. Yes, sir.
Q. Who was in there besides you, Selig and the plaintiff, in the room at the time of this interview?
A. I stated that it was Mr. Selig.
Q. Mr. Selig, yourself and the plaintiff? A. Yes, sir.
Q. Who else, if anybody?
A. I don't think there was anybody else.
Q. Was Mr. Selig in there when the plaintiff came in, or did he come in after she came in?
A. No, I don't remember that; I simply remember of his being there.
Q. You took a piece of paper and you wrote down, put writing down on it? A. Yes, sir.
Q. You say she said about the hair, I believe, and she said he had good teeth?

A. I said she said she thought he had good teeth, and th she said subsequently that she wasn't certain about it; the might have been some of them defective, or some of them lo out, she didn't know; that was the substance.

Q. Can you tell me what you wrote down on that paper?

A. No, I can only—I can't tell you that.

Q. If you can, tell what you wrote down on that paper?

A. No, sir.

Q. Can you tell me a single line that you wrote down?

A. No, sir; I can't.

Q. Did you at the time write down what she said at t time?

A. I think I commenced to write down what she said.

Q. You can answer yes or not whether you wrote dow what she said?

A. No, sir, I didn't write down all she said.

Q. So far as you wrote anything, did she say what y wrote? A. Of course she said, or I wouldn't write.

1826 Q. I want to know if so far as you wrote, she sa what you wrote? A. Yes, sir, I should say she di

Q. Did you show her the writing?

A. I don't know whether I did or not.

Q. Don't you know you did not? A. No, sir, I don't kno

Q. How much writing did you do; what was you writi on, on what sized paper? A. I don't know, sir.

Q. Can't you tell? A. No, sir.

Q. Can't you tell whether it was legal cap or fool'scap letter paper?

A. No, sir, I could not tell whether it was legal cap letter paper or anything about it.

Q. Can't tell anything about what kind of paper it wa

A. No, sir.

Q. Can you tell about how much writing you put on th paper? A. Very little to the best of my recollection.

Q. How many lines.

A. You have got it, Mr. Wheat; if you will show it to I will tell you all about it.

Q. I ask you how many lines you wrote?

A. I don't know.

Q. Can you tell anything about it? A. No, sir.

Q. Can't approximate it?

A. No, sir, I think, my recollection is it was a very fe very small, very little.

Q. What did you do with that paper?

A. I don't know; I gave it to some of you lawyers.

Q. Do you pretend to say you gave me that paper?

A. I [dinnt] say I did.

Q. Do you mean to carry the most remote idea that you ever gave me that paper?

A. I don't know, Mr. Wheat, whom I gave it to; I gave it to the attorneys I think about the time of the coroner's inquest; I turned over everything I had in every shape, manner or form; I did so, and that is the last that I knew about it.

Q. To whom? A. I don't know who it was.

Q. Why did you intimate that I had it?

A. I didn't say that.

Q. You knew I never lived in Lawrence?

A. I did not intend to intimate—

1827 Q. Don't you know I was not in Lawrence at that inquest? A. I didn't see you, Mr. Wheat.

Q. Now, you didn't see me in Lawrence about that time?

A. Not that I know of.

Q. Then, why did you include me in the delivery of that paper?

A. You are a lawyer; I think it was some of the lawyers; that is all I mean to say; I don't know who; I didn't intend to include you personally.

Q. Mr. Griffith, did you deliver it over to the lawyers of the insurance companies?

A. Mr. Wheat, I really [donwt] know what became of it.

Q. I want to try to refresh your memory and see if you can't tell what became of that paper?

A. No, sir, I can't; I have thought of it a great many times.

Q. You have been asked at every trial why you didn't save that paper, and to bring it to show what she really said there haven't you by the plaintiff's attorneys? A. All I know—

Q. Haven't you been asked that at every one of these previous five trials why you didn't save that paper so as to show what she said, so far as you wrote? A. I don't know.

Q. Don't know whether you have or not? A. No, sir.

Q. I will ask you again now why didn't you save that paper so as to show as to what she said?

A. I turned it over to somebody working in the coroner's inquest; that is all I know about it.

Q. Did you ever say that before at any previous trial?

A. I don't whether I did, or whether I was ever asked the question or not.

Q. Did you give it to Mr. Green? A. I don't know, sir.

Q. He was at the inquest? A. I think he was.

Q. Did you give it to Mr. Barker?

A. I can't say. There is no use of asking me the question, because I positively don't remember; I feel certain that somebody got the paper, and the telegram also.

Q. Did you not testify in relation to this particular piece of paper at the trial in 1882?

A. If I was asked about it I did.

1828 Q. See if you cannot refresh your memory?

A. I don't remember that.

Q. Would you say that you tore it up or threw it in the waste basket? A. I don't know what I did with it.

Q. You knew at the time you were writing down there that the matter of description was important, didn't you?

A. Yes, sir.

Q. You had been asked by Wiseman to get a description?

A. Yes, sir.

Q. From her; you had been asked by Wiseman to get a description from her, didn't you?

A. I answered that question that I was not certain about it.

Q. And you thought you ought to get it from her in pursuance of the request? A. Yes, sir.

Q. And in pursuance of that you were examining her there at that time; is that right? A. That part of it, yes, sir.

Q. You did get a part of what you say she said on that occasion down in writing? A. Yes, sir, but very little.

The plaintiff moves to strike out the last statement of the witness as not responsive. Overruled, the plaintiff excepts.

Q. Mr. Griffith, there was a difference between you and her on that occasion in regard to the description of her husband, wasn't there? A. No, sir.

Q. Mr. Selig talked some about the description, didn't he?

A. Doubtless he did, for he was present.

Q. Didn't you claim he had decayed teeth on that occasion?

A. No, sir, I didn't, for I didn't know.

Q. Didn't you claim he had a scar on his hand?

A. I did not.

Q. On that occasion? A. I did not, sir.

Q. Did you not on that occasion claim that he had false teeth? A. I did not.

Q. Did you not on that occasion say that he was a short man? A. I did not.

Q. You stopped writing before you had written very m-ch, you say? A. Yes, sir.

1829 Q. What did she say at the time you stopped writing; what was she saying at the time you stopped writing?

A. She said a good many things; she wanted me—she would not say anything definite.

Q. Mr. Griffith, wasn't it something unusual,—didn't you say to her that you wanted to get an application to send on to the company so that she could get her money?

A. I don't remember what I said to her.
Q. Let me ask you if this question was not asked you at the last trial: "You may state what your conversation was. I asked her to give me a description of her husband."
Wasn't that question asked you and that answer made to it at the last trial in 1896, in March, 1896, at the courthouse in Topeka, when Judge Williams was presiding?
A. You ask me if that question was asked?
Q. Yes.
A. I presume so; I should think it must have been.
Q. Did Mr. Selig ask her questions on that occasion?
A. He was present and took part in the conversation.
Q. Did you get a description from her on that occasion?
A. Nothing definite.
Q. Your real object in quizzing her about a description was to catch her in some mistake, was it not?
A. No, sir, I did not wish to catch her in any mistake at all.
Q. Wasn't that your real object?
A. No, sir. My object was to find out the truth.
Q. Did you ever before ask anybody to come and give a description of a dead person before they came to apply?
A. No, sir, I did not.
Q. You never did before?
A. No, sir. Never had a similar case to this.

The plaintiff moves that the last part of the answer be stricken out as not responsive to the question. Motion sustained, the defendants and each of them at the time duly excepting.

1830 Q. I will ask you if at the time I speak of, this question was not asked you: "Didn't you say to her, 'If I remember right, your husband had false teeth'—
A. No, sir, I never said anything of the kind.
Q. And before she could answer, Mr. Selig said, 'Why, Griffith you are mistaken; don't you know his teeth were all jagged in front?' Didn't Mr. Selig say that then?
A. I have no recollection of Mr. Selig—
Q. Then, didn't she say, "You are both mistaken, my husband had good teeth."
A. No such conversation that I heard.
[—] You certainly were not reading from my testimony.

The plaintiff moves to strike out the last statement of the witness as not responsive to the question. Motion overruled, the plaintiff duly excepting.

Q. When did you first see Mr. Hillmon, did you say?

A. When he came into my office and introduced himself.
Q. Walked into the bank or into your office?
A. He came in through the bank into my office.
Q. You stayed in the bank, did busines in the bank at the time? A. Yes, sir.
Q. He came in the front door? A. I think so.
Q. He came in alone?
A. That is my best recollection, that he came in alone at first.
Q. You have always so testified, have you not?
A. I meant to.
Q. Were you in the front room or in the back room at the time? A. In the back room.
Q. He came in through the front room, and came into the back room? A. That is as I recollect.
Q. And came in alone? A. Yes sir.
Q. Did he introduce himself to you in the front room or in the back room, that is, where were you when you first saw him after he came in?
A. I think I was in the back room.
1831 Q. Who else was in there with you?
A. I don't remember.
Q. Was there anybody in there at that moment when he came in? A. I am inclined to think there was.
Q. Who?
A. I don't remember; some man on business, I think.
Q. Was Mr. Wiseman there at that time?
A. He was in the bank; I think; I don't think he was in the room; I think he was outside in the banking room.
Q. Then if I understand you right, you think Mr. Wiseman was not in that room at that time when he came in?
A. That is so immaterial that I could not fix the matter definitely; but I have a kind of indistinct recollection that I had to step out in the door to introduce him to Mr. Wiseman.
Q. You had to step out of the door to introduce him to Mr. Wiseman? A. Yes, that is the way it occurs to me now.
Q. Ain't you quite sure that that is so, or are you not?
A. That is a long time ago, and so simple a matter as that I could not fix in my memory at all.
Q. It happens in this case that it is a very important matter, therefore, I want you to state to the best of your recollection.
A. I have stated to the best of my recollection that Mr. Wiseman was there six or eight feet or ten feet outside of my office in the banking room.
Q. He was in there?
A. That is my best recollection; I might not be right.
Q. He introduced himself to you, if I understand you right?

A. Mr. Hillmon, yes, sir.
Q. What did he say to you?
A. Just what he said would be very difficult to remember. I can give the substance as it now occurs to me.
Q. I would like to have you give us just what he said to you as near as you can?
A. I could not undertake to give his language, but I think it was that he had seen an advertisement of the Mutual
1832 Life Insurance Company signed by Theodore Wiseman, requesting persons to call at my office to see about it, and he had called to make some inquiries about insuring his life.
Q. Did you introduce him to Mr. Wiseman on that occasion? A. That is my recollection that I did.
Q. How long was it before he came into your office again: First, did Levi Baldwin come into your building, either this room where you were, at all during this interview and before Hillmon went away? A. No, sir.
Q. You are sure of that?
A. I think not; that is my recollection.
Q. Your recollection is that Levi Baldwin was not there at all during that interview? A. Yes, sir.
Q. Now, the next interview occurred when; how long after this one you have spoken of?
A. I could not remember, Mr. Wheat.
Q. As near as you can remember?
A. It might have been that afternoon of the same day, it might have been the next day. There is two or three days there—
Q. Who did you say came with him then?
A. In one of his visits to us, Mr. Baldwin came with him.
Q. Since this matter has been spoken of, can't you—Don't it call up to your mind to whom you gave that paper?
A. No, sir, I can't remember anything connected with it any further.
Q. You know you gave it to one of the attorneys: Did Borgolthaus, Sam Riggs or John Hitchings, either one of those gentlemen, ask you for any paper?
A. I don't remember but I don't believe they did. That is all.
Q. Well, according to your best judgment, best opinion, if you have any opinion, on the subject, which one of the different parties which have had anything to do in any shape with the case, did you give this paper in which you say you wrote down her answers as far as they went?
A. I can't remember.
Q. What other papers do you think you gave over with it?

A. I have no recollection except the telegram.

1833 My recollection is that the coroner's inquest wanted those papers; somebody wanted them.

Q. What could they want of the telegram at the coroner's inquest? Are you not mistaken about their wanting them there?

A. I might be but that is my recollection.

Q. Mr. Griffith, going back to the matter of the dispatch; I will ask you if at the last trial of this case, this question was not asked you, and you didn't make this answer to it:

"That dispatch said, 'See Mrs. Hilmon immediately and get a description of her husband.' A. That dispatch read as near as I can tell, to see Mrs. Hillmon and get a description of her husband, and especially with reference to a lost tooth."

A. I should say that was probably it.

Q. You say now that you think that is the fact, that this dispatch was, that that was the general tenor of it. Was not this question asked you at the last trial of this case, in March, 1896, before Judge Williams, when this case was being tried in Topeka, with reference to the paper we have been talking about: "Didn't she sign it," and you answered, "I couldn't state whether she did or not."

A. I don't remember anything about that.

Q. Then, was not the next question: "Didn't you so testify upon the last trial of the case that she signed the paper that you wrote, and that you gave that paper to Mr. Wiseman?

A. I believe that I did; I believe that is the case now but I am not positive about it."

A. You ask me if I didn't testify to that?

By the Court: Yes, the question is whether that question was asked you, and you gave that answer?

A. I don't remember what question was asked me at all.

[—] Ain't that a fact?

A. Well, I think perhaps it is.

Q. You think probably the fact is she did sign the paper there? A. No, I don't believe she did.

Q. Wasn't this question asked you at that trial by Mr. Hutchings:

1834 "Q. Didn't you so testify upon the last trial of the case that she signed the paper that you wrote, and that you gave that paper to Mr. Wiseman? A. I believe that is the case now, but I am not positive about it." Wasn't that question asked you and that answer made in 1896?

A. I don't remember whether it was or not, and I don't remember whether—

Q. What is the fact?

A. I say I don't remember now, I have an impression on both sides, that I wrote some things down and that they were

very indefinite and I just abandoned, and then again, I have an impression sometimes that she signed it; I don't know just the truth.

The next question: "It is your best recollection now that you did so testify at the last trial, and it is still your belief that that is true," and to that, you answered, "Yes, sir."

A. I could not state positively, for I don't remember what I said.

Q. What do you think about the question, that you wrote down something that she signed, now.

A. I have an impression that she did and I have an impression that she did not; I don't know which is the correct one.

Q. Didn't you give the paper, whatever it was, to Mr. Wiseman? A. Perhaps I did; I would think—

Q. I ain't asking perhaps; I don't want perhapses.

A. I don't know.

"Q. Did you write down at the time that Mrs. Hillmon was there, certain matters which she signed in your presence?"

"A. I commenced to write—"

Q. Wasn't that question asked you at the last trial?

A. I don't remember.

"Q. By the Court: Answer the question."

"A. No, sir, I didn't write what she said—"

Q. Wasn't that question asked you by the court, and didn't you make that answer:

"Q. By the Court: Answer the question." Here is the first question:

1835 "Q. Did you write down at the time that Mrs. Hillmon was there, certain matters which she signed in your presence? A. I commenced to write—"

Q. Wasn't that question and answer made there?

A. I don't know.

Q. What is your best recollection?

A. I don't remember anything about the question asked me.

Q. Then immediately following that, didn't the Court say, "By the Court. Answer the question," and then you answered, "No, sir, I didn't write what she said."

A. I don't remember that, no sir; I don't remember that the court asked me a question at all.

Q. Then, wasn't this question asked you by Mr. Hutchings: "When Mrs. Hillmon was in there, you wrote down certain things, that Mrs. Hillmon signed them or signed the paper, and that you delivered that paper to Mrs. Wiseman; you believe still that that is true, do you not?" To which you answered, "I wrote something and I believe she signed it; I wouldn't state positively, but if I did I gave it to Mr. Wiseman." Was that question asked you and that answer given at the last trial in 1896? A. I don't know, sir.

Q. Now, what is your recollection about that fact, as to whether you wrote it down and she signed it, and you gave it to Mr. Wiseman?

A. I commenced to write down some things that she said, and I did partially, but not being able to get anything definite I quit. I stopped; did not continue.

Q. Then, did she sign what you wrote?

A. I can't remember definitely, as I said before.

Q. Were not this question and answer substantially true; didn't this occur at the last trial of the case that I mentioned; ain't the substance true, the facts stated in that answer. I will read it over again: "I wrote something I believe and she signed it; I wouldn't state positively, but if I did, I gave it to Mr. Wiseman."

A. Well, I state now that I wrote something, but I 1836 don't remember definitely whether she signed it or not.

I have said that three or four times, and I believe that I [have] it to Mr. Wiseman since you speak of it; I believe I did, but I don't know.

Q. Wasn't this question asked you on that trial:

"Q. What was the color of his hair?" A. I don't think I could state except it was dark."

A. I don't remember whether it was asked or not.

Q. What is the fact?

A. That is my general recollection that he had dark hair.

The defendants object to the question as not proper cross-examination. Objection overruled the defendants and each of them duly excepting.

Q. State what colored hair this man Hillmon had that you were talking to?

A. All I can state is that he had dark hair.

Q. State with reference to his teeth, whether you noticed anything about his teeth or not?

A. I couldn't state anything about it.

Q. Don't remember of seeing any missing teeth, or his teeth at all? A. No, sir.

Q. If he had any missing tooth, you didn't know it; is that right? A. I don't know anything about his teeth.

Q. With reference to any scar on his hand, if he had a scar on his hand did you know anything about it?

A. I wouldn't know anything about it for I never examined his hand.

Q. With reference to how many times you saw him: If I understand you rightly, he was in there several times?

A. Two or three times.

Q. No more than that?

A. Then and once afterwards when he came back from the south.

Q. That was the fourth time probably: Was that the fourth time? A. Yes, sir.

Q. He was there two or three times the first day?

A. Yes, sir.

Q. And then the fourth time? A. Yes, sir.

Q. Did you ever see him measured? A. No, sir.

1837 Q. Were you there when Mr. Wiseman was taking the application, in the room right there with him?

A. I think so.

Q. Sure? A. I am not sure.

Q. I want a little more than "think;" I want to know if you remember?

A. I believe I was but I would not be positive about it.

By the Court: I think, Mr. Wheat, that those questions, regarding the color of his hair, the scar and teeth, since you confined him, are not for the purpose of raising a question as to whether the man that he met there that day was Hillmon or some other man.

By Mr. Wheat: I want to see whether it was Hillmon or whether it was some other man; I want to show whether, in his judgment, he was the man that was dead, that he insured.

By the Court: Ask him how he knows it was Hillmon: If you confine the inquiry to just those few things, the condition of his teeth, the scar on his hand, and the color of his hair, it ought to be stricken out.

Q. How do you know it was Hillmon?

A. I know it because—I only know it because he said it was, and because he was the man that signed the application for the insurance policies and talked with me and paid me the money; that is the only evidence I have and because other people said it was, who talked to him and recognized him as Hillmon.

Q. Could you give any further description of the man than what we have had here; if you can, do it?

A. Well, he was a young man.

Q. How old?

A. Well, I guessed him about 25; I think, however, that he gave his age as 30 years; but he didn't look over 25 to me.

Q. Well, can you give any other description of him?

A. Medium size man, medium height; otherwise rather an ordinary man. That is about all I recollect.

By the Court. In that view, I think his answers as to whether he noticed the color of his hair, or the scar on his hand or the teeth should be stricken out.

To which ruling the plaintiff duly excepted.

Witness excused.

1838 A. L. Selig, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. Where do you reside, Mr. Selig?
A. At Lawrence, Kansas.
Q. How long have you resided there?
A. Off and on since 1859.
Q. What is your business? A. Insurance.
Q. What was your business in 1878 and 1879?
A. Insurance, fire, life and accident.
Q. Where was your place of business at that time?
A. At the corner [if] Massachusetts and Winthrop streets [in] with the express company.
Q. How long at that time, do you remember, had you been carrying on that business? A. Since 1874.
Q. Did you ever know a man by the name of John W. Hillmon? A. I did.
Q. Where and when did you become acquainted with him?
A. At my office.
Q. About when, if you remember?
A. The latter part of October, 1878.
Q. Did he have any business at your office? A. Yes, sir.
Q. Who came with him?
A. A gentleman by the name of Peter DeVries who was a special agent of the New York Life Insurance Company.
Q. For what life insurance companies at that time did you take applications, if any?
A. For the New York Insurance Company and the Connecticut Mutual Life Insurance Company.
Q. You say that was about the latter part of October, I think, 1878? A. 1878, yes, sir.
Q. You may state what he did that day there if anything?
A. Made out an application for $5000 life insurance in the New York Life Insurance Company.
Q. Look at he paper marked A, and state what that is, Mr. Selig?
A. That is an application for $5000 of life insurance in the New York Life Insurance Company, made by John W. Hillmon.
1839 Q. On what date?
A. On the 31st day of October, 1878.
Q. When after that day did you next see Mr. Hillmon?

A. I can't state the exact time, possibly two or more weeks, possibly not so long.

Q. Where did you see him on this occasion?

A. At my office.

Q. Who was with him at that time if any one?

A. No one that I remember.

Q. Did he have any business there at that time?

A. He came to inquire whether a policy had been issued on his application.

Q. Did you see him again? A. I did.

Q. When did you see him the next time?

A. At this time when he made the inquiry I suggested to him the advisability of carrying accident insurance, when he came after the application had been made.

Q. What, if anything, did he do?

A. I took his application for accident insurance in the Travelers Insurance Company of Hartford.

Q. Now, the next time that he came to see you, was that after he had taken this accident policy or applied for it?

A. After he made application for it.

Q. Do you remember about how long after that it was?

A. A very few days.

Q. Was any one with him at that time?

A. I think not at that time.

Q. Did he get his accident policy on the occasion of his visiting your place the second time?

A. Not at that time.

Q. When did you next see him?

A. Some days later; at this time, at the first visit after the application for the accident insurance had been made, he said that—No, I am wrong about it; I will withdraw that. The next time he came in with Mr. Levi Baldwin for the accident policy which had arrived.

Q. Did you deliver the accident policy to him?

A. I did at that time; showed it to him.

Q. What was done with it?

A. He and Mr. Baldwin examined it.

Q. Did he receive it? A. He did not.

1840 Q. What did they do with it?

A. He objected to some of the clauses that was in the policy; we discussed it, and then he asked leave to take the policy to Mr. Shannon, Osborn Shannon, who was a practicing attorney there, and consult with him about the objectionable clause, objectionable to him.

Q. Did they return to your office?

A. No, I went to Mr. Shannon's office where I found them.

Q. What was done with the policy, if anything?

A. It was not accepted; Mr. Shannon concurred in the opinion that if the company would grant him leave to carry firearms and do fast riding after stock, that he would accept it, that it would be acceptable. I wrote to the general agent of the Accident Company and the reply was that they could not change the printed portion of the policy. Therefore, the policy was not accepted by Mr. Hillmon.

Q. Now, you may state whether he came to your office again? A. Yes.

Q. About how long after this time that you went up there to Shannon's office with them?

A. Pending the time that we heard from the general agent in regard to the accident policy, he called to know whether I had received a reply, and then stated if they would not accept, approve of a permit such as he wanted, that he would take another policy of $5000 in the New York Life. I then telegraphed for a copy of his original application to Mr. Tillinghast, and on its receipt, it came in a day or two, on receipt of the copy I made out his second application to the New York Life.

Q. Look at the paper now shown you which has been marked Exhibit B and state what that paper is?

A. That is the second application to the New York Life Insurance Company for $5000 on Mr. Hillmon's life.

Q. You may state what if any other applications, he made at that time? A. He made an application—

By Mr. Wheat: I object to the question as calling for written evidence.

By Mr. Green: I will obviate the objection. This
1841 paper, which has not been introduced, I will have marked as an exhibit. (Exhibit 5.) Look at the paper which has been marked Exhibit No. 5 and state what that is?

A. That is an application for $5000 life insurance in the Connecticut Mutual Life Insurance Company. This part of it is the medical examination part, and this is the application part. This is the medical examination that accompanied it, was one sheet, originally made at the same time that the second application was made to the New York Life Insurance Company.

Q. Now, you may state if you [—], whether policies were issued on the two applications to the New York Life?

A. There were.

Q. Was a policy issued on the application, Exhibit 5, just shown you? A. There was not.

Q. When did you next see Mr. Hillmon?

A. I cannot positively state as to the date.

Q. Can you state why a policy was not issued on the application, No. 5?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff duly excepts.

A. I was informed by the general agent of the Connecticut Mutual Life, about which you have reference, that the application was made on an old blank, not then in use by the company, and I was requested to make out a new application on a form then sent me, or forms sent me.

Q. Look at the paper now shown you which has been marked Exhibit No. 7, and state what that paper is?

A. This is an application for $5000 in the Connecticut Mutual Life Insurance Company on the life of Mr. Hillmon.

Q. What is the date of that? A. December 24th, 1878.

Q. Was Mr. Hillmon at your place of business at that time? A. Yes, sir; he was.

Q. Now, when did you next see him after he was at your place on December 24th, 1878?

A. I am not positive on the dates; sometime afterwards.

Q. Do you know whether he had been in Lawrence
1842 all the time from the time that you saw him on December 24th, and the next time you saw him?

A. I think he had been away at Wichita.

Q. Will you look at the paper marked Exhibit No. 8 and state what that is?

A. [The] is the application of John W. Hillmon for $5000 life insurance in the Connecticut Mutual Life, dated the 24th of February, 1879.

Q. Was he at your place of business on that day?

A. Yes sir.

Q. Who was the medical examiner for the Connecticut Mutual at that time? A. Dr. J. H. Stuart.

Q. Where, if to any place, did you and Hillmon go from your office? A. Went to Dr. Stuart's office.

Q. For what purpose?

A. Of making the examination on the application.

Q. Now, was any policy issued on that application to the Connecticut Mutual Life on December 24th, 1878?

A. No sir there was not.

Q. Can you tell the jury why?

A. In the original application to the Connecticut Mutual, what they called the old form, the question was asked, "Have you ever been successfully vaccinated", or language to that effect. It did not call for a date. I had copied that from the original application, as far as I could, made to the New York Life, where it was answered, "Yes." This application calling for the date brought the subject up as to whether he had been vaccinated, and he answered he had not. The application was rejected on account of his not being vaccinated.

Q. This was on the 24th of December?

A. This was on the 24th of December.

Q. Do you recollect now whether you saw him again before the 24th of February, the time that he made this last application?

A. I have no recollection of seeing him, but he was in and out of my office at times; I saw him on the street several times, but had no particular business on the street with him.

1843 Q. Now, had you informed him of the rejection of the application made on the 24th of December?

A. Yes sir, I had.

Q. What, if any, conversation, did you have with him in February in regard to his being vaccinated?

A. I urged him to be vaccinated; he said that he had a friend who was vaccinated and died in consequence of having contracted some infectious disease from that vaccination, and that he was opposed to being vaccinated, but in conversation then between the three of us, that is, Mr. Hillmon, Dr. Stuart and myself, he finally consented to be vaccinated, and Dr. Stuart telegraphed for fresh virus, assuring him there was no danger.

Q. Now, at the time of this last application, the one dated the 24th day of February, 1879, I think you said you went with him to Dr. Stuart's office?

A. Yes, my recollection is that I went with him to Dr. Stuart's office previous to the 24th of February, and talked over this vaccination.

Q. Do you know how tall John W. Hillmon was?

A. Yes sir.

Q. How do you know, how did you come to know how tall he was?

A. By seeing him measured, and by standing up beside him.

Q. Where did you see him measured?

A. In Dr. Stuart's office.

Q. On what occasion?

A. When the application dated February 24 was made.

Q. How much did he measure at that time?

A. Five feet, nine inches.

Q. Was a policy afterwards issued, do you know, upon this application of February 24th? A. Yes sir.

Q. How did he come to be measured at that time, if you remember?

A. When the examination was being filled out by Dr. Stuart, Dr. Stuart filled it out principally from the other examination on the other applications, as there had been no change. Mr. Hillmon then called attention, said that a mistake had been made in the measurements given in his application, that Dr. Miller had measured him and that he was five feet nine.

Q. Then he was measured; was that verified?
A. Yes, Dr. Stuart stood him by the side of the door or against the door or casing on which there was a scale, a measuring scale.
1844 Q. Measured him there?
A. Yes, and pronounced it five feet nine inches. I then stood up by the side of him and saw he was not as tall as I am.
Q. How tall are you?
A. I am five feet ten and three-quarters inches with my shoes on.
Q. Do you remember the circumstance of a dead body being brought back to Lawrence? A. I do.
Q. About when was that, do you remember, Mr. Selig?
A. Early part of April, 1879; I think it was on the 3d day of April.
Q. Did you see that body? A. I did.
Q. Where did you see it?
A. At the undertaking establishment of Bailey & Smith, on Massachusetts street.
Q. How long had the body been at Bailey & Smith's when you saw it? A. I judge not more than an hour.
Q. Did you see that body more than once? A. I did.
Q. Now, you may state whether that was the body of John W. Hillmon for whom you had taken these several applications? A. I did not recognize it as such.
Q. Now, are you acquainted with the plaintiff, Mrs. Hillmon? A. I am.
Q. When did you first meet her?
A. Some time in February, 1879.
Q. Where did you meet her? A. At my office.
Q. Did she have any business there?
A. Yes, she called for the Connecticut Mutual policy to see whether it had arrived.
Q. Had it arrived? A. It had.
Q. That is the first time you remember of seeing her?
A. That is the first time I remember, yes sir.
Q. Did you see her after that? A. Yes sir.
Q. About when was that, if you remember?
A. In March, 1879; latter part of March.
Q. Did you ever write any letters at her request?
A. Yes sir.
1845 Q. To whom did you write a letter?
A. To the Mutual Life Insurance Company of New York.
Q. How did you come to write that letter?
A. This seems to have been about February—March 18th. Considerable had been said in regard to the vaccination, and she asked me, she told me she had been to see the agent of

the Mutual Life Insurance Company of New York, to inquire as to what answers had been given to the question in the application relative to Mr. Hillmon being vaccinated, and she got an unsatisfactory answer, she said, from him, and she asked me what to do. I advised her to write to the Mutual Life Insurance Company and request it to answer, to let her know what answer was given in that application, relative to the vaccination. She asked me whether I wouldn't write it for her, and I said I would and I did, and signed her name to it.

Q. Is that the letter which you wrote?

A. That is the letter.

By Mr. Green: We now offer the letter in evidence. The same was marked Exhibit R, was read to the jury, without objection, and is in words and figures as follows, to wit:

"Lawrence, Kansas, March 19th, 1879.

The Mutual Life Insurance Company,
140, 146 Broadway, New York,

Gentlemen:

Please let me know by return mail what answers were written to the question about vaccination in the application for policy No. 195,132 of your company, on the life of John W. Hillmon, my husband, date of policy, December 10, 1878. By giving this your immediate attention, you will greatly oblige

Mrs. SALLIE E. HILLMON,
per L."

Q. Now, did you meet Mrs. Hillmon after that?

A. Yes sir.

Q. When next did you meet her?

A. I think the next time was the latter part of March, 1879, along about the 25th or 27th, somewhere along there.

1846 Q. Where did you meet her at that time?

A. At the house where she was rooming, at Mrs. Judson's house.

Q. Now, after that, did you meet her again?

A. Yes, sir.

Q. Where did you meet her at that time?

A. At my office.

Q. About when was that?

A. The same day, in the afternoon, towards evening.

Q. What, if any, business did she have at your office at that time?

A. To know what further was necessary in the matter; we had been talking about bringing the body—

Q. I do not ask for the conversation that happened there. Was the report that John W. Hillmon had been killed

down near Medicine Lodge known to Mrs. Hillmon and yourself at the time that she came to your office on this occasion?

A. Yes, sir.

Q. About how long before that had the report come to Lawrence, if you remember?

A. I think about two days; two or three days.

Q. Two or three days?

A. When I first heard of it.

Q. Did you hear of it as soon as the report came to Lawrence? A. I could not state that; I think I did.

Q. Now, what was her business, if any, at your office on that occasion?

A. To know whether there was anything further necessary for her to do in the premises, preliminary to making her claim, I suppose.

Q. What conversation did you have with her there at that time, if you remember?

A. I told her nothing further was necessary except bringing the body, until the body was brought there and identified.

Q. Now, did you see her again immediately after that?

A. Soon after that, yes, sir; several days afterward.

Q. Where did you meet her on that occasion?

A. At Mr. Griffith's office.

Q. What time in the day, do you remember?

A. It was in the afternoon.

Q. Who was present?

A. Mr. G. W. E. Griffith, Mrs. Hillmon and myself.

1847 Q. Now, do you remember how you came to be there?

A. Yes, sir.

Q. How did you come to be there?

A. Mr. Griffith either showed me or gave me the contents of a telegram he had received from Major Wiseman to the effect—and he said that he had arranged with Mrs. Hillmon to come to his office that afternoon to give a description, and he invited me to be present.

Q. Now, what conversation took place there at that time. Who carried on the conversation. first?

A. Mr. Griffith principally.

Q. What was the subject-matter of the conversation?

A. He said to her that as a preliminary matter to making application for life insurance, or claim, making out her claim, he wished to take a description of her husband, and asked her to give a description of her husband.

Q. Now, state what she said?

A. Mr. Griffith asked her to state his height.

Q. What did she answer to that?

A. She did not know, as to the color of his hair, color of his eyes, questions that would go to make up a description of her husband, she did not know.

Q. What did she say, if you remember?

A. She did not know.

Q. Now, was there anything asked her in regard to his teeth? A. Yes, sir.

Q. What did she say to that? A. She did not know.

Q. Did she make any further reply to that, do you remember?

A. Not that I remember; she did not know; she could not answer any question.

Q. Did Mr. Griffith state to her there, in answer to any question, that her husband had false teeth, and did you then state, "No, Griffith, you are mistaken, he had jagged teeth?"

The plaintiff objects to the question as leading. Objection overruled, the plaintiff duly excepts.

A. Mr. Griffith did not ask that question and I did not make that statement.

Q. Did you make that statement there at any time?

A. I did not; I took very little part in the conversation; I asked only one question.

1848 Q. What questions did you ask her, if any, Mr. Selig, and what did she answer thereto.

A. I asked her what was the color of Mr. Hillmon's mustache, whether it was the color of mine or some other color.

Q. What answer did she make to that?

A. She said, "Mr. Selig, I don't know; he was a man I was not much acquainted with."

Q. Did you ask her any further questions on your part?

A. I did not.

Q. Do you know Charles W. Smith? A. I do.

Q. What business was he engaged in at that time at Lawrence?

A. He was a member of the firm of Bailey & Smith, furniture dealers and undertakers.

Q. You may state whether you saw him about the time that body arrived in Lawrence?

A. I saw him the evening before the body arrived, first. I saw him also on the morning that the body arrived.

Q. What, if anything, did he show you on the morning the body arrived?

A. He did not show me anything that morning.

Q. What did he show you, if anything, the night before?

A. As I was going home, he called me across the street, and said he had received a telegram that he said I might wish to see. He showed me the telegram.

Q. What did you do, if anything?

A. I made a copy of it.

Q. Look at the paper marked Exhibit S, and state what that paper contains, if anything?

[—] This is a copy somewhat abbreviated of the telegram that Mr. Smith showed me on the 2nd day of April, 1879.

Q. Will you state what those abbreviations are.

The plaintiff objects to the question as incompetent, irrelevant and immaterial.

By Mr. Green: I will now offer this in evidence, and will show the loss of the original by Mr. Smith.

The Court overruled the objection, to which ruling of the Court the plaintiff at the time duly excepted.

1849 Q. Now, you may state how that copy is abbreviated, Mr. Selig? A. In the names.

Q. State what names?

A. B. & S. stands for Bailey & Smith, Mrs. J. W. H. stands for Mrs. J. W. Hillmon.

Q. Who were Bailey & Smith?

A. They were the undertakers.

Q. And the Smith being Charles W. Smith whom you have just mentioned? A. Yes, sir.

Q. I will read it if there is no objection.

No objection was made.

"Received 5:50 p. m. April 2d, 1879. Bailey & Smith, See Mrs. J. W. Hillmon have lot secured and grave dug immediately. Be in six a. m.

LEVI BALDWIN."

By Mr. Atwood: Any date on it?

By Mr. Green: "Hutchinson, Kansas, received 5:50 p. m., April 2nd, 1879."

Q. When and where did you make that copy, Mr. Selig?

A. In Bailey & Smith's furniture store.

Q. At what time?

A. In the evening of April 2d, 1879, about six o'clock.

Q. Do you know who delivered the Connecticut Mutual policy? A. I delivered it.

Q. To whom did you deliver it?

A. To Mrs. [Mrs.] Hillmon.

Q. What if any objection did she make to receiving that policy at that time? A. None.

Q. What, if anything, did she say to you at that time in regard to her husband directing her not to take up the policy but to receive the money which had been paid as premium therefor? A. Nothing.

Q. Was there any conversation of that kind took place there between you? A. There was not.

Q. Where were you when the policy was delivered?

A. At my office.

Q. Do you know how she came to come to your place
1850 to get the policy?

A. I presume she was directed to call for it. She was entitled to it.

Q. Did you send her word that the policy was there?

A. It is possible that I did.

And in answer to cross-interrogatories propounded to him by L. B. Wheat, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Were you present at the last trial of this case, and another with them?

A. I have testified at each trial of the case.

Q. Each of the five previous trials of this case?

A. Yes sir.

Q. Another case tried with them?

A. Yes sir, they were joined.

Q. I care nothing about that; I want to identify the case. Will you look at this paper marked at this trial Exhibit No. 8, M. L. J. and look at Exhibit 7, C. H. N. the upper part, right here? A. Yes sir.

Q. Do you notice that "Ex. 7."

A. I see "Ex. 7, C. H. N."

Q. You see that? A. Yes sir.

Q. Now, you notice on the inside of that that the application is signed by—

A. Sallie E. Hillmon by John W. Hillmon. John W. Hillmon.

Q. Who wrote that? A. Mr. John W. Hillmon.

Q. Wrote those three names? A. Yes sir.

Q. The date of that application is what?

A. The 24th day of February, 1879.

Q. Now, on the next page, you see it is dated, "above examination at place, Lawrence, Kansas, on the 25th day of Feb. 1879 and that is signed by— A. J. H. Stuart, M. D.

Q. Is that in his handwriting?

A. That is in Dr. Stuart's handwriting.

Q. Is this the paper you referred to in your examination here to-day as the application dated the 24th of February, 1879? A. Yes sir.

1851 Q. Is that the only application that bears date the 24th of February, 1879, that you know anything about, in connection with Hillmon?

A. I am not certain, Mr. Wheat, but what there is an application for $10,000 which may bear the same date, that was never sent to the company.

Q. There was another application for $5000 on that date, was there? A. No sir, not to my knowledge.

Q. None other? A. No sir.

Q. So far as you know? A. So far as I know.
Q. You were present when that application was made?
A. I wrote the first half of it; this part of it.
Q. You wrote the part that was signed by Hillmon?
A. Yes sir.
Q. And Stuart— A. Wrote the other.
Q. Were you present when that was written?
A. Yes sir, I was in the room.
Q. He wrote it, and filled it up?
A. It is principally a copy of his former examinations.
Q. I will ask you to look here at this 5 feet, 11, on the side that he wrote. You see that? A. I see that.
Q. At the present time what is your judgment as to who wrote that five feet, 11?
A. I have no knowledge, positive knowledge as to that.
Q. I will ask you if you did not testify at the trial of this and that other case that I mentioned that was tried with them, at the trial in Topeka, in the federal courtroom in 1895, sometime in February, that you gave your testimony, at any rate, at that trial, you testified, did you not?
A. I testified in every trial of the case that has been tried.
Q. That application was shown you on that trial, was it not? A. I think it was, yes sir.
Q. Now, that, you say is the same one; that is No. 7, C. H. N. I will ask you if this same Mr. Nettels, who sits
1852 here now at this table didn't take the testimony as stenograher at that trial?
A. Well, I couldn't identify the gentleman as to that; I think I have seen him before.
Q. At several trials. Wasn't this question asked you on that occasion. "'Look at Exhibit No. 7, and state what that is," to which you answered, "That is an application for a $5000 policy in the Connecticut Mutual Life on the life of John W. Hillmon." Look at that No. 7 again. Wasn't that same exhibit shown you on that trial? A. I think it was.
Q. That same application was shown you on that trial?
A. I think it was.
Q. The fact is, that application has been shown you on every trial has it not that you have testified at?
A. I am not absolutely certain whether it was at the first trial or two; my recollection is not certain as to that, but I am quite certain that this application was shown me at the last trial.
Q. I ain't asking you about the last trial. I am talking about the trial of 1895. A. Was there a trial?
Q. Yes, that was before Judge Thomas.
A. Wasn't that the last trial?
Q. No, the last trial was in 1896. I am only trying to get your memory straight. The case was tried in 1895 before

Judge Thomas; it was commenced in January and it ran through January and February and into March; you remember the long trial? A. Yes sir.

Q. The long trial before Judge Thomas? A. Yes sir.

Q. I will ask you if at the trial before Judge Thomas, you were present at that time? A. I testified at that trial.

Q. Wasn't that question asked you at that trial, and didn't you make that answer: "That is an application for $5000 in the Connecticut Mutual Life on the life of John W. Hillmon."

A. I have no doubt.

Q. That is the same paper? A. That is the same thing.

"Q. What is the date of that," to which you answered, "24th of February, 1879."

A. My recollection is I qualified it, that the first part
1853 of it was the 24th of February 1879, and the examination on the 25th of February, 1879.

Q. Now, we are talking about what you swore to at that time; we are talking particularly about the application, and didn't you in answer to that say, "24th of February, 1879."

A. The application is dated the 24th of February, 1879.

Q. Didn't you make that answer at that time?

A. This application is dated—

Q. I want to know whether you didn't make that answer at that time, "24th of February, 1879."

A. Please read the question again.

Q. "What is the date of that."

A. The 24th, yes, that is correct.

Q. Wasn't this question asked you next: "Now I wish to call your attention, Mr. Selig, as to these applications, which were written by you, caling your attention particularly to the descriptive part of Exhibits 8, 7 and T; I will ask you to state in whose handwriting that is. I will inquire first as to Ex. No. 7. Look at the descriptive part, where it says, 'Height, 5 feet, 11.' Whose handwriting is that," to which you answered, "Dr. J. H. Stuart's.

A. I have no recollection of being questioned as to whose handwriting that part was, that particular part.

Q. Haven't you been examined at every one of these trials, and at the trial of 1895, as to whose handwriting that was?

A. Yes sir.

Q. Including the trial of 1895? A. Yes sir.

Q. Do you wish to see it? I will let you read this. You can see Mr. Nettels' signature right there at the bottom. Let me read again that question I have just read to you:

"Now, I wish to call your attention, Mr. Selig, as to these applications, which were written by you, calling your attention particularly to the descriptive part of Exhibits 8, 7 and T. I will ask you to state in whose handwriting that is. I

will inquire first as to Ex. No. 7. Look at the descrip-
1854 tive part where it says, 'Height, 5 feet, 11.' Whose hand-
writing is that." "A. Dr. J. H. Stuart's."

A. I may have said that in 1895, yes, sir, but there is a change.

Q. You didn't notice any change at that time?

A. My attention was not called to it until after I had testified.

Q. You hadn't previously noticed any change, had you?

A. I think not.

Q. You testified on that trial in 1895 before Dr. Stuart, did you not?

A. I am not positive about that, Mr. Wheat, I would not say one way or the other; I don't remember.

Q. You agree that you did answer that Dr. Stuart wrote the 5 feet 11 in the application?

A. Dr. Stuart wrote the medical examination.

Q. And that he wrote the 5 feet 11; at that trial you said he wrote it, didn't you?

A. I am not positive; I don't know whether the 5 feet 11 was there at that time.

Q. Wasn't the 5 feet 11 at that trial?

A. I have no recollection.

Q. Let me read that question again: Now, I wish to call your attention, Mr. Selig, as to these applications which were written by you, calling your attention particularly to the descriptive parts of Exhibits 8, 7 and T. I will ask you to state in whose handwriting that is. I will inquire first as to Ex. No. 7. Look at the descriptive part where it says, 'Height, 5 feet 11 in.' Whose handwriting is that." "A. Dr. J. H. Stuart's." Didn't you make that answer to that question?

A. I might have made that answer, yes, sir.

"Q. Were you present when that was made," to which you answered, "I am not certain about that." Wasn't that question and answer made at that trial before Judge Thomas? I am talking simply, I am giving you what you testified to. I am asking you about the trial in 1895.

A. I understand.

Q. When Judge Thomas was presiding? A. Yes, sir.

Q. In this case?

1855 By the Court: The question is, whether that question was asked you and you made that answer at that trial.

A. In reference to what? That is what I want.

Q. That is the very next question: "Were you present when that was made." "A. I am not certain about that."

A. I was present when this application was made.

Q. When the medical examiner, when Stuart filled up the medical examination? A. In part, I was.

Q. You were present? A. Yes, sir.

Q. Look at exhibit No. 8, second page. Whose handwriting is that? A. That is Dr. J. H. Stuart's.

Q. I will skip a little. You were asked on that trial of 1895, "How tall was he," to which you answered, "Five feet, nine inches." A. Yes, sir.

"Q. You may state if you ever saw him measured. A. I did."

Q. Is that correct? A. That is correct.

Q. You testified at that trial the same as this.

"Q. Where? A. At the office of Dr. Stuart."

A. Yes, sir.

Q. Do you remember that question and answer?

A. Yes, sir.

Q. That was correct? A. That was correct.

"Q. Who by? A. By Dr. Stuart." [—] That is correct.

Q. Next question. "When was this? A. On the 26th or 27th of February, 1879." Was that question and answer asked you?

A. My recollection is that I said about the 26th or 27th.

Q. Didn't you answer square to that question: "When was this," your answer, "On the 26th or 27th of February, 1879."

A. I have no definite recollection whether I have the exact dates; it was about that time.

Q. I am [not] asking you when it was, about; I want to know if you made that answer on the trial of 1895?

A. Well, my best recollection would be that I said about the 26th or 27th of February.

Q. Didn't you say on the 26th or 27th of February, 1879; I want yes or no to that?

1856 A. Well, I wouldn't swear positively to that; I think, Mr. Wheat I said on or about.

Q. I understood what you said, but I wish you would answer yes or no? A. That is my recollection.

Q. Whether you said the 26th or 27th of February, 1879.

A. It was about that date; I am not positive.

Q. I am not asking when it was; I am asking whether you did not say on that occasion it was on the 26th or 27th of February, 1879?

A. I might have said that, but I think I qualified it by saying about.

Q. The next question: "Who was present at this time?"

"A. The three of us." A. There was three of us present.

"Q. Now, I will ask you if he was ever measured more than once when you and Hillmon and Stuart were present? A. Not to my knowledge, no sir." A. Not in my presence.

"Q. When you were present, he was not measured more than once? A. No, sir."

Q. Next question: "How did it come about he was measured at that time?" Then the next question, "State what was said at that time in regard to his height." "Objection. No answer." "Objection sustained."

"Q. State what was said in regard to having him measured." "Objection."

"By the Court. He may state not what was said but the circumstance that brought about the measurement. It is not necessary to give the conversation."

"Q. I am now asking for the circumstance as to how it came about that he was measured."

"By the Court: He may testify as to the circumstance or occasion how he came to be measured."

"Q. You may state what Mr. Hillmon said at that time in regard to his height." "Objection."

"By the Court: State."

1857 By the Court: Can't you get down to the question that was answered that you claim is contradictory of his statement now? It is unnecessary to read further.

Q. (Reading).

"By the Court: State what Hillmon said. A. He said"—

By the Court: The question to this witness at present is whether at that trial in 1895, the Court directed this witness to state what was said, and whether in response to that, he made the answer you will read, is that it?

By Mr. Wheat: Yes; I want to see—

By Mr. Barker: It seems to me it should be stricken out of the record, all that was said by Mr. Wheat previous to that question.

By the Court: Some of it was proper a few minutes ago, but this other is not, the last four or five or six questions and answers.

By Mr. Wheat: It is necessary to read them to show the connection.

By the Court: I don't know how much to strike out. Considerable ought to be stricken out, if you will point it out.

By Mr. Green. All those questions to which there is no response.

By the Court: They should be stricken out of this record.

By Mr. Wheat: Now, the next question of Mr. Selig, in the trial of 1895:

"By the Court: State what Hillmon said."

By the Court: That is with respect to the measurement.

"A. He said that a mistake had been made in his height as given in the application, and that Dr. Miller had measured him, and that he was not as tall as given in the application."

By the Court: The question is, Was that direction given you by the Court, and whether you made that answer thereto.

A. I am not certain whether that direction was given by the Court, but is a true answer.

By the Court: That is not the question, and it seems to me you ought to be able to understand it by this time.

1858 [—] The question is whether you made that answer.

A. I am quite certain that I made that answer at the time, because that is a true answer.

"Q. Now, was he measured there at that time?

A. He was."

By the Court: You mean to ask this witness whether that question was asked him, and that answer made at the trial in 1895?

By Mr. Wheat: Yes.

By the Court: Your questions are calculated to lead the witness into the error that he makes.

Q. Was that question asked you at that time before Judge Thomas in 1895? "Now, was he measured there at that time?

A. He was."

The defendants object to the question for the reason that it does not tend to impeach the witness.

By the Court: You asked him questions that appear in the transcript. Ask him the questions now, and if he answers them differently, then ask him if he did not at a certain trial, make contrary statements.

Q. Look at this paper and tell me whose signature that is; who wrote that? A. J. H. Stuart; that is J. H. Stuart.

Q. To the medical examiner's certificate dated the 31st of October, 1878? A. Yes, sir.

Q. Who wrote that 5 feet, 11, in there?

A. I presume Dr. Stuart did.

Q. Do you know his handwriting?

A. That appears to be the same handwriting as the balance, yes, sir.

1859 Q. Do you know his handwriting?

A. I know his handwriting.

Q. Know his signature?

A. This was written in my office, I didn't see him write it.

Q. Was there anybody else around the paper when it was written?

A. Yes, sir, this Mr. DeVries, special agent.

Q. Who wrote the 5 feet, 11, according to your belief?

A. I believe that Dr. Stuart wrote it.

Q. Now, look at this, that is, the application in the New York Life? A. That is the medical examination.

Q. That has already been shown to the jury, the 5 feet, 11, in that one, of the 31st of October. Now, this one dated of the 4th day of something of December?

A. The 4th of December I believe.

Q. It is changed there? A. I think it is the 4th.

A. That is the one you have called of the 4th?

A. Yes, the 4th.

Q. Who wrote the signature, J. H. Stuart, M. D., to that?

A. Dr. Stuart.

Q. That is his handwriting is it? A. Yes, sir.

Q. That is not the date, is it, the 4th day of December?

A. It appears, it seems to have been changed from perhaps the 2nd or the 3rd; I think it was; I think it has been changed from the 3d to the 4th.

Q. That is the one we have always referred to as of the 4th day of December?

A. Yes, sir, it is the 4th of December here.

Q. Now, state in whose handwriting the 5 feet, 11, is?

A. I believe that to be Dr. Stuart's.

Q. Handwriting? A. Yes, sir.

Q. I will take this one of the 24th of December, 1878, in the Connecticut. Whose signature is this here, J. H. Stuart, M. D.? A. That is Dr. Stuart's.

Q. The same man? A. The same man.

Q. Who wrote the 5 feet, 11, in that?

A. I believe Dr. Stuart did.

Q. You believe that to be in his handwriting?

A. Yes, sir.

Q. That is— A. The 24th day of December, 1878.

[—] This one dated the 4th of December, 1878, over
1860 the signature of John W. Hillmon: That does not seem to have been filled out?

A. No, sir, that application never was sent in.

Q. Was not filled out? A. No, sir.

Q. Was 5 feet, 11, in that? A. No, sir.

Q. The description is left blank? A. Yes, sir.

Q. Now, look at this application of the 24th, the medical examination on the 25th. Who wrote that signature?

A. Dr. J. H. Stuart.

Q. He wrote that? A. Yes, sir.

Q. You see the 5 feet, 11, in there. Can you tell me who wrote that?

A. I am not certain about that; that seems to have been changed.

Q. The 11 there, you say that is fixed?

A. Yes, it seems to have been.

Q. If I understood you right, you say you couldn't tell me who wrote that? A. I am not certain about that.

Q. You sent all of these applications on to the insurance companies? A. All but the one for the $10,000.

Q. You mean all except the one that is not filled up?

A. Yes, sir.

Q. The one where the description is not filled out?

A. Yes, sir.

Q. That is dated the 4th of December in the Connecticut Mutual? A. Yes, sir.

Q. Here is one of the Connecticut Mutual which is filled up, I see, here on the 4th day of December, over the signature of J. H. Stuart, on the 4th of December to the Connecticut Mutual. Whose signature is this? A. Dr. J. H. Stuart's.

Q. He wrote the 5 feet, 11, in there?

A. I believe he did.

Q. Were these several papers written in your presence?

A. Not all of them; I wrote the application part, but the medical examination was not all written in my presence.

Q. Wasn't it written in all these? A. No, sir.

Q. In which ones was it not written

A. I think the first one.

Q. To the New York Life, and the second to the New York Life?

1861 A. I think all of them were not written in my presence except the last one.

Q. The last one, you think, was not filled up in your presence? A. The last one, I think was.

Q. You think the last one was filled up in your presence?

A. I was in the room; I didn't watch him.

Q. You think you were there? A. Yes, sir.

Q. As I understand you, I think on your examination in chief you claimed that was the occasion on which he was measured? A. That is my understanding, yes, sir.

Q. Did you send these applications on? A. I did.

Q. All of these applications on? A. I did.

Q. To the Connecticut Mutual? A. Yes, sir.

Q. Did you send the two that are in the New York Life on to the New York Life?

A. The first one I did not; that was sent—

Q. That is the one dated the 31st of October?

A. Yes, sir; that was sent by Mr. DeVries.

Q. You sent the one?

A. It is possible I mailed it; he put it in an envelope.

Q. You sent to the New York Life the one that is dated of the 4th of December, did you? A. Yes, sir.

Q. That was to the New York Life? A. Yes, sir.

Q. You sent all these, all that were sent?

A. I sent three; one was not filled up.

Q. Wasn't the height mentioned the same in all the applications you sent out to the Connecticut Mutual?

A. I don't know whether it was or not.

Q. When did you first notice the erasing or scratching in that one, where the medical examiner's certificate is the 25th of February? When was your attention first called to that?

A. In 1896, at the time of the trial.

Q. That is right; your attention was called to it in 1896?

A. Yes, sir, that is, if the trial was in 1896; it is the last trial.

1862 Q. It was the last trial; it was at the trial before Judge Williams? A. I think it was Judge Williams.

Q. Your atention was called to that in 1896. Now, you had always before testified that the 5 feet, 11, was written by Dr. Stuart, had you not?

A. On general principles I took the application to be in the handwriting of Dr. Stuart.

Q. You always testified to that?

A. I think I did, yes, sir.

Q. You testified at each trial?

A. I have testified at each trial of this case.

Q. In 1882? A. 1882.

Q. You were then asked who wrote the 5 feet, 11, in the application of the 24th, the medical examiner's certificate dated the 25th of February, 1879?

A. I have no recollection of having been asked the question in particular about the 5 feet, 11, at that time; I have no recollection of it.

Q. All these applications were in evidence at every trial, were they not?

A. I think so, yes, sir—no, sir; not all of them.

Q. Which one was not?

A. The one for $10,000 was not in evidence until two or three trials back.

Q. The one for $10,000?

A. Yes, sir; that has not been in evidence every time.

Q. That is the one that is dated—

A. I think it is December 4th.

Q. But all the others have been in evidence at every tri[illegible]

A. That is my recollection, yes, sir.

Q. You have been asked at every trial who wrote the 5 feet, 11 in there?

A. I don't know as to that, Mr. Wheat, whether the 5 feet, 11 was called to my particular attention or not; I can't say; it is possible that it was; I am not certain.

Q. You remember that it was in 1895, don't you?

A. I think that it was, yes, sir.

Q. Did you not on that trial testify that it was in the handwriting of Dr. Stuart?

A. I presume I did, yes, sir; on general principles—

1863 Q. I am not asking about general principles. I move to strike that out.

By the Court: The question was whether you testified on that trial that the figures were in the handwriting of Dr. Stuart.

By Mr. Wheat: I understand that you did?

A. I think I did, yes.

Q. I understand that you sent all of these applications on to the company?

A. Yes, sir; that is all except perhaps the first of the New York Life; that may have been sent on by Mr. DeVries.

Q. There has always, at each of these trials—you know there has been a contention between the plaintiff and defendants as to the height of John W. Hillmon, don't you?

A. Yes, sir; I think there has.

Q. And the first time you ever noticed any scratch about it was at the trial in 1896?

A. Yes, sir; that is, the last trial.

Q. You didn't notice it at the trial in 1895?

A. I think not, no, sir.

Q. You testified in 1895 before Dr. Stuart did, didn't you?

A. I am not certain about that; I did not keep run of the witnesses.

Q. Look at this date here, and see if that will help you in fixing the time; see if it creates any impression. It is not your writing?

A. No, sir; I have nothing to fix the time, because as soon as I testified I left the court room; I don't know who testified before me.

Q. So that at all the trials previous to 1896, you testified unreservedly that the handwriting, 5 feet, 11, in this application, in the medical examiner's certificate, dated February 25th, 1879, was unreservedly 5 feet, 11?

The defendants object to the question for the reason that the witness has answered the question at least three times before.

By the Court: He has testified that he has sworn that he testified at the previous trial that it was in the handwriting of Dr. Stuart.

By Mr. Wheat: At the trial in 1895?

1864 By the Court: Yes.

Q. Now, you would not, of course, have testified to the handwriting of anybody in the application unless you had looked at it at the time you were testifying, would you?

The defendants object to the question as incompetent, irrelevant and immaterial.

Q. That application, with the 5 feet, 11, in it was shown to you at the time you testified to its being written by him, at the trial in 1895? A. I did not catch the question.

Q. Here is this medical examiner's certificate, where it is written 5 feet, 11, in this paper dated the 25th of February, 1879; wasn't that shown to you, the 5 feet, 11, therein, at the time when you testified in this case in 1895?

A. I presume it was, sir; I am not certain about that, but I think it was, yes, sir.

Q. You have no doubt upon that point, have you?

A. Well, I can't say that I am absolutely certain.

Q. You would not have testified to whose handwriting it was unless it had been shown to you?

A. I took the application to be in Dr. Stuart's handwriting, that is what it is.

Q. You wouldn't have testified without looking to-day to the 5 feet, 11; you wouldn't have testified without looking at it?

A. I testified to the application and the 5 feet, 11, I presume was in there, and on that ground I would testify that it would be in his handwriting, yes, sir.

Q. But you wouldn't have done that without looking at the 5 feet, 11, when you were asked in whose handwriting that was, would you?

A. I am not certain about that, whether I would.

By the Court: The question was, whether the 5 feet, 11, was shown you?

A. I presume it was but I am not certain just what question was asked me.

Q. You testified to the 5 feet, 11, at that time?

A. I think it was shown to me, yes, sir.

Q. You know that at that time you believed the 5
1865 feet, 11, was in his handwriting, didn't you?

A. I presume I did.

Q. Don't you know you did? A. No answer.

Q. Is that your best recollection?

A. My best recollection, yes, sir.

By the Court: I think you have pursued that far enough.

Q. Now, this Travelers Insurance Company matter, the one that you spoken of here in your examination in chief; this Travelers Insurance Company matter, when did that arise?

A. I think it was in the early part of December, 1878; I am not certain as to the dates.

Q. You said, if I understood you right, that he did not take that accident policy? A. He did not accept it, no, sir.

Q. What was that; an accident policy?

A. An accident policy.

Q. For what amount? A. $5,000.

Q. And he refused it because you could not get leave for him to carry firearms and to ride fast after stock?

A. That is correct.

Q. That is the way; I understand you right?

A. Yes, sir.

Q. That was the point of objection? A. Yes, sir.

Q. To be sure on that point, whether the policy would answer him, I think you said he took it to Mr. Shannon to look at? A. Mr. Shannon, yes, sir.

Q. And then you consulted your company to take it out?

A. The company declined to give the permit and the policy was returned to the company.

Q. What else did he say, about riding after stock. Did he say where he wanted to ride after his stock?

A. He said in his business it might become necessary to do fast riding after stock.

Q. And he wanted permission to do it? A. Yes, sir.

Q. You said you were with Mr. Tillinghast at [her] home on one occasion, on last Saturday, did you not?

A. I haven't testified at this trial to that effect.

Q. Didn't you on Saturday?

A. Yes, I did; that is right.

Q. Where did she reside?

A. She resided at the house of a lady by the name of Mrs. Judson.

1866 Q. Where did Mrs. Judson live, on what street?

A. It was either on Henry or Warren street; I am not certain; I think it was on Henry street.

Q. Massachusetts street also?

A. No sir, it was away over west from Massachusetts street.

Q. Was it anywhere near Pickney or Winthrop?

A. If it was Henry it would be within one block of Winthrop, yes sir.

Q. Now state what time of day it was when you called with Mr. Tillinghast at her home?

The defendants object to the question as immaterial. Objection overruled, the defendants and each of them duly excepting.

A. Afternoon.

Q. What were Tillinghast's initials? A. C. E.

Q. He was a resident of where? A. Leavenworth.

Q. You said he was your superior officer?
A. He was general agent of the New York Life Insurance Company, yes sir. I was local agent.
Q. At Lawrence? A. Yes sir.
Q. Who was present at your interview between Tillinghast, you and Mrs. Hillmon?
A. The three of us, Mrs. Hillmon, Mr. Tillinghast and myself.
Q. Wasn't Mrs. Judson there?
A. She was in the house but not in the room.
Q. Wasn't she in the room part of the time?
A. She was not.
Q. State whether Mrs. Quinn was there or not?
A. She was not to my knowledge, not in the room.
Q. Did you say anything Saturday about what she said on that occasion? A. I think not.
Q. I believe you said what purpose you had in calling on her on Saturday? A. I think not.
Q. I was engaged in reading and I might have missed it. Didn't you say what purpose you went there for?
A. I think not, no sir.
1867 Q. When was it you called there?
A. It was soon after dinner.
Q. Well, I mean.— A. As to date?
Q. Yes, as to date.
A. I think it was in the latter part of March, possibly about the 27th, along there.
Q. Of March of what year? A. 1879.
Q. That was after you had heard that Hillmon was killed?
A. After the reported death, yer sir.
Q. And was before Tillinghast went down to Medicine Lodge? A. Yes sir.
Q. You had a conversation with her?
A. Yes, Mr. Tillinghast did most of the talking.
Q. You did some of the talking with her too?
A. Very little.
Q. There was a conversation between the three of you?
A. Yes sir.
Q. You stated on Saturday, if I remember right, that you had a talk with Baldwin? A. Yes sir.
Q. I will ask you another question before I get to that Baldwin business. This talk between you, Tillinghast and Mrs. Hillmon, at her home, that was at Mrs. Judson's, was it not? A. Yes sir.
Q. Mrs. Judson's place? A. Yes sir.
Q. Whether that was on the same day that you had the interview with Griffith, her and you at Griffith's office?
A. No sir.

Q. It was several days before? A. Yes sir.
Q. Now, you said you had a talk with Levi Baldwin?
A. Yes sir.
Q. That was the only time you had any talk with Mr. Baldwin about this matter, just at that time?
A. I think that was, yes sir.
Q. Now, at Griffith's office, how came you to be at Griffith's office? A. On Mr. Griffith's invitation.
Q. Did he tell you he had seen Mrs. Hillmon?
A. Yes sir.
Q. And he expected her to come? A. He did, yes sir.
Q. And he wanted you to be there?
A. He asked me to be there; he didn't insist on my being but he invited me to.
Q. Invited you to be there? A. Yes sir.
Q. Mr. Griffith did some writing whilst you were there, didn't he?
1868 A. He appeared to be.
Q. He appeared to be writing? A. Yes sir.
Q. Could you tell on what kind of a piece of paper?
A. My impression is it was either, well, I would say it was the size of legal cap, I would say.
Q. Do you remember anything said on that occasion about proof of death? A. He said to her that—
Q. I am asking you [—] know if anything was said about proof of death?
A. To make a claim, but whether the words, proof of death were used, I would not be positive, but it meant perhaps the same thing.
Q. He mentioned something to her about making a claim?
[Q.] Yes, preliminary to making claims.
Q. He said something about making claims?
A. Yes sir.
Q. For her death? A. Yes sir.
Q. I will ask you if the substance of that was not with reference to a claim for the amount of her policy in the insurance company?
A. Yes sir, the Mutual Life Insurance Company.
Q. It was with reference to the amount of her claim against it? A. Yes sir.
Q. Now, in writing this paper down, what kind of paper did you say it was written on?
A. I think it was the size of legal cap. I was sitting opposite.
Q. Could you tell me about how much he wrote?
A. I could not, Mr. Wheat.
Q. In your judgment, how much, as near as you can?
A. I don't know.

Q. Can't you call the paper up in your mind?
A. No sir, I didn't look over it; I was sitting opposite.
Q. Now, when you were sitting opposite, you would see something about how much he wrote, wouldn't you?
Q. What is your best recollection as to whether she signed it or not?
A. My recollection is that she did not sign anything.
Q. That is your recollection?
A. That is my recollection.
1869 Q. What is your recollection of what was done with that paper at that time?
A. I don't know, for I left there; I took Mrs. Hillmon home.
Q. You took Mrs. Hillmon home? A. Yes sir.
Q. Well, then, was the paper left there with Mr. Griffith when you left? A. Yes sir.
Q. What was done with it, after that, you don't know?
A. No sir.
Q. I will ask you if there wasn't a controversy there between you, Mr. Griffith and herself, with reference to a description of her husband?
A. No controversy; questions were asked and she could not give—
Q. I am not asking you what she said; I am asking if there wasn't a controversy there? A. No sir.
Q. You don't mean that you all agreed to a description of him, do you?
A. No, I don't remember any controversy.
Q. You said that you did not recognize the corpse?
A. Yes sir.
Q. I will ask you, do you remember anything about the teeth of John W. Hillmon? A. No sir, I do not.
Q. Do you remember anything about seeing any scar on his hand? A. I do not.
Q. Did you look for any scar on the hand of the corpse?
A. I was at the cemetery.
Q. I will take it when it was at Bailey & Smith's?
A. No sir, I did not.
Q. You didn't then look for any scar on Hillmon's hand?
A. No sir, I did not.
Q. If I understand you right, you don't remember of any scar on Hillmon's hand?
A. There was no [—] on the— I have no recollection of there being any on Mr. Hillmon's hand at all.
Q. You were with Hillmon a good many times?
A. Possibly eight or ten times.
Q. Eight or ten times? A. Yes, or possibly more.

1870 Q. Didn't you walk with him along the street?
A. It is possible that I did, yes, sir, meeting him going in the same direction I would—
Q. Don't remember of going along the street with him?
A. Oh, yes, I have a recollection of that.
Q. How high are you?
A. I am 5 feet, 10 3/4 inches in my shoes.
Q. You were present with him in a room several times, when these applications were made out?
A. At my office and at Dr. Stuart's office.
Q. Saw him both standing up and sitting down?
A. Yes, sir.
Q. Saw him walking? A. Yes, sir.
Q. Don't you regard the height of a man, and didn't you at that time when these applications were made out, and the medical examiner's certificate, regard the height of a man as a matter of some considerable importance in a description of the person in the application?

The defendants object to the question as immaterial. Objection overruled, the defendants and each of them duly except.

A. I think I would, yes, sir.
Q. Did you, after this time that you claim you measured him, did you send on any word to the companies about any difference in the height? A. It was not my business.
Q. I didn't ask you—
A. It was the business of the doctor.
Q. I asked you whether you did it?
A. No, sir, I did not.
Q. You knew he was in the applications you had sent on—
A. I don't think I examined it; I had nothing to do with the doctor's certificate whatever.
Q. This application of the 24th of February, will you look at this application of the 24th—25th of February,—signed by John W. Hillmon, you said? A. Yes, sir.
Q. And signed Sallie E. Hillmon?
A. Yes, by John W. Hillmon.
Q. And in his name? A. John W. Hillmon.
Q. Some place in there, where other insurance is mentioned—
A. "Is there any other insurance on your life?" "Answer. Yes."
1871 Q. I ask you to read the answer.
A. "Is there now any insurance on your life?"
Q. The answer is: "Yes."
Q. "If in this company, state number of policy and amount.
A. The answer is "No."

Q. "If, in other companies, state the amount of each policy and amount insured in each. In the New York Life Company, for $10,000 in the Mutual Life of New York Company, $10,000." A. I did.

Q. Who wrote those two sums, "$10,000" A. I did.

Q. You wrote them yourself? A. Yes, sir.

Q. That was on the — A. 24th of February.

Q. 1879? A. Yes, sir.

Q. Then you knew at that time that he had $20,000 of insurance in other companies at that time? A. Yes, sir.

Q. You took this application for $5000? A. Yes, sir.

Q. And the policy now in suit was issued on that application? A. Yes, sir.

Q. You sent this same application on to the Connecticut Mutual Life Insurance Company to procure that policy, didn't you? A. Yes, sir.

Q. Knowing that he had $20,000 of life insurance, $10,000 in one of these other companies, and $10,000 in the other?

A. Yes, sir.

For the purpose of saving the point, the defendants object to the above testimony for the reason that it is incompetent, irrelevant and immaterial, and has no bearing on the ultimate question at issue whether the defendants knew at that time of the amount of insurance John W. Hillmon was taking. The Court overruled the objection, to which action and ruling of the Court, the defendants and each of them at the time duly excepted.

Q. You have already answered that you wrote those figures, the two amounts of $10,000

A. They are in my handwriting.

Q. That is the insurance that you knew of his having on his life? A. Yes, sir.

1872 Q. You knew the travelers matter had faded out?

A. Had been dropped.

Q. And all the other applications had been dropped that did not result in this insurance that you spoke of?

A. Yes, sir.

And in answer to redirect interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Mr. Selig, what did your agency consist of; what was the charcater of your agency?

A. Fire, life and accident insurance.

Q. No, that would be your business; you say you were local agent? A. Yes, sir.

Q. What was the character of your agency; what were your duties?

A. My duties were to take applications for insurance, life insurance and accident insurance, and to collect permiums and remit them to the company, less my commission.

And in answer to re-cross interrogatories propounded to him by Mr. Wheat, counsel for the plaintiff, the witness testified as follows, to wit:

Q. I did forget one thing I would like to refer to, with reference to the time of this measurement. If I understood you right, you claimed that this measurement, in your evidence in chief, was on the day that the application was made, dated.

A. The day of the examination, the 25th, I think.

Q. The 25th of February, You said you only measured him once. A. I saw him measured only once.

Q. That was the only time? A. Yes, sir.

Q. When you saw him measured, did you yourself make the measurement? A. No, sir.

Q. All you know about how high he measured, was by what Dr. Stuart said at that time, ain't it?

1873 A. That is all.

Q. As to the exact measurement? A. Yes, sir.

Q. That is all you know? You had no better opportunity to look at him then and to judge of his height [then] you had had many times before had you? A. Well, I did,—

Q. Wait a minute. I say you had no better opportunity; you were right in the room with him oftentimes before?

A. Yes, sir.

Q. And you had walked beside him oftentimes before?

A. Yes, sir.

Q. And you say you are 5 feet, 10—

A. And about three-quarters.

Q. Had walked along the street, too? A. Yes, sir.

Q. Were you ever present when any other person measured Mr. Hillmon except Dr. Stuart?

A. No, sir.

And in answer to redirect interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

A. Now, at this time of the measurement in Dr. Stuart's office, you may state whether or not your attention was especially called to his height? A. Yes, sir.

Q. How did it come to be specially called to his height at that time?

A. He made the statement that an error had been made in his measurement and that Dr. Miller had measured him.

Q. Now, prior to that time, had your attention been specially called to that feature? A. No, sir.

Q. What was Mr. Hillmon's bearing, if you remember, his carriage? A. Erect.

Q. State as to his shoulders, whether he had high or sloping shoulders? A. He had rather high shoulders.

Q. That would make him look taller than what he actually was.

Q. You were asked if you saw any scars on his hand. I will ask you if you ever examined his hands for scars?

A. I did not.

1874 Q. While he was in life? A. I did not.

Q. Now, about his teeth: Did you ever examine his teeth? A. I did not.

Q. You neither noticed scars on his hands nor that he had defective teeth? A. I hadn't noticed any of them, no, sir.

Q. Calling your attention once more to the measurement; at the time you saw him measured there, was he measured in his boots or shoes? A. Yes, sir, he did not take them off.

Q. Now, did Dr. Stuart at the time he measured him, did he announce his height?

A. Five feet nine, yes, sir.

Q. Did Mr. Hillmon demur thereto? A. He did not.

Q. What height did Dr. Stuart announce at that time.

A. Five feet nine.

By Mr. Wheat:

Q. You understand that Dr. Miller claims to have measured him on the 17th of December, don't you?

A. I don't know as to the date, Mr. Wheat; I don't know as the date was stated.

Q. You say now that when this measurement took place in your presence, that Hillmon said Dr. Miller had measured him? A. Yes, sir.

Q. You understand Dr. Miller says he measured him on the 17th of December, don't you? A. I don't know that.

Q. You don't know what was said about that?

A. No, sir.

Q. Were you present when this medical examiner's certificate of the 24th of December was written?

A. I don't think I was.

Q. Were you present when this application of the 24th of December, 1878, was made?

A. Yes, sir, that is all in my handwriting except Mr. Hillmon's signature.

Q. The signature of Sallie E. Hillmon and of John W. Hillmon? A. Yes, sir.

Q. This whole page is in your handwriting? A. Yes, sir.

Q. We are talking about the paper dated—

A. The 24th of December, 1878.

1875 Q. You wrote that yourself? A. Yes, sir.

Q. All except the signatures there of the Hillmon's?

A. Yes, sir.

Q. You wrote it all? A. Yes, sir.

Q. Where were you when you wrote it?

A. In my office. I know it by that ink; I was using that kind of ink at the time.

Q. Did you go with him to the medical examiner at the time?

A. I think not; I simply handed it to Mr. Hillmon and he took it down; he knew where Dr. Stuart was.

Q. You say this 5 feet, 11, in this application, in this medical examiner's certificate, dated the 24th of December, 1878, is in Stuart's handwriting? A. Yes, I believe it to be.

Q. This application you sent on immediately after that?

A. Yes, sir.

Q. Of course, you looked to see if the Medical Examiner's report was filled out when you got it?

A. I have nothing to do with the medical examiner's report, Mr. Wheat.

Q. Did you take it and look at it to see that it was there and in shape?

A. To see that his signature is there?

Q. Didn't you look it over?

A. No, I don't criticise the medical examiner's reports; it is not my business.

Q. I will ask you this question: Do you believe that Hillmon, having said to Miller on the 17th of December, 1878, that there had been a mistake made in his measurement and was then measured and found to be two inches shorter than in the application, would go just seven days after to Stuart, and on the 24th make the one you did. Now, is it not more reasonable that you made a mistake with regard to the time when you claim the measurement took place?

The defendants object to the question as simply a matter of argument. Objection sustained, the plaintiff duly excepts

Witness excused.

1876 Charles W. Smith, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by George J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name and residence?

A. Charles W. Smith, Lawrence, Kansas.

Q. How long have you resided in the city of Lawrence?

A. A little over 45 years.
Q. State in what business you are engaged?
A. Undertaking business now.
Q. Where? A. In Lawrence, Kansas.
Q. I will ask you in what business you were engaged in 1878-9? A. Furniture and undertaking business in Lawrence.
Q. Did you have a partner or associate in business?
A. I did.
Q. What was the name of the firm?
A. Bailey & Smith.
Q. Whereabouts was your place of business then?
A. On the east side of Massachusetts between Henry and Warren streets.
Q. Were you acquainted at that time, in 1878, 1879, with one Levi Baldwin? A. Yes, sir.
Q. Were you acquainted or did you about that time become acquainted with the plaintiff, Mrs. Hillmon?
A. About that time, I did.
Q. Do you remember the fact of a body being brought to Lawrence from Hutchinson, Kansas, on or about the first day of April, 1879? A. I did.
Q. Do you know on what date that body arrived?
A. The morning of the 3rd of April, 1879?
Q. Before that, had you received any telegrams concerning it?
A. I received a telegram the night before, the evening of the 2nd of April, 1879.
Q. From whom did you receive it and from what place?
A. Levi Baldwin; it was dated at Hutchinson, Kansas.
Q. From Levi Balwin and to whom addressed?
1877 A. Bailey & Smith.
Q. I will ask you what you did with that telegram, so far as showing it to any one is concerned?
A. I went over to the house on Henry street, corner of Illinois, or near the corner of Illinois street, and called for Mrs. Hillmon; she came to the door where I was and I showed her the telegram.
Q. Did you have any conversation with her then?
A. I did, sir.
Q. State what she said.
A. I asked her in regard to the body and she said to follow Mr. Baldwin's instructions.
Q. Did you take the telegram back with you? A. I did.
Q. I will ask if you showed that telegram to any other person?
[Q.] I showed it to Mr. Selig also, but I don't know for certain whether I showed it to Mr. Griffith. I think not, though.

Q. Do you remember Mr. Selig taking a copy of that telegram? A. He did so.

Q. I will ask you what has become of that original telegram?

A. I am unable to state. I put the telegram in my safe and when I came to look for it at the first trial of this case I could not find it.

Q. It would be how many years since you saw that telegram? A. Seventeen or eighteen years.

Q. I will ask you if at these various trials, or before these various trials, you searched for that telegram?

A. I have once or twice.

Q. Have you looked where you ordinarily keep such papers?

A. Yes, sir, I did.

Q. Have you been able to find the telegram?

A. Never found it.

Q. Is the telegram lost? A. It is lost so far as I know.

Q. You spoke of seeing Mrs. Hillmon. Now, the next morning, what did you do?

A. I took my team that we used in our business and driver with me and proceeded to the Santa Fe depot in the east bottoms, and when the train came in, I received the body. The body that was brought in from Hutchinson.

1878 Q. Who was there at that time?

A. Colonel Walker, Levi Baldwin and possibly two or three others; I could not state positively about the others.

Q. Where was the body taken from and to what place?

A. It was taken from the train and taken to my store, my shop.

Q. Your store where; on Massachusetts street?

A. On Massachusetts street, or at the back end of the store. I used two lots, one facing on New Hampshire and one on Massachusetts, and the shop that we took the body to was on New Hampshire street right back of the store.

Q. Do you remember who rode with you on the wagon from the depot to your undertaking establishment on that occasion? A. Levi Baldwin and Colonel Walker.

Q. I will ask you if before you took that body down to your undertaking establishment, if any one requested you to take it anywhere else? A. No, sir.

Q. Do you remember one Arthur Judson?

A. I knew a man by that name.

Q. Did you see him there that morning?

A. Possibly he might have been there.

Q. I will ask you if he made any request of you to take that body over to Mrs. Hillmon? A. No, sir.

Q. Did Mr. Levi Baldwin make any objections to your taking that body? A. He did not.

Q. You say he rode with you?
A. He rode with us in the wagon up to the store.
Q. After you got to the undertaking establishment what was done with that body?
A. The box was opened; the box was of pine fence boards, not right boards, and the coffin was taken into the shop.
Q. Besides the box, what was the body enclosed in?
A. In a coffin, plain coffin.
Q. What kind of a coffin?
A. My recollection is it was a plain walnut coffin; I can't say certain.

Q. Now, what was the condition of the body when
1879 the coffin was opened there at your undertaking establishment?
A. Well, it was in fairly good condition for a body that had been buried for several days.
Q. Did you see the body when the coffin was first opened?
A. I did.
Q. Who performed the act of opening the coffin?
A. Myself and Mr. Stanley; my assistant.
Q. I will ask you to state how the body was dressed at that time, if you remember.
A. Dressed in a suit of brown checked, as I remember it, brown checked goods.
Q. Did you observe at that time about the fit of the clothes, whether they properly fitted the body?
A. They looked as though they were too small for him.
Q. What would you say in regard to the sleeves?
A. The sleeves were something like that; two or three inches too short.
Q. Did you notice the trousers?
A. The trousers were short also.
Q. Now, what, if anything, did you do in regard to embalming the body?
A. I didn't do anything about embalming the body at that time, that I recollect of; I closed the coffin—

Objection.

Q. You may state what you did do?
A. I closed up the coffin, locked up the shop and went to my breakfast.
Q. When you came back, then what was done?
A. As I came back I met the coroner of the county, Dr. Morris, at the front door of the store and he told me—

Objection as hearsay. Objection overruled, to which ruling of the court the plaintiff at the time duly excepted.

Q. Only generally what the instructions were, if any.

A. Dr. Morris, I knew to be coroner of the county; he told me at the door of the store that there was to be a post-mortem examination under the coroner's directions.

Q. You may go on and state what was done after
1880 that?

A. I went to the shop and unlocked the door and not a great while after, I could not say how long, Dr. Stuart, Dr. Mottram and Dr. Fuller came there.

Q. Who were they? A. They were physicians of the city.

Q. Practicing physicians there in Lawrence?

A. Practicing physicians there in Lawrence; I think Dr. Miller was also along; there was three or four physicians came there and told me that they had come to make a port-mortem examination of the body under the direction of the coroner.

Q. You may go on and state briefly what was done; I don't care to go through the autopsy.

A. The body was taken out of the coffin, after I had taken the cover off; the body was taken out of the coffin and laid on a cooling board and stripped.

Q. Now, at that time, or any other time, did you measure the body? A. I did.

Q. When was it?

A. My recollection is it was about four hours, from two to four hours after it was received.

Q. In what maner was the body measured

A. As I said, the body was stripped and laid out on the boards; then I took a carpenter's square or tongue square and set it up at the head with the tongue up and took a tri-square at the foot; the squares both touch; I took a measure spaced off in feet and inches and I measured between the two squares as they stood.

Q. How much did the body measure?

A. Five feet, 11⅝ inches.

Q. After that what was done with it?

A. The body was dressed again, the clothing was put on and it was left in the store there for the balance of that day and the next.

Q. The same clothing put upon the body that was upon the body when it came there? A. Yes, sir, the same clothing.

Q. Now, do you remember of the coroner's inquest being held there at Lawrence? A. There was.

Q. I will ask you if, during the time that this body was lying there, in your undertaking establishment, if people came to see it? A. Yes, a great many people came to see it.

1881 Q. State whether you allowed all people to come who desired? A. I did.

Q. I want to ask you again: Perhaps it is a repetition, whether there were few or many people viewed those remains while they were lying thre?

A. Yes, sir, there was quite a large number.
Q. Now, at any time, during the time the body was there, did you use preservatives?
A. I used preservatives after the coroner's inquest, after the physicians examination was completed so as to be sure to keep the body in condition as the coroner had told me to take care of it until further orders.
Q. Now on what day was the autopsy held?
A. On the forenoon of the third day of April, 1879. It remained there some two days or a day or two days after that and it was buried on the afternoon of the fifth.
Q. What was the condition of the body at the time it was buried as compared with the condition it was in at the time it was received? A. It was about the same.
Q. Did you take the body to the cemetery? A. I did.
Q. And it was buried there, was it? A. Yes, sir.
Q. Were you out there at any other time when the body was taken up?
A. I was out there the next day, the sixth.
Q. Were you out at the cemetery at the time the body was taken up?
A. Yes, I was out there at the time the body was taken up.
Q. You said that was on the 5th? A. The 6th.
Q. 6th of April, 1879? A. Yes, sir.
Q. Who was present at that time?
A. I think Dr. Stuart, Dr. Miller and Mr. Lamon the photographer.
Q. What was done with the body at that time?
A. The body was taken from the coffin.
Q. Of course, the coffin was removed from the ground?
A. Yes, sir, the body was taken from the coffin and after it was removed from the grave, it was raised in the
1882 coffin and photographs or pictures were taken of the body in two different positions.
Q. Do you remember what photographer took [thse] photographs? [Q.] Mr. Lamon, William Henry Lamon.
Q. Who was he; a photographer there in the city?
A. A photographer in Lawrence at that time.
Q. Then the body was buried again, was it?
A. Yes, sir, after re-arranging the—
Q. At the time the body was taken up and these photographs taken, do you remember in regard to the appearance of the body at that time?
A. I don't think there was any change practically from what it was when it was buried the day before; I don't remember of any how.

Q. Now, I will ask you if, at any time during the time that this body was at your undertaking establishment, if Mrs. Hillmon was denied access there by you?

The plaintiff objects to the question as calling for a conclusion. Objection overruled, the plaintiff duly excepting.

A. Mrs. Hillmon came to the store in the forenoon of the third and wanted to see the body; I told her that the body was stripped and the physicians was examining it, but if she would wait until we could arrange the clothing, she could come in. She drove off and didn't come in at that time.

Q. During that day, that time, the body was stripped and was in the condition you told her? A. Yes, sir.

Q. Do you know how long it was before she came back again? A. I would not say how many hours.

Q. Was it on the same day?

A. I think not—until the next day.

Q. I want to ask you one other question and that is in regard to your custom of taking bodies that were received in that way, that is that came in by rail; whether it was your custom to take them to your undertaking establishment unless you had orders to the contrary.

A. We always do so unless we have orders to take them direct to the home.

1883 And in answer to Cross-Interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Your name is Smith? A. Yes, sir.

Q. Charles Smith? A. Charles W. Smith.

Q. Were you kin or by marriage related to Colonel Walker in his lifetime?

A. My wife is Colonel Walker's oldest daughter.

Q. You have testified at every trial of this case?

A. Yes, sir, several times; I don't remember whether all of them.

Q. What is your best recollection about that?

A. I think there was one trial I didn't testify at.

Q. Do you remember which one it was?

A. I can't tell you now. I say I think it was one trial, because I think at one trial I was called but was sick and could not come.

Q. Did you ever testify before that the coroner informed you that the body was to have a post mortem examination held over it? A. I have always testified at every trial.

Q. And you retained it in your possession because of that fact?

A. Because the coroner told me to do so; because Mr. Baldwin put it in my charge.
Q. It was placed in your charge by him? A. Yes, sir.
Q. And you took it to your undertaking establishment?
A. Yes, sir.
Q. And there you had this talk with Dr. Morris?
A. I did, yes, sir.
Q. When did you next see Dr. Morris after that talk that you had with him at your door that morning?
A. When he came there with the jury to examine the body.
Q. What time was that?
A. I think it was some time in the course of that day. I won't be certain.
Q. That was the same day on which the body arrived?
A. I think so.
Q. This talk was had with him the morning the body arrived? A. Yes.
Q. When you came back to the store after breakfast?
A. Yes, sir.
Q. Then he came back there with the coroner's jury some time during that day, you think during the forenoon? A. No, I don't think he came in the forenoon.
Q. But sometime during the day?
A. Sometime during the day.
Q. When did you next see him, with reference to this matter, of course; I suppose you have seen him a thousand times since that.
A. I think the next time I saw him he came there to the store about half past four o'clock on the afternoon of the 5th.
Q. With relation to this day, what day was it; the next day? A. Well, he came with the coroner's jury that day.
Q. That is the same day; I am asking when was the next time that you saw him with reference to this matter?
A. I was talking and you interrupted me. I told you he came there at half past four on the afternoon of the fifth, and he told me that he had given authority that the body might be buried.
Q. It lay in your establishment on the 3rd, 4th and 5th?
A. Yes, sir.
Q. And was buried on the 5th?
A. Buried on the afternoon of the 5th.
Q. You- employment came from Levi Baldwin in the first place? A. Yes, sir.
Q. You were paid, however, by the insurance people for what you did around there, at least for some portion of what you did? A. Partially.
Q. When did they employ you?

1884

A. They didn't employ me at all.
Q. How did they come to pay you?
A. I don't know how they came to pay me, only they did pay me.
Q. They are so disinclined to pay I think that is worth investigating.

The defendants object to the question and it was withdrawn.

Q. Now, Mr. Smith, I wish you would give us the best explanation you can as to why you have been paid by the insurance companies when the only people who spoke to you relative to the body and who could have authority would be the coroner and Mr. Baldwin.

A. I can't tell you how it came that I put a bill to 1885 the insurance companies at this late day, sir.

Q. But this is a matter that you have had your recollection refreshed about at least on four different trials, and possibly five; you have been asked the question as to why the company paid you. You have thought about these things?
A. Yes, sir.
Q. I presume that part of the transaction, I apprehend that payment was as important as any other? A. Yes, sir.
Q. That was the most important? A. Yes, sir.
Q. Did you make out a bill? A. I did.
Q. To whom did you make it out?
A. Mrs. Hillmon, and she paid $14 of the bill.
Q. How much did the bill amount to?
A. The full bill was $37 or $38. I believe.
Q. Did you present a bill to her for more than $14?
A. I presented the whole bill to her and she paid $14, only the first item.
Q. What was the first item?
A. Receiving the body at the depot and paying for the grave.
Q. That amounted to $14? A. Yes, sir.
Q. What were the other items?
A. Embalming the body, and caring for, washing and dressing it.
Q. What was the embalming process; injecting the veins and arteries? A. No, sir, the veins were not injected.
Q. What did the [embaling] process [consit] of?
A. Injecting the cavities of the body.
Q. The direction to embalm it came from the coroner?
A. Yes, sir.
Q. When these other items were not paid by Mrs. Hillmon, to whom did you present a bill for it?
A. Didn't present it at all.

Q. They brought you the pay for it?
A. It was paid by the insurance companies' agents in two or three different payments.
Q. Who did?
A. I couldn't tell without looking, there was so many there was two or three credits by the insurance companies.
1886 Q. Now, will you explain to the jury why it is, that not having done any work for the insurance companies, that they should pay a portion of that bill?
A. I don't know why they should pay it only they saw that I got my pay.
Q. The fact is, however, that the insurance companies did pay you for a portion of the work you did to that body?
A. Yes sir.
Q. Then, so far as you did it for them, you were working for them?
A. I suppose so, but I didn't so understand it at the time I done the work.
Q. And you got your money from them? A. Yes sir.
Q. Your statement is that while not working for the insurance companies, and not supposing they would pay you any part of your bill, the fact is that they came forward and voluntarily paid a portion of this bill; that is a fact?
A. I told you—
Q. Is that a fact?
A. Yes sir, the last part of the bill.
Q. No matter, you have answered the question.
A. I was going to say the last part of the bill. When the officer brought me the permit to take up the body again from the grave, an insurance man was with the officer and he told me he would see that the work was paid for, and it was paid for by the insurance companies.
Q. Who said that?
A. One of the insurance men came with the officer that brought permission to take up the body; one of the agents came with that officer, and told me that the taking up of the body and the taking of the photographs would be paid for by the companies.
Q. Did you take up the body? A. I did, sir.
Q. Who was present at the time the body was taken up?
A. Mr. Stanley, Dr. Stuart; I don't know whether Dr. Morris was or not; I can't tell certain about it.
Q. Dr. Morris sent you out there, though?
A. Dr. Morris did not; it was an order from the city clerk to take up the body; he was clerk of the cemetery.
1887 Q. But Dr. Morris sent you out to take up the body?
A. No sir.
Q. Did he tell you—
A. He sent an officer up there—

Q. Just wait a minute. I understood you to say that he did not send you out there?

A. I don't know whether he did or not.

Q. Did he ask you to go out there? A. No.

Q. So far as you personally know, he had nothing to do with your going out there; is that a fact?

A. Personally, I did not see him at all in regard to that.

Q. Then, as a matter of fact, so far as you know, he had nothing to do with your going to the cemetery and disinterring that body? Is that a fact?

A. So far as I know personally.

Q. But you did go out there, however?

A. Yes sir, upon the promise of the insurance people that they would pay that bill, upon the order the officer brought.

Q. Who was the officer?

A. He was one of the officers of the city, I think a deputy sheriff; I wouldn't be certain; I can't tell.

Q. Do I understand you to say that after cutting it up, you disinterred this body under the authority of a mere deputy sheriff or city clerk?

A. I think the coroner sent it there. I think the coroner sent the deputy there.

Q. What makes you think so?

A. It was the same deputy that had been back and forth.

The plaintiff moves to strike out the answers of the witness in which he states what he thinks. Motion overruled the plaintiff duly excepts.

Q. Now, you think the coroner sent this officer?

A. Why, it was the officer that had been with the coroner's jury.

Q. Under the direction of the coroner right along all the time? A. He was under the direction of the coroner.

Q. At the time he came to you, he brought the jury there?

A. He came with the coroner.

Q. At the time he came to you to disinter the body, did he come there with authority from the coroner?

A. He came there with authority of the city clerk

1888 to raise the body.

Q. Did he come there with authority from the coroner? A. Not that I know of, no sir.

Q. Well, is it a fact that he did come there with any authority from the coroner?

A. No, it is not a fact that he did come with any authority from the coroner.

Q. So far as you know? A. So far as I know.

Q. So far as you know then, the only authority for disinterring that body was that of this deputy sheriff and city clerk? A. Yes sir.

Q. Is that right? A. The order was from the city clerk.
Q. That is the man whose order you observed?
A. Yes sir.
Q. In disinterring this body? A. Yes sir.
Q. At the time the order for disinterring the body came from the city clerk, did you inform Mrs. Hillmon or Levi Baldwin of the fact that you had received this order?
Q. Did she give permission that it be disinterred?
A. I didn't take the trouble to get it.
Q. Will you answer the question, sir? A. No sir.
Q. Did you go to Mr. Baldwin or communicate with him in any way about the matter after you received this order from the city clerk? A. At no time, sir.
Q. As a matter of fact, did you? A. No sir.
Q. Then in pursuance of some order brought to you by a deputy sheriff issued by the city clerk, and without, so far as you know, any knowledge or permission from Mrs. Hillmon or Levi Baldwin, you went out and disinterred that body?
A. Yes sir.
Q. That is the job these insurance people promised to pay you for? [Q.] Yes sir.
Q. And did pay you for? A. Yes sir.
Q. Now, reverting to the time, the morning that the body came You say that Colonel Walker among others, went to your establishment on the wagon with you when you took the body up there? A. Yes sir.

1889

Q. When did Dr. Stuart put in an appearance if at all that morning? A. After the coroner had told me to—
Q. Will you tell me as to the time?
A. I think about half past nine o'clock.
Q. Dr. Stuart was not the coroner, was he? A. No, sir.
Q. The coroner was not with him, was he?
A. No sir, he was not.
Q. Dr. Stuart, however, came there? And came there alone at first didn't he? A. No sir.
Q. Who was with him?
A. Dr. Stuart, Dr. Mottram and Dr. Fuller, and possibly Dr. Miller, but I think Dr. Miller was not the first time.
Q. Then the inquest or post-mortem examination was held right there that morning, was it? A. Yes sir.
Q. The body was cut up that morning by these doctors?
A. The body was not cut up, sir.
Q. There were cuts on it?
A. It was opened, yes sir.
Q. It was done with a knife, wasn't it? A. Yes sir.
Q. Then there was some cutting done upon the body.
A. Yes, but the body was not cut up.

Q. Not according to your understanding, but if your intestines were cut out, you would imagine you were cut up.
A. There was no intestines cut out.
Q. Were they not all removed from the body? A. No, sir.
Q. The stomach wasn't taken out, was it? A. No sir.
Q. Nor the entestines nor none of them taken out?
A. No sir.
Q. Nor no part of the organs of the body at all were taken out of the body?
A. Not taken out of the body, they raised and examined them.
Q. They were not taken out of the body? A. No, sir.
Q. Do you mean they lifted them up from the abdominal cavity?
A. Yes, just lifted them up so they could be examined.
1890 Q. They were lifted up out of the abdominal cavity?
A. No, they were turned up at the sides so that they could examine the sides.
Q. Was the stomach cut open? A. Yes, sir.
Q. Was any part of the intestinal canal cut?
A. None that I can tell now.
Q. Was the chest cavity cut open? A. Yes, sir.
Q. Was the liver exposed? A. Yes, sir.
Q. Was that cut at all? A. I think not.
Q. You say the chest cavity was cut open?
A. Yes, that is my recollection.
Q. And that was poked around? A. Yes, sir.
Q. And the stomach and the abdominal cavity was opened?
A. Yes, sir.
Q. And the organs in there were poked around?
A. Yes, but there was only one opening.
Q. Stomach was cut open?
A. All done through one opening.
Q. Cut open? A. Yes, sir.
Q. A part of the intestinal canal cut?
A. I don't know; I didn't notice.
Q. That body was not cut up?
A. The body was not cut up.
Q. You were the custodian of that body weren't you?
A. I was.
Q. Placed in your charge by Levi Baldwin?
A. Yes, sir.
Q. When you were informed that there was going to be a post-mortem did you inform Levi Baldwin of that fact?
A. No, sir.
Q. He was the person who had placed this body in your care? A. Yes.

Q. He was the person, or Mrs. Hillmon was the person to whom you looked for a portion of your compensation, at least?
A. Yes, sir.
Q. They were the ones who employed you? A. Yes, sir.
Q. And when you knew that this body was going to be cut up, you didn't inform them of that fact. Will you please answer that yes or no.
A. I was just going to say I did not.
Q. The fact remains that you did not. Will you give
1891 the reason to the jury why, when this body had been placed in your hands by Levi Baldwin, as you have said, at the instance of Mrs. Hillmon, and you were informed that the body was going to be cut open, you should not let Mrs. Hillmon or Mr. Levi Baldwin know of the fact so that some representative of theirs could be present?
A. When the coroner took charge of the body, as he did, by telling me there was going to be a post mortem and an inquest, I considered that the case was entirely in their hands, in his hands, but in my care.
Q. In your care? A. Yes, sir.
Q. And the work you did from that time on was work done for the coroner? A. Yes, sir.
Q. And yet you say, the coroner did not pay you?
A. He didn't pay me; I never presented any bill to him.
Q. Did I ask you whether you presented a bill to the coroner? A. You never did.
Q. Is there any occasion for your volunteering what is not called for by the question. Is that part of your employment to be here and answer questions and make speeches?

The defendants object to the question as improper.
By the Court: The question is improper.

Q. You say that after that time you considered yourself in the employ of the coroner, but you never presented a bill to him? A. No, sir.
Q. Did you understand that the coroner was in the employ of the insurance people? A. No, sir.
Q. Will you explain how it is that a bill that was contracted under the direction of the coroner, should have been paid by the insurance people, if he was not in the employ of the insurance company?

The defendants object to the question as repetition. Objection sustained, the plaintiff duly excepting.

A. I don't know why, I say.
Q. Now, I want to ask you when was it that this
1892 arm was cut and the piece of skin taken away containing the vaccine sores?

A. I don't know when it was cut; it was done in my presence but I did not see it done.

Q. You were the custodian?

A. It was done while I was in the room but I did not see it done.

Q. It was done the day the post-mortem was held?

A. Yes, sir.

Q. That was the morning the body arrived?

A. Yes, sir.

Q. Didn't you at the last trial of this case testify that it was cut out of that arm by Dr. Stuart within half an hour after it arrived in your store?

A. No, sir, I did not, not within half an hour.

Q. Didn't you say it was done before the post-mortem was held? A. No, sir.

Q. You say now it was done at the same time the post-mortem was held?

A. It was done while the physicians were there.

Q. Did you not testify at the last trial of this case that the reason you took the body to your undertaking establishment was to properly prepare it so that it could be viewed by those who might desire to view it?

A. That was why I took care of it.

Q. That is why you took it to the undertaking establishment? A. Yes, sir.

Q. Well, you did finally prepare it for that purpose; is that a fact?

A. Well, I don't know as I got a chance to prepare it, because the physicians took charge of it for the coroner and they had charge of it all the time.

Q. You finally caused it to repose in the coffin, for the purpose of taking the body to the cemetery after a while?

A. I did that, yes, sir.

Q. They let you have it for that purpose? A. Yes, sir.

Q. Did you from that time make any effort to prepare it so it was proper to be viewed? A. I did.

Q. At the time these doctors held their post-mortem examination over him in the morning, how long did that last?

1893 A. I could not tell; I should think they were there two or three hours possibly.

Q. That was during the forenoon of the day the body arrived. A. Yes, sir.

Q. Did you see the arm after this piece of flesh was cut off of it? A. I did.

Q. You say you did not see the cutting done? A. No, sir.

Q. Did you see the piece of flesh after it was cut off?

A. No, sir.

Q. Do you know who took it away?

A. Only from hearsay.
Q. You didn't see Doctor Stuart take it away?
A. No, sir, I did not.
Q. Did you authorize him to take it away?
A. No, sir.
Q. Did he say anything to you about having taken it away; if he did, did he tell you afterwards, when he was present, that he had taken it away?
A. I could not tell you whether he did or not.
Q. When did you first learn that that piece of flesh had been cut from the arm?
A. When I was working over the body to arrange it for the post-mortem.
Q. Did you make inquiries about that from these doctors that had been doing the cutting there?
A. I don't know whether I made any inquiries or not; I found out some way that it was done.
Q. Did Dr. Stuart have an order from the coroner at the [the] time that he came there with his knives?
A. He did not.
Q. Or any of the other doctors have such an order?
A. He did not.
Q. The coroner was not with them? A. No, sir.
Q. You say that this cutting business lasted two or three hours?
A. I should judge something like that, two or three hours, before they got through.
Q. When were the clothes replaced upon the body?
A. I can't tell whether it was before dinner or after.
Q. Was that part of your work?
A. That was my work.
Q. And you did it?
A. Yes, sir, I think not until after dinner.
1894 Q. But after dinner, they had got through with the cutting of this body? A. Yes sir.
Q. And you then replaced on the body the clothes that it had on? A. Yes sir.
Q. And restored it to its coffin?
A. It is my recollection it was after dinner.
Q. And you then prepared it for burial? A. Yes sir.
Q. It was buried in the same clothes that you had taken off when it first came there? A. Yes sir.
Q. The clothes that were upon it when it first came there were removed while the doctors were cutting it but after they were through those clothes were replaced upon it?
A. I think I took the clothes off myself for the doctors.
Q. You replaced the same clothes? A. Yes sir.
Q. And it was buried in those clothes? A. Yes sir.

Q. At the time you put those clothes upon it you arranged it for burial and view? A. Yes sir.

Q. When did Mrs. Hillmon first see it that you were present? A. I was not present when she saw it.

Q. Were you the one that went out and interviewed her at the time she came there and wanted to see him?

A. My partner, Mr. Bailey, saw her the first time she came to the front door.

Q. Did you go out and interview her?

A. I did when she came to the rear door where the shop was.

Q. That was at the time the doctors were cutting the body up?

A. That was during the forenoon of the day that the body arrived, yes sir.

Q. And did she come back there during that day?

A. It is my recollection now that it was during the forenoon; I can't say certain whether forenoon or afternoon.

Q. Now, it remained there on the 3rd, 4th and 5th and on the 5th it was buried? A. Yes sir.

Q. And on the 6th exhumed again? A. Yes sir.

1895 Q. You say the body was practically in the same condition at the time it was exhumed that it was during the other days that it was there? A. Yes sir.

Q. That would include the 3rd, 4th and 5th days of April, 1879? A. Yes sir.

Q. By using the preservatives that you spoke of you managed to keep the body in practically the same condition from the time it arrived until it was finally consigned to the grave the last time? A. Yes sir.

Q. The clothes that show in the picture of the cadaver are the clothes that you buried him in of course?

A. I should judge so; I think they were.

Q. You saw the picture taken? A. Yes sir.

Q. You know there was no change of clothes at the grave?

A. Yes.

Q. Mr. Hutchings suggests that at another trial— I will ask the witness if at the last trial of this case, you testified that the coat that body wore at the time it came there was ripped or cut or in somewise split up the back?

A. Yes, it was.

Q. That is a fact, is it? A. Yes sir.

Q. That was the condition when the body arrived there?

A. Yes.

Q. That was the condition of the garments, and of course nothing was done to them except to put them back after they were removed? A. That was, sir.

Q. So that garment was in two pieces?

A. The collar was not cut. I never cut the collar in undressing a body.

Q. State whether or not at the last trial of this case, in describing the condition of that garment you said it was ripped clear from the collar down?

A. From the collar down.

Q. [Than] as a matter of fact it was united at the collar?

A. Yes.

Q. That was the condition in which it arrived at your place? A. Yes.

Q. You did not do that? A. No sir.

Q. So that the custom as to whether you ripped from the collar or cut through the collar would not be a matter of moment here as you did not do it on the body in this
1896 instance? A. No.

Q. When was it that the companies paid you for this work? A. I think in May.

Q. Did you make a bill for the exhuming of the body out at Oak Hill Cemetery?

A. The whole bill was made all in one to Mrs. Hillmon.

Q. Let me ask you, did you include in the first bill that was presented to Mrs. Hillmon, the opening of the grave and the taking out of the body on the 6th day of April?

A. No sir, I did not.

Q. That was a separate bill? A. Yes sir.

Q. And that was paid by the insurance people?

A. Yes sir.

Q. How much did they pay you for that?

A. I think it was $25. I would not be certain.

And in answer to redirect interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. You have said that a part of this bill was paid by Mrs. Hillmon? A. Yes sir.

Q. I will ask you what part that included, if it included the lot in which he was buried?

A. It included the meeting of the body with the team at the depot and the grave and was—

Q. What do you mean by the grave, the opening and closing of the grave?

A. The opening and closing of the grave and the grave itself, $7 was the price charged for the grave in the Reserve, and that included opening and closing.

Q. Was this grave in the Reserve? A. Yes sir.

Q. Was this a single grave? A. A single grave.

Q. Had you paid for that grave? A. I had.

Q. You paid for the grave and she reimbursed you for that some time afterwards?

A. And the hearse was in her bill too.

Q. They have asked you how much was the entire amount paid by the insurance companies, if you remember?

1897 A. $33 by the insurance company, part by one and part by another.

Q. That was the whole amount paid for your services there, $33? A. Yes, by the insurance companies, $33.

Q. That was in addition to what Mrs. Hillmon paid?

A. Yes sir.

Q. That included your entire services? A. Yes sir.

Q. Now, in regard to Levi Baldwin: During the time that the body was at your undertaking establishment was he in there? A. Several times.

Q. Did you see him on the street? A. Yes sir.

Q. State if at that time or any other time he made any objection to you as to what you were doing or permitting to be done there?

By Mr. Atwood: I object to the question because there is nothing to indicate that he had any knowledge of it until after it was done. The body was left there and within two or three hours these cormorants fell upon it and cut it up, and then he asks if Mr. Levi Baldwin objected to something that had been already done.

By Mr. Isham: I ask that the language of counsel be taken down and our exception noted to it. From the beginning of this trial there has been a constant making on his part of remarks of that kind to witnesses before this court and jury. I say that his treatment of witnesses, by the character of questions addressed to them, has been most unseemly. We have not put a witness upon the stand who has not been treated with indignity by counsel, and I ask that his language may be taken down and our objection noted to it, and that that character of thing may hereafter be stopped.

By the Court: Gentlemen of the jury, you will give no heed, pay no attention to outside comments of counsel. Counsel on both sides at almost the slightest opportunity will make speeches outside of the point that is properly before the court and jury for consideration. I think perhaps Mr. Atwood has offended more in that particular than other counsel, but the suggestion applies in a general way to both sides.

1898 Q. Before you disinterred this body, I understand you received an order from some person? A. Yes, sir.

Q. Do you know whether that order was in writing? He gave an order to disinter the body? A. It was in writing.

Q. It was issued by what officer or officers, do you know?

A. It was issued by the city clerk, who was also clerk of the cemetery.

Q. It was issued by him and brought to you by some official?

A. By the official that had been passing back and forth with the coroner's jury and between the coroner and the jury.

Q. And clothed with that you went on and disinterred the body as you have stated? A. Yes, sir.

Q. At that time do you remember whether or not the coroner's inquest was still going on at the court house at the time the body was disinterred? A. Yes, sir.

Q. Do you know of your own knowledge? You know it continued after that?

A. I couldn't say; it was some time the next day or the day after I think.

Q. Now, I will ask you if in this matter of this body you acted differently than you did on other occasions when a coroner's inquest was held?

The question was objected to and withdrawn.

Q. I will ask you if this matter was conducted differently by you than other inquests which were held under like circumstances? A. It was not.

The plaintiff objects to the question as calling for the opinion of the witness. Objection overruled, the plaintiff duly excepts.

A. It was not; it was just the same.

Q. Were you acting with the insurance companies in any way? A. In no way at all.

By Mr. Atwood: Mr. Smith, do you recollect any other instance where a body was placed in your possession
1899 by any person and acted thereon in the way that this was done without their knowledge, if I have made myself plain? A. I could not recollect any particular instance.

Q. You cannot? A. No, sir.

By Mr. Barker:

Q. Was that body disinterred before the inquest closed?

A. Yes, sir.

Q. Now, you have been engaged in regard to this autopsy Was that conducted in any different manner from what autopsies usually are?

The plaintiff objects to the question as immaterial. Objection sustained, the defendants and each of them duly excepting.

Witness excused.

1900 E. A. Bittell, a witness produced by the defendants, being duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Barker:

Q. State your name and residence?

A. E. A. Bittell, Marysville, Kansas.

Q. How long have you lived in Marysville, Kansas?

A. Since the winter of 1888-1889.

Q. Where were you living in the fall of 1878 and winter of 1879? A. In Wichita, Kansas.

Q. At what particular place?

A. At the Globe Hotel, on Douglas Avenue.

Q. Do you know who the proprietors of that hotel were in the fall of 1878 and winter of 1879? A. Yes, sir.

Q. You may state?

A. Henry Draves and Adam Bittell, my father.

Q. What time, do you remember, did you come to Wichita?

A. I left Wisconsin on the 31 day of October, 1878, and arrived in Wichita about the 10th of November, 1878.

Q. During that fall or winter did you make the acquaintance of a man one by the name of John H. Brown and the other by the name of John W. Hillmon? A. I did.

Q. Where did you form their acquaintance?

A. At the Globe Hotel.

Q. When did you first see them there if you remember.

[Q.] It was in the month of December, 1878.

Q. About what time in the month if you remember?

A. Well, it was in the latter part of the month.

Q. How long did they remain at that time?

A. As near as I can remember it was over a week; it might have been two weeks.

Q. Where were they staying? A. At the Globe Hotel.

Q. Did they board there? A. Yes, sir.

Q. Did they room there and sleep there? A. Yes, sir.

Q. After that time did one or both of them go away?

A. Both of them went away.

1901 Q. Do you remember when they went away?

A. Well, I can't tell exactly when they went away but it was after they had been there a week or two.

Q. Did they return again? A. Yes, sir.

Q. About what time did they come back the second time?

A. Why, it was about a month later.

Q. Did they continue to board at the Globe Hotel after they returned? A. Yes, sir.

Q. Did they room and sleep there? A. Yes, sir.

Q. Do you remember any other person being there at the same time they were? A. Yes, sir.

Q. I will ask you what persons you remember. I will ask you particularly if you remember one Marshall being there, H. B.? A. Yes, sir, I remember him distinctly.

Q. Now, during the time that they were there, did you observe them doing anything, or notice what they were doing?

A. Why, they were not doing much of anything that I saw.

Q. Did you ever see one or both of them measured?

A. Yes, sir.

Q. About when was that? During their first or second stay at the hotel? A. My recollection is a little at both.

Q. Did you see them measured on more than one occasion?

A. Yes.

Q. Where did you see Hillmon and Brown, either or both of them measured?

A. They were measured on the awning posts in front of the hotel.

Q. When you say in front of the hotel what hotel do you mean? A. The Globe Hotel.

Q. How many times did you see them measured there, more than once?

[Q.] I could not say as to that but a number of times.

Q. Were other people measured at the same time they were? A. Yes.

Q. Now, do you remember the height of John W. Hillmon?

A. Yes, sir.

Q. You may state what his height was?

A. 5 feet, 9 and a fraction inches.

1902 Q. Now, did you have an opportunity to observe and did you observe the condition of Mr. Hillmon's teeth during his stay at that hotel? A. I did.

Q. You may state whether he had good teeth or defective teeth?

A. Well, there was a vacancy in the upper jaw on the left hand side. I remember that as one of the distinguishing marks of Mr. Hillmon.

Q. In regard to the measurement, was Mr. Hillmon measured with his boots on or without his boots?

A. No, his boots were on when I saw them.

Q. Who left the Globe Hotel first, you or Brown or Hillmon, that is, when you finally went away from there?

A. You mean when I finally left?

Q. When you went away from there?

A. I went away from there at different times.

Q. The last time you saw them there?

A. The last time I saw them they were there when I went away.

Q. When was that? A. 10th of February, 1879.

Q. You lived there at the Globe Hotel, did you?

A. Yes, sir.
Q. How long were you gone?
A. I was gone until the latter part of March, 1879.
Q. When you returned from that trip were Brown and Hillmon still at your hotel? A. No, sir.
Q. Was your father still keeping the hotel?
A. Yes, he was still interested.

Cross-Examination by Mr. Atwood.

Q. Did you see Wiseman when he was down there some time in May? A. I don't remember.
Q. Making inquiries in regard to this matter?
A. I don't remember of meeting a gentleman by that name.
Q. Do you remember of meeting anybody who claimed to be an insurance representative the spring or summer following this occurrence?
A. No, sir, not that I remember.
1903 Q. How long did you remain in Wichita after the spring of 1879?
A. Well, I left Wichita finally in October, 1879.
Q. You were absent from the city during the intervening time, were you?
A. I was absent from about the first week in October.
Q. Until the first week in October?
A. Yes, from the first week in June until the latter part of October I was there in the city.
Q. Where did you go from there in October?
A. I went to Lawrence, Kansas.
Q. How long did you remain there?
A. About a week or ten days.
Q. Simply on a visit?
A. Yes, sir, I had relatives there.
Q. Was it [—] connection with these matters?
A. Oh, no, sir.
Q. Did you see any of the insurance people, agents or lawyers at that time? A. No, sir.
Q. From there where did you go, Mr. Bittell?
A. Kansas City, Mo.
Q. Simply on a trip?
A. No, I went to Kansas City to look for work at my trade.
Q. What is your trade?
A. I am in the marble and granite business.
Q. How long did you stay in Kansas City?
A. Some little time; I remained in Kansas City until the following February; I think I left the 22nd day of February.
Q. Did you see or talk with any of the insurance agents or attorneys during that time? A. No.
Q. Where did you go then?

A. I went to Fort Scott, Kansas.
Q. How long did you remain there?
A. I remained there until the latter part of July, 1880;
nt to Lawrence and Kansas City in the fall of 1879 and in
bruary, 1880, I went to Fort Scott and stayed there until
e latter part of July.
Q. Did you talk about this matter with the insurance
ents or attorneys while you were there?
A. Not to my knowledge.
Q. Where did you go then, Mr. Bittell?
A. I went to Appleton City, Missouri, I went to Sedalia
d the next day to Appleton City.
Q. Were you there some little time? A. Yes, sir.
004 Q. How long?
A. I was in Appleton City, Missouri, until June 19,
believe, 1882.
Q. Did you see or talk with any of the insurance people,
gents or attorneys while you were there?
A. No, sir, I don't remember of talking with any attorney
bout the case.
Q. Then where did you go then?
A. I was married on the 2nd of June.
Q. Where did you remove to from Appleton City?
A. I went to Lamar, Missouri.
Q. Did you remain there some time?
A. I remained until the fall of 1885.
Q. Did you talk with any insurance agent or attorney there
while you were there? A. No, sir, not to my recollection.
Q. You think you would remember it if you had talked
with them? A. I do.
Q. Where did you go to from there?
A. I went to Kansas City, Mo.
Q. To stay?
A. Yes, with the idea of staying; I was looking for a place
to stay; I remained there just one year until December, 1886.
Q. Did you talk about this matter to any insurance agent
or attorneys at that time? A. No, sir, I don't remember.
Q. Where did you go then?
A. I came to Kansas, to Pottawatomie County, where I
remained until February, 1887.
Q. Up to that time had you talked with any one of the
insurance people about this matter?
A. Not to my recollection.
Q. How long did you stay in Pottawatomie County?
A. Until February, 1887, when I went to Frankfort, Kan-
sas, and from Frankfort to Marysville.
Q. During the time you were in Pottawatomie County did
you talk with any insurance agent? A. No, sir.

Q. February, 1887: That would make it 20 years in round numbers. At what trial did you first testify?

A. It was in the winter of 1895, at Topeka.

1905 Q. How long prior to the winter of 1895, at which time you testified, did you talk about this matter with the insurance people or any agent or attorney of theirs?

A. The first time I talked with any I think was in Kansas City in January preceding the trial, to my recollection.

Q. That would be January, 1895? A. January, 1895.

Q. 16 years after the occurrence? A. Yes, sir.

Q. With whom did you talk there about it?

A. Stuart Brown.

Q. He was an agent of the New York Life?

A. I don't know; he was connected with the case in some way.

Q. How long was that preceding the time you testified?

A. About one month.

Q. Were you subpoenaed at that trial?

A. No, I was not.

Q. You were sent for and went?

A. Well, Mr. Brown—I also received a letter from Mr. Green prior to Mr. Brown's visit.

Q. The communication that brought you to the trial was a letter rather than a subpoena; is that right?

A. The letter and my conversation with Mr. Brown.

Q. Was that interview the result of accident or was it previously arranged?

A. Mr. Brown came into my place of business at Kansas City. We started a branch in Kansas City in the fall of 1894.

Q. He came in there to see you? A. Yes, sir.

Q. And a conversation was entered into between you and him at that time? A. Yes, sir.

Q. And at that time you told him about your acquaintance with these people in Wichita? A. Yes, sir.

Q. How long did he remain with you at that time?

A. Oh, I presume 10 or 15 minutes, he was in my place.

Q. You talked the matter over, did you, and then agreed to come to the trial and testify?

A. I told him I couldn't very well leave my businses as I was alone; my partner was in Marysville attending to our other business and I had no one to leave there and I didn't see how I could testify in the case.

1906 Q. Did he then tell you when the trial—how long after that that the trial would probably come on?

A. Why yes, he said if I would go they would just wire me so that I would not lose any more [than] than was possible.

Q. And as a matter of fact he did?

A. I don't remember—well, yes, I did receive a telegram.

Q. And in reponse to that you went there and testified as you have testified? A. Yes, sir.
Q. You said that Hillmon and Brown measured a number of times? A. Yes, sir.
Q. How many times?
A. I kept no track of the times; they carried it on to such an extent that I thought they were hard up for amusement.
Q. You say a number of times; what do you mean by that; you of course, have that in your mind?
A. I should say ten or a dozen times, perhaps.
Q. Did Hillmon and Brown both measure there in your—
A. With others.
Q. But they two?
A. Well, I could not say they were always together when they did.
Q. Did you see either one of them measured ten or twelve times? A. Yes, sir, I did.
Q. Which one was that; that was Hillmon wasn't it?
A. Hillmon.
Q. How many times did you see Brown measured?
A. Well, he was generally around; I don't know that Brown measured as often as Hillmon did.
Q. Do you think he measured oftener?
A. I could not say; it was Mr. Hillmon that I remember particularly.
Q. You say you don't remember any particular reason why they measured more than once except you thought they were hard up for amusement?
A. No, sir, with other boarders in the house.
1907 Q. How many boarders were there in the house at that time?
A. The house was generally full of boarders.
Q. How many of them?
A. There were ten or fifteen then is my recollection.
Q. You said they came there late in December, 1878?
A. That is my recollection.
Q. And they stayed a week possibly and went away?
A. Yes, sir.
Q. And came back again when?
A. About a month from that time.
Q. You left the hotel the 10th of February? A. Yes, sir.
Q. How long before you went away was it that they came back the second time?
A. It must have been in the neighborhood of a week or ten days.
Q. Let us see if we can get this thing chronologically; as near as your recollection serves you they came there sometime the last part of December? A. The first time.

Q. To refresh your recollection, I will ask you if it was not the 19th or 20th; if they left Lawrence on the 18th, it would be just about a day's journey by rail, wouldn't it, 12 hours or something like that?

A. Yes, sir, at that time, I know the train I went down on came in the middle of the night.

Q. It would not be more than one day? A. Oh, no.

Q. You understood that they came right to your hotel, did you not? A. That was my understanding.

Q. If they left Lawrence on the 18th, they must have got to Wichita about the 19th of December, possibly the 20th; that would be so, wouldn't it? A. I don't know what day.

Q. Of course, I am just speaking for the purpose of refreshing your recollection. There isn't much question about the time when they went. Now, would your recollection serve you that they got there about Christmas time?

A. I could not say that they came there before Christmas.

Q. Don't you think they left before Christmas?

1908 A. I am quite sure they were there on Christmas day, because I remember it was very warm weather, something new to me; I could go around out of doors in my shirt sleeves. I remember that distinctly.

Q. At Christmas time? A. Yes, sir.

Q. How long after that before it blew up cold; how long did that warm weather continue?

A. We had had cold weather before that.

Q. How long before the warm weather?

A. I don't remember.

Q. What is your best recollection?

A. I know we had bad weather when I went to Eldorado, in February.

Q. You had just come from some place where it had been colder than it had been in Kansas? A. Yes, sir.

Q. And the pleasant weather at that time made an impression upon you? A. Yes, sir.

Q. How long would your recollection serve you that the warm weather lasted?

A. We had little flurries about every two weeks in my recollection, but it turned warm again.

Q. It was tolerably warm until this bad weather that you had in February?

A. I remember we had bad weather in February because I remember on account of my trip.

Q. You took a trip and it impressed it upon your recollection in that way? A. Yes, sir.

Q. And is it your recollection that in the month of January it was tolerably cold?

A. No, there were occasional flurries about every two weeks in January as I recollect it.

Q. What was the character of the weather at that time, altogether; was it mild or pleasant or very cold?
A. Mild weather; nice weather for me.
Q. Now, then, they came there, whatever time they did, sometime the latter part of December, you think about Christmas; you think they were there on Christmas day?
A. I don't say I think before Christmas, because—
Q. Didn't you say thought they were there on Christ-
1909 mas; you think they were there on Christmas day?
A. That is my recollection.
Q. Now, then how long does your memory indicate to you that they stayed there; they stayed a week or two weeks, you think; New Years day had come and gone when they left?
A. Well, it was my recollection just about New Years, or perhaps a few days after when they left.
Q. I think perhaps that is correct too. That was somewhere in the neighborhood of the first of January when they went away. A. 1879.
Q. Then, after they got there, your memory does not serve you any better than that it was possibly two weeks that they were there? A. That is right.
Q. They came back in about a month; that would, of course, be a few days after the first of the February succeeding? A. Yes, sir.
Q. And they remained there until you went away on the 10th; that is right? A. Yes, sir.
Q. So they must have been at the hotel the second time they came there before you went away about a week, possibly a little more? A. Yes, sir, it was a little more than that.
Q. But it could not have exceeded ten days because you were clear that they did not come there until a month after the first of January. Is that a fact?
A. It is my recollection that they were there a week; it might have been ten days or two weeks.
Q. If they were there ten days before you left, they must have come there as early as the first of February and probably before; that is a fact is it not? A. Yes, sir.
Q. How old were you at that time, Mr. Bittell?
A. I was in my 23d year.
Q. Were you employed about the house?
A. I helped when they were in a rush; helped about the house.
Q. You were then a journeyman marble cutter?
A. Yes, sir.
Q. You had served your trade? A. Yes, sir.
Q. You were not working at it at that time? A. No, sir.

Q. You were stopping at your father's hotel?
1910 A. Yes sir.
Q. What were your duties?
A. I had no particular duties; I helped generally around the house wherever it was necessary.
Q. Now, you said the hotel was full nearly all the time with boarders; what other boarders were there at the time of the first visit besides Marshall and Hillmon?
A. I remember a man by the name of Jesse Bowman.
Q. What was his business?
A. My recollection is he was a carpenter. And another by the name of Campbell.
Q. He was boarding with you as a permanent boarder?
A. Yes sir, boarding at the hotel.
Q. He was there during the whole time of which you have been talking? A. To my recollection.
Q. During the whole winter he boarded there?
A. My recollection is all of them did.
Q. Who else was there?
A. A man by the name of Campbell; he was also a boarder.
Q. Mr. Marshall and Mr. Campbell. Marshall and Campbell and Bowman all measured with Hillmon?
A. I don't remember whether Bowman measured or not; there was another man named Nichols.
Q. What was Nichol's first name?
A. I don't remember his first name; I believe it was Frank; I wouldn't swear to it; Frank Nichols.
Q. They all measured, did they not, these men you have mentioned Bowman, Campbell and Nichols?
A. I don't remember that Bowman did or Campbell; I don't remember that they did.
Q. Well, that would leave you with Marshall and Brown; eliminating Bowman and Campbell, it left Marshal, Brown and Hillmon; who else was measured? A. Nichols.
Q. That is four? A. Yes sir.
Q. Do you remember of their measuring together?
A. Yes sir.
Q. Who else participated in the measurement that you recollect of or did any of these parties?
A. I don't remember of any others now.
1911 Q. They were all living together in the house at that time? A. Yes.
Q. They were all together during the whole of that time?
A. I could not say they were.
Q. Would that be your best recollection about it?
A. I can't tell; they were there at times, I know that.
Q. I understood you to say that Campbell and Bowman were regular boarders and stayed there at the house all winter?

Q. They lived in Wichita and worked somewhere; might have been gone a few days.

Q. But that was their headquarters? A. Yes, sir.

Q. So far as you know they were at the hotel, which was their home. They boarded there during the time that Hillmon and Brown were there? A. Yes sir.

Q. Now, when was the first time as your recollection serves you that Nichols, Marshall, Hillmon and Brown measured?

A. It was just a short time after I remember the men being there.

Q. After they first came there? A. Yes sir, short time.

Q. And I understood you to say they came Christmas day?

A. I couldn't say; my recollection is that they were there on Christmas day; I couldn't say just what time they came.

Q. About the time or shortly after the time they arrived, these four men were measured—You don't remember of seeing Bowman and Campbell? A. No sir.

Q. Who else participated in the measuring bee besides these four at any of the times? A. I measured myself.

Q. Well, with these men? Was that done at the time you have just spoken of?

A. I can't say the whole four were together; I know the whole five were measured; when thy measuring was done I saw these different men measured.

Q. Is it not a fact that on Christmas day—that would be a day when there wouldn't be anything done; it was warm at the Globe on the porch that day. Is it not your recollection that the first measuring was done on Christmas day?

A. No, I would not say that at all.

1912 Q. How does your recollection serve you as to the first time measuring was done; you said shortly after they came; how long does that mean; two or three days?

A. It might mean a few days.

Q. You remember distinctly of course, this measuring business? A. Yes sir.

Q. Have a distinct recollection of it? A. Yes sir.

Q. Because you remember the measurements?

A. I measured myself.

Q. You remember the other measurements not particularly Hillmon's is that a fact? A. I have reasons for it.

Q. I simply ask you if that is a fact? A. Yes sir.

Q. You have a distinct recollection of the fact of the measuring? A. Yes sir.

Q. Now then who was measured at this time, this measuring, in which the figures were fixed in your mind so definitely? A. I don't know.

Q. All of them measured together of these five men?

A. There was Hillmon measured, and Marshall measured.

Q. Yes. The posts were all marked up around there with measurements and Nichols measured?

Q. Marshall, Hillmon and Nichols? A. Yes sir.

Q. That was the first time; the time you mentioned as the first time?

A. I do not distinguish between the times, because I can't remember; I know there was measuring made different times.

Q. Hillmon was measured? A. Yes sir.

Q. And at the first measurement he was demonstrated to be five feet nine inches and a fraction? A. Yes, sir.

Q. When did you see him measured again?

A. I don't remember as Hillmon measured again; he was there when they were measuring; his height was there; it was noted on the post.

Q. Now, you say you never saw Hillmon measured but one time?

A. Not to my recollection; they were there and would stand up against a post; that I remember, this time I measured them.

1913 Q. This was the first time the measuring took place?

A. I could not say as to that.

Q. The first time you remember?

A. The first time I measured; I did measure with them.

Q. On this day you are now speaking of shortly after they came? A. Because I made the measurement myself.

Q. When you said he was measured a number times, you did not mean he was measured more than once?

A. No, I could not say he was.

Q. And the persons present and participating in that measurement were yourself, Marshall and Nichols?

A. Yes sir.

Q. Is that right? A. Yes sir, I think it is.

Q. Those were the only four measured at that time?

A. Well, I could not say.

Q. And the time, you could not fix it any more than to say it was shortly after they came there?

A. Shortly after they came there.

Q. The measuring took place out of doors under the awning? A. Sometimes they came out—

Q. I am talking about this time that you have just described? A. Yes sir.

Q. That took place out of doors? A. Yes sir.

Q. It was warm?

A. It was a pleasant winter day; something new to me.

Q. All standing around the porch. Who was present besides these four at that time; were not Campbell and Bowman there at that time. A. I could not say that they were.

Q. What would be your best recollection?

A. They were stopping at the house at that time, but they were not altogether there.

Q. I am asking about this occasion; you have remembered that Hillmon was there, and Marshall was there, and that Nichols was there. Now, I will ask you if your recollection serves you as to whether or not Bowman and Campbell were there?

A. I don't remember of their being there at the time I measured.

1914 Q. Then your best recollection would be that they were not there.

A. Not perhaps right present; they were staying at the house.

Q. Couldn't they, so far as you saw, either have observed or participated in that measurement?

A. They may have done so, I wouldn't say they didn't.

Q. I am asking for your recollection.

A. I don't remember of them.

Q. The whole of the three front teeth of Mr. Hillmon were gone were they not? A. I didn't say so.

Q. I ask you if that is a fact? A. No, sir.

Q. How many of them?

A. There was a vacant space right here; I couldn't say whether there was more than one out on the upper left side.

Q. Was it one or more than one?

A. I would say only one.

Q. You have a distinct recollection of that matter after 16 years? A. I have reasons to remember it.

Q. I am trying to get to this point: If your recollection is good it must be definite upon the fact that there was only one tooth gone at that time? A. That is my recollection.

Q. And you think your memory is correct? A. Yes, sir.

Q. It is very clear and distinct to you? A. Yes, sir.

Q. You are quite positive that only one tooth was gone?

A. That is my recollection.

Redirect Examination

By Mr. Barker:

Q. At the time they were there, did you wait upon the table? A. I did at times.

Q. Among other things? A. Yes, sir.

Q. You spoke in regard to Mr. Hillmon being measured. I will ask you if various other people were measured after he measured?

A. Why, certainly, people coming and going stopping at the house there.

Q. Did he measure with more than one person?

A. With more than two persons; his measurement
1915 was there.

Q. When other people went out to measure did they go where his measurement was?

A. It was generally through conversation brought by Hillmon and Brown guessing heights, etc.

Q. They would guess on heights and then do the measuring? A. Yes, sir.

Q. And Hillmon would be re-measured?

A. He was not re-measured, not necessarily.

Re-cross-examination

By Mr. Atwood:

Q. I will get you to state what you meant by Hillmon being measured a number of times?

A. They did not always measure on the one post; there were other places that they measured.

Q. Did you see him measured more than once?

A. Yes, sir, my recollection is I did.

Q. You spoke about measuring him once? A. Yes, sir.

Q. Did you measure him at that time? A. I did.

Q. When was that?

A. That was shortly after they were [guess].

By the Court: I understood you to say that Hillmon was measured as many as a dozen times, and also understood you to say he was only measured once. How was it?

A. Well, he measured in different places, around in the house where they had been measuring.

By the Court: You saw him measured?

A. Yes, sir.

Questions by Mr. Barker:

Q. Did you measure him more than once?

A. I don't remember of any other measurement—

By the Court: Probably the witness did not understand the question. His testimony is all mixed up on the subject of the times.

Q. You spoke in regard to Hillmon being measured; how many times do you say he was measured?

A. I don't know how many times the man was measured.

Q. I know, but there is a measuring mark upon one
1916 of those posts? A. Yes, sir, on a post.

Q. After he was measured and the mark was made on the post, what was done after that when other measurements were made?

A. They would measure the other men; that is my recollection of it; they would just talk about it and go out and measure.

Q. So far as Hillmon was concerned, what did he do if anything with reference to verifying the measurement that had theretofore been made when other and different men had been measuring with him?

A. He would show where his measurement was and sometimes they would dispute about it and they would measure there again.

Q. What do you mean by measuring again, standing up against the mark?

A. Yes, standing up against the post and measuring there.

Q. Would his measurement be re-marked when already marked once?

A. I don't remember of measuring him but once myself, at the time I measured myself.

Questions by Mr. Hutchings:

Q. Mr. Bittell, do you say that Hillmon measured on more that one day? A. Yes, sir, I do.

Q. How many different times did you see him measured?

A. I could not say as to that because they were talking about these things frequently.

Q. Will you give your best recollection or impression of how many times you saw him measured?

A. I could not say just how many times different times.

Q. Can you give your best recollection.

A. It was something that would come up occasionally.

By the Court: Don't put so many conclusions to your answers. Try to answer the question and when you have done it, then stop, and then you will probably save some of the confusion in your testimony.

Q. Can you state to the jury what your recollection is now, your best impression, as to how many different times he measured?

1917 [Q.] Well, I should say he measured five or six different times any how.

Q. Now, he measured on different posts?

A. Yes, sir. On those different days I could not say that on one day he measured on one post, and on another day on another one, exactly.

Witness excused.

1918 Michael Mesh, a witness for the defendants, being first duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Barker:

Q. State your name? A. Michael Mesh.

Q. Where do you reside? A. Turner, Kansas.

Q. What is your business? A. Farmer and fruit raiser.

Q. How long have you lived in Wyandotte county, Kansas?
A. About twenty-eight or twenty-nine years.
Q. Where were you living in 1878 and 1879?
A. Wichita, Kansas.
Q. With whom?
A. With my half-brother. We were partners. We were gardening.
Q. What is his name? A. Ben Helda.
Q. Whereabouts were you living in the winter of 1878 and 1879?
A. We was living just a little ways from the mouth of the Little Arkansas River, where it empties into the Big Arkansas. There is a park there, right close by.
Q. Was it in the suburbs of Wichita?
A. It was in the city limits.
Q. During that time did you become acquainted with two men by the name of Brown and Hillmon? A. Yes, sir.
Q. Where were you at the time you became acquainted with them? A. At our house where we was batching.
Q. Were you acquainted with Brown prior to that time?
A. About thirty years?
Q. You had known Brown for thirty years, John H. Brown?
A. I said thirty years. I know him from that time 1919 up to this time, about thirty years. I know him just from that time on about, well just thirty years.
Q. Then you had known him about ten years before.

The plaintiff objects to the question as leading.

Q. How long had you known him prior to that time, up here in Wyandotte County?

Objection.

By the Court:
Q. Did you know him in Wyandotte County?
A. Yes, sir.

Objection overruled. The plaintiff excepts.

Q. How long had you known him prior to 1878 and 1879?
A. It must have been about twelve years.
Q. Do you know what time they came to your brother's, or half-brother's to stay?

The plaintiff objects to the question as assuming something not proven.
The objection sustained. The defendants, and each of them, duly excepted.

Q. What time did they come to your brother's house?
A. They came there along about between the 20th and 25th of February.

Q. About how long did they remain there?
A. Very near, Oh, about ten or twelve days.
Q. Had you seen Brown or Hillmon or either of them in Wichita before they came to your brother's house?
A. No, sir.
Q. I wish you would describe the house which you and your brother occupied at that time?
A. It was what we call a shanty, built all one way, and the roof sloped all one way. It was a room where we cooked and slept in. It was all in one room.
1920 Q. Was there more than one room in the house?
A. No, not what we occupied.
Q. Now, during the time they [arrived] there who occupied this room?
A. My brother, myself, Hillmon, and John Brown.
Q. Did they eat there? A. Yes, sir.
Q. Did they sleep there? A. Yes, sir.
Q. Did you have any acquaintance, or had you had any acquaintance with Hillmon before he came there?
A. No, sir. I was introduced by Brown.
Q. Now, during that time did you have conversations with Mr. Hillmon, during the time he was living there at the house? A. Did I have while he was there?
Q. Yes, sir? A. Yes, sir.
Q. I will ask you to state what he said to you in regard to employing you, if anything? State all that was said by him on that subject?

The plaintiff objects to the question as being incompetent, irrelevant and immaterial.

Objection overruled. The plaintiff excepts.

Q. Go on and state, as well as you recollect, what he said to you about that matter?
A. He wanted me to go along with him. He said he was going to buy a ranch, and he wanted me to go with him, and offered me $100 a month if I would go. I told him no; that I had a good home there and was making money, and I did not want to leave Wichita.
Q. Did you have conversations with him more than once on that subject? A. Once after that.
Q. During the time that he was staying there at the house? A. Yes, sir.
1921 Q. State the substance of the other conversation.
A. Why, the night before they went away Brown and him was together. They just came back home from town. Hillmon had went to Lawrence and got vaccinated, and they wanted me to go down and get vaccinated and they would pay for it, and then from the minute we got started and

I went in the wagon why my time was to commence, and he offered me $100 besides for a present if I would go.

Q. You say that was the night before they left?

A. Yes, sir.

Q. Did you have more than two conversations, or they with you, on that subject? A. Not both together, no sir.

Q. Did you have any other conversation except the one you have mentioned, with Mr. Hillmon in the absence of Mr. Brown? A. No, sir.

Q. There were two conversations? A. Yes, sir.

Q. One in the presence of Mr. Hillmon and the other in the presence of Mr. Brown and Hillmon? A. Yes, sir.

Q. Can you describe Mr. Hillmon? A. I believe I can.

Q. How tall was he? A. He was five feet nine inches.

Q. Do you remember the color of his hair?

A. It was dark brown.

Q. From the time that Brown and Hillmon had that conversation with you, the morning before they left, have you seen or heard from Mr. Hillmon since that time?

1922 A. No, sir.

Q. At the time they were staying there, did they have a team? A. Yes, sir.

Q. What kind of a team was it?

A. Well, they had a bay team of their own, but the night before they left, their horses kicked one another so bad; they kicked each other so bad, that we traded teams with them the next morning and they gave us $10 to boot, and the team that they drove away was a gray and a sorrel.

Q. What kind of a wagon did they have?

A. A small spring wagon, very light spring wagon. They had bows on it, but no cover.

Q. During the time they stayed there, where was the team kept? A. At our barn, at our stable.

Q. On the place there? A. Yes, sir.

Q. How did you live there? I mean what was your sleeping arrangements?

A. They slept on the floor and we slept on the bed.

Q. And in regard to the cooking and boarding?

A. They furnished some meat and stuff, and we had potatoes and things, and just all ate together.

Q. Boarded there together? A. Yes, sir.

Q. You may state who did the cooking? A. I did.

Cross-Examination

By Mr. Atwood:

Q. How old are you, Mr. Mesh?

A. I am forty-four years old; will be soon.

Q. How long did you live in Wyandotte County before you went to Wichita?

1923 A. Why we came here in 1867, to Wyandotte county, from Ohio.

Q. When did you leave to come to Wichita?

A. I was just twenty-four years old.

Q. Well, when was it? What year was it that you left?

A. I went in the fall of 1878.

Q. What had been your business in Wyandotte County?

A. I was working a team with my father on the farm.

Q. Had you ever been away to work from the farm?

A. No sir.

Q. Whereabouts was your farm located in Wyandotte County; your father's place I mean.

A. It is about a mile and three-quarters from the court house, northwest.

Q. How big a place was that?

A. One hundred and twenty-nine acres and a half.

Q. Who was at home there with you at that time; your half-brother, Helda?

A. No sir. At Wyandotte, my right brother was there, and my father and sister.

Q. Where was this half-brother? I think you said his name was Helda? Where was he at the time you were living at Wyandotte? A. He was at Wichita.

Q. Did he send for you to come down there or did you go there? A. I went down there.

Q. Where was his place located? How far from the city?

A. It was in the city limits.

Q. How large a place was it?

A. It was about five acres.

Q. You say you were batching there? A. Yes sir.

1924 Q. The two of you? A. Yes sir.

Q. What other ground did you work? Did you rent it yourself, or your brother rent it?

A. He rented it, and then he rented some more up farther.

Q. You were working in partnership were you?

A. Yes sir.

Q. How much land had you rented during that time, during the summer and fall of 1878?

A. We had, I think, twenty acres up the river, and this five acres.

Q. Twenty-five acres? A. Yes sir.

Q. What were you raising? A. All kinds of vegetables.

Q. Were you on equal shares? A. Yes sir.

Q. You and your brother? A. Yes sir.

Q. How old was your brother? You were twenty-four then you say?

A. Yes sir. Well he is nine years older than I am.

Q. That would make him thirty-three at that time?

A. Yes sir.

Q. You were batching together? He was not married, I take it from that fact? A. No sir.

Q. Neither were you? A. No sir.

Q. But you two were living there together on this land, or whatever you call it. How wide was that house or shanty, whatever it was?

A. I do not know just for right sure, but I think it
1925 was about 12x16.

Q. And divided into how many rooms?

A. Only one.

Q. Now how much did you make as your share of the profits of that business the preceding year?

The defendants object to the question as calling for incompetent, irrelevant and immaterial testimony, and not cross-examination.

Objection overruled. The defendants, and each of them, duly excepted.

A. Why we made as high as $50 and $60 a day there.

Q. How long did that last?

A. Why it would start along about the first of April and keep up until about the last of October.

Q Average about that, you say? A. Yes sir.

Q. You say you never saw Hillmon before Brown introduced you to him there at your brother's house?

A. No sir.

Q. You speak of it as your brother's house; I take it it was as much yours as it was his? A. Yes sir.

Q. You were partners there in this business? A. Yes sir.

Q. You say that they were there about the 20th to the 25th of February? A. Yes sir.

Q. You think they stayed there ten days or two weeks?

A. Somewheres like that.

Q. Do you think it was well into March before they went away? Let us see: The 28th day of February, that would be three days in February, if they came on the
1926 25th, and eight days if they came on the 20th. Now how far into March do you think, Mr. Mesh, it was before they went away. Of course I do not suppose you could tell to a day but I want you best recollection about it?

A. I can almost swear to it they went away on the 4th or 5th day of March.

Q. They had been staying with you about two weeks prior to that time? A. It was not two weeks.

Q. Ten days? A. Between ten and twelve days.

Q. Well, if they went away on the 4th of March, that would bring it back to the 28th day of February; they must have

come to your place about the 20th of February, if there are 28 days in February; that is right isn't it?

A. Somewheres like that, the 20th or 21st.

Q. What makes you believe, or what causes you to fix the time as being the 4th or 5th of March? A. Why that was—

Q. Was it that horse trade?

A. No sir, it was not. It was—we was fixing hot beds down. We talked about it afterwards.

Q. And that impressed it on your mind? A. Yes sir.

Q. So that your recollection is pretty tollerably clear upon the point that they left there in the neighborhood of the 4th or 5th? A. Yes sir.

Q. Your recollection is clear and distinct that they must have stayed there ten or twelve days prior to leaving?

A. Yes sir.

Q. You had known Brown at Wyandotte quite a while before? A. Yes sir.

1927 Q. Perhaps had been boys together down there?

A. He was a little older than I.

Q. But you knew him in Wyandotte? A. Yes, sir.

Q. He knew Helda? A. Yes, sir.

Q. Knew him in Wyandotte? A. Yes, sir.

Q. Did you understand that Helda had met them up town and invited them to come? A. Ben invited them.

Q. You had not seen Brown at any time during the winter preceding—the preceding months or weeks of winter, until he came there about the 20th of February? A. No, sir.

Q. If he had been staying in Wichita during the month of January and the early part of February you had not seen him? A. No, sir.

Q. Your brother, Helda, had never mentioned having seen him there any portion of December? A. No, sir.

Q. In other words, so far as you knew, they had not been in Wichita until they came to your house about the 20th of February, 1879, is that right? A. As far as I remember.

Q. You say Hillmon is five feet, nine? A. Yes, sir.

Q. You measured him of course, didn't you? A. Yes, sir.

Q. Where did you measure him; against an awning post, or any sort of a post, or against the side of the house, or how? What place did you measure him?

A. We measured him in the room.

1928 Q. You are five feet, nine, yourself, are you not?

A. Not quite.

Q. What is your height, Mr. Mesh?

A. About five feet, seven and a half.

Q. Was your hair the same color then it is now?

A. Very near.

Q. Light brown I take it is, about a right description of it?

A. Yes, sir.
Q. Did you wear a beard at that time?
A. I had a mustache.
Q. The same as you have now? A. Not quite as heavy.
Q. But was the color about the same then as now?
A. It was a little more brown.
Q. You mean it was lighter or darker?
A. It was not as red as it is now.
Q. Not quite as red? A. No, sir.
Q. What you call a light brown mustache? A. Yes, sir.
Q. Were your eyes the same color then as now?
A. Yes, sir.
Q. They are blue, I believe? A. Yes, sir.
Q. What do you say your height would be?
A. Five feet, seven and a half.
Q. Had you ever been vaccinated before the time that they importuned you to go down and be vaccinated?
A. No, sir.
Q. You were not vaccinated at that time?
A. No, sir.
1929 Q. How much did you weigh at that time?
A. One hundred and seventy-eight.
Q. What do you weigh now? A. Two hundred and six.
Q. How do you happen to remember that you weighed one hundred and seventy-eight?
A. I remember the weights. He weighed one hundred and seventy-six and I weighed one hundred and seventy-eight.
Q. Where did you weigh; at the house?
A. No, we went down town.
Q. Whereabouts down town?
A. At the grocery store.
Q. Went down for that purpose; got to discussing the matter, which one weighed the most? A. We bet on it.
Q. And went down there and weighed down there?
A. Yes, sir.
Q. Was that before or after you were measured?
A. About the same time.
Q. Didn't your brother Helda measure too, at that time, and Brown and all of you then? A. They wasn't there.
Q. Neither one of them? A. No, sir.
Q. That was in the day time? A. Yes, sir.
Q. When you were alone? A. Dan Coy was there.
Q. Didn't Dan measure?
A. No. He was six feet, four in his stocking feet.
Q. So he didn't have to measure? A. No, sir.
1930 Q. Did he ever weigh with you? A. No, sir.
Q. He wasn't either in the measuring or the weighing? A. He done the measuring.

Q. And gave you the results of that measurement did he?
A. Yes, sir.
Q. And you marked it on the wall there? A. Yes, sir.
Q. You noticed Hillmon's hand? Did you notice a scar?
A. I never seen that.
Q. He was around there ten or twelve days? A. Yes, sir.
Q. You ate in the same room? A. Yes, sir.
Q. Sat at the same table? A. Yes, sir.
Q. Very social?
A. No, sir; he was not talking at that time. No, sir.
Q. Had your work begun at that time in February?
A. The hot beds, yes, sir.
Q. Brown was there, too? A. Yes, sir.
Q. You were all friendly and sociable; you were together every evening were you? A. Yes, sir.
Q. Spent he evenings at the house?
A. They was down there some evenings; they went down nearly every evening.
Q. But they were there some of the time?
A. Yes, sir.
1931 Q. You were the one that did the cooking?
A. Yes, sir.
Q. That necessitated your being around the house with them certainly to prepare the meals? A. Yes, sir.
Q. Were they around the house during the daytime or were they down the street all the time during the daytime?
A. They would sometimes be at the house and sometimes down town.
Q. Did they eat at your place at noon time?
A. Well, not every day; mostly breakfast and supper.
Q. Do you know where they were down town?
A. No, sir.
Q. But in those days that you were associating with them in the way you have said, eating supper and breakfast with them, and sometimes dinner, and the portions of the day and some of the evenings. you say you never saw a scar on Mr. Hillmon? A. I never did.
Q. You saw his hands, I suppose? A. Yes, sir.
Q. You have a pretty distinct recollection of Hillmon?
A. Yes, sir.
Q. You have a distinct recollection of his general appearance as you have described it here? A. Yes, sir.
Q. Were his eyes blue, like yours, or dark brown, or black, or what were they?
A. They was dark brown. He had a full keen eye.
Q. I will ask you if you consider that your eyes looked like his? A. No, sir.
Q. The color of your hair was not the color of his either?

A. A good deal.

1932 Q. I thought you said his hair was brown a little while ago? A. Was kind of brownish.

Q. Kind of light brown? A. Reddish brown.

Q. It was dark brown, and light brown, and reddish brown. Now will you please definitely locate that color as near as you can? Was it light brown or reddish brown or dark brown?

A. It was kind of reddish brown.

Q. Then it was not dark brown?

A. It was not red. It was not dark.

Q. You spoke a while ago of dark brown. Now, I am trying to find out whether it was dark or red brown?

A. It was a kind of lightish brown.

Q. A light rather than dark? A. Yes, sir.

Q. You were mistaken when you called it dark brown, is that right?

A. It was not dark, nor it was not light.

Q. You have said it was both. Now you say it was neither. Will you be good enough to give us your best recollection as to whether it was dark; or perhaps it was some other color entirely?

A. It was not much different from my hair now and his was at the time.

Q. You say it was light brown, do you?

By Mr. Parker: He did not say that.

By the Court: Yes, he has said it was dark brown, light brown and reddish brown.

A. It is hard to tell the color of the hair or to describe it. I couldn't tell.

Q. Now, then, you remember about his teeth, of course, Mr. Mesh? A. No, sir, I never saw his teeth.

Q. You were with him there during the time you have described to the jury? A. Yes, sir.

1933 Q. That is a fact, is it not? A. Yes, sir.

Q. And when you were with him you talked with him, and laughed and joked, as men do who are together, in a particular way; that is a fact, is it not?

A. Yes, sir.

Q. Now would he, when he laughed, show his upper teeth quite plainly? You know there is a good deal of difference between men. Some men hardly show their teeth when they laugh or speak, and others show them distinctly. Which of the two classes did Mr. Hillmon belong to? Did his teeth show quite plainly when he laughed and talked?

A. He never laughed very much. He kind of grinned a little. That was his laughing qualities. He never laughed

Q. He grinned a little occasionally? A. Yes, sir.
Q. When he would grin a little, or joke, would he show his teeth quite plainly, or didn't he show them at all?
A. I never noticed his teeth.
Q. What do you recollect of his having a mouth of the character which would show his teeth when he grinned or talked, or both? You have a pretty distinct recollection of Mr. Hillmon. You remember that, don't you.
A. Yes, sir.
Q. And remember his eyes? A. Yes, sir.
Q. And the color of his hair, and how dark, and how it was dark brown, and reddish brown and light brown, and the color of his eyes, and the fact that he had no scar on his hand; now can't you give some opinion as to whether or not
1934 he was one who showed his teeth plainly, or didn't, when he was speaking or smiling?
A. I never noticed his teeth at all.
Q. He kept his mouth pretty close; he was one that didn't show his teeth much? A. Yes, sir.
Q. He was one that didn't show his teeth? A. Yes, sir.
Q. Do you remember that quite distinctly, Mr. Mesh?
A. Yes, sir.
A. That is the reason why you didn't know whether his teeth were snow white or discolored or all gone?
A. No, sir.
Q. Don't know anything about it? A. No, sir.
Q. If he had been one that showed his teeth quite plainly in talking or laughing, you would be able to remember that fact as well as you remember of his hand, his eyes, and all that; that is a fact? A. I believe I would.
Q. And the fact that you can remember makes you very firm in the opinion that his teeth did not show when he was speaking or laughing? A. Yes, sir.

Redirect Examination by Mr. Barker.

Q. During the time that you had the conversation with Brown and Hillmon was your brother, Ben Helda, present?
A. No, sir.
Q. You spoke about going to Wyandotte in the fall of 1878, and then you were asked in regard to a partnership between you and your brother, and in regard to your business and the profits of that partnership. When and where was that
1935 partnership made, and where was this business carried on? A. At Wichita.
Q. Had you been down before that time? A. No, sir.
Q. Were you carrying on business up here?

A. I was just working at home.
Q. When were the profits of this business divided? Where was this business carried on?

Question objected to, and no answer.

Q. You say you went to Wichita in the fall of 1878?
A. Yes, sir.
Q. And your brother, Ben Helda, was living there?
A. Yes, sir.
Q. About how long had he been down there?
A. About three years.
Q. Before you went down there had you had any business arrangements with him? A. Yes, sir.
Q. Where?
A. He came up to Wyandotte and asked me if I would not go in partners with him.
Q. Then you went down and went into partnership with him? A. Yes, sir.

The plaintiff objects to the question as leading, and the question is withdrawn.

Q. Then you went down there, did you, at the time you mention? A. Yes, sir.
Q. Then you were engaged after that in carrying on the gardening business at Wichita?

The plaintiff objects to the question as leading.

1936 Objection overruled. Plaintiff excepts.
Q. How long did you remain at Wichita?
A. About two years and a half.
Q. Then where did you go to?
A. Wellington, and from there back to Wyandotte.
Q. Now you spoke about the profits of your business. What did you mean by that? The amount of your sales?
A. Yes, sir.

The plaintiff objects to the question as leading.

By the Court: That is leading.

Q. What did you mean by your answer, when you spoke of the profits on your business, how much you divided?
A. We taken in from $50 to $60 a day. Of course our expenses had to be paid out of that.
Q. That was from what time to what time?
A. From about the 1st of April until the last of October.
Q. How extensive was your business?

The plaintiff objects to the question as a repetition.

Objection overruled. The plaintiff excepts.

Q. How many acres of garden did you carry there?
A. About twenty-five acres.
Q. Where was your market?
A. Wichita and Wellington. We would drive to all them towns, to Hutchinson, north, but mostly at Wichita.

Recross-examination

By Mr. Atwood:
Q. You never have testified before in this case, have you Mr. Mesh? A. No, sir.
Q. Would you say you left Wichita when, after this occurrence in 1878 and 1879?
A. About two years and a half.
1937 Q. Didn't you meet Major Wiseman, a man named Wiseman down there in May or June, 1879, following this? A. No, sir.
Q. Didn't you meet any insurance man, or agent, or attorney down there during that year?
A. I met a man by the name of Mr. Graves.
Q. Was he an insurance man?
A. I don't know what he was.
Q. I will ask you if you talked about this matter with any insurance man, attorney or agent, belonging to these companies? A. No, sir.
Q. Did you, during the whole of your stay there at Wichita? A. No, sir.
Q. And from there you went to Wellington?
A. Yes, sir.
Q. I understood you to say? A. Yes, sir.
Q. Where you remained two years? A. No, I didn't.
Q. How long did you remain at Wellington
A. About six or seven months.
Q. During that time did you meet or talk about this matter with insurance men? A. No, sir.
Q. Then you went to Wyandotte where you have remained ever since? A. Yes, sir.
Q. Do you know Mr. Buchan? A. Yes, sir.
Q. Did you know either of the gentlemen who are attorneys of the company, Mr. Barker or Mr. Green, until recently?
A. No, sir.
1938 Q. You have lived there in Wyandotte during this time. When was the first time you talked with the insurance people about your recollections of what transpired down there? A. About a week ago.
Q. With whom did you talk at that time?
A. I don't know what his name is.
Q. Is he here now.

A. He is not here. No sir; that is, he is not in this room.

Q. Have you seen him here since you have been here as a witness? A. Yes, sir.

Q. How long have you been here as a witness waiting to be called? A. Since last Wednesday.

Q. You say you do not know the gentleman's name?

A. No, sir.

Q. Will you describe him to us; you say he has been around here? A. He has got white sideburns.

Q. That gentleman with the side whiskers we have seen around here? A. Yes, sir.

Q. You do not know what his name is? A. No, sir.

Q. It was a week ago that you told him about what you know? A. Yes, sir.

Q. You told him about measuring, didn't you, you and Hillmon measuring? A. I don't think I told him that?

Q. Did you tell him about your weighing?

A. Yes, sir.

Q. Didn't you tell him how tall Hillmon was?

The defendants object to the question as not proper cross-examination.

Objection overruled. The defendants and each of them duly except.

1939 Q. You talked, of course, frequently about this matter during all this time. Did you ever talk with Mr. Buchan about it, by the way? A. No, sir.

Q. Did you ever talk with people about what happened down there? A. Not very much. No, sir.

Q. Do I understand you to say that you have not talked a good many times to different people about what transpired down there at Wichita? A. No, sir.

Q. When was the last time that you talked with anybody as you remember it; prior to the time you talked with the man with the side-whiskers? A. Sir.

Q. When was the last time you talked with anybody as you remember it, prior to the time you talked with the man with the side-whiskers, that you talked about this matter? That was a week ago you talked with him; that was, an insurance man; some other time prior to that time you must have, I suppose? Now how long before? Way back about the time the thing happened, or since, or when?

A. I never talked much about it, or particularly.

Q. Had no occasion to talk about it. You left that country after two years and came back, and the things that happened down there were not called to your attention?

A. No, sir.

Q. And that is how many years ago now; that was 1878?

A. Nearly twenty years, about twenty; that would be twenty years in 1898.

Q. And you remember these things quite distinctly?

A. Yes, sir.

1940 Q. Although you have not talked hardly at all since about the time it happened?

A. Yes, sir.

1941 Ben Helda, a witness produced by the defendants, being first duly sworn, testified as follows, to wit:

Cross-examination

By Mr. Barker:

Q. State your name and residence.

A. My name is Bernard Helda. I live in Oklahoma, Ponca City, Kay county.

Q. Did you ever live in Wyandotte? A. Yes, sir.

Q. From what time to what time did you live in Wyandotte county?

A. Well I came to Wyandotte county in the latter part of '65.

Q. How long did you live in the county?

A. I lived there about ten years,—ten or eleven.

Q. During the time you lived there were you acquainted with a Mr. Brown? A. Yes, sir.

Q. Did you know John H. Brown? A. Yes, sir.

Q. Did you know his father? A. Yes, sir.

Q. How far did you live from his father's when you lived in Wyandotte county?

A. When I lived in Wyandotte county I lived in Mr. Brown's house with my mother.

Q. What Brown do you have reference to?

A. Mr. John Brown's father, Robert Brown.

Q. Then you were acquainted with Brown? A. Yes, sir.

Q. Where were you living in 1878 and 9?

A. I lived at Wichita.

Q. In what business were you engaged?

A. I was in the gardening business.

Q. Where was your place of residence?

A. In the northwest part of the city limits.

Q. How far would that be from what is known as Douglas Avenue? About how far?

A. About three-quarters of a mile, probably.

1942 Q. During the time that you were living there did you meet John H. Brown? A. Yes, sir.

Q. Under what circumstances?

A. Well, I could not tell you now whether I met him up town or whether he came down to the house. I rather think they came to my place.

Q. By "them," whom do you mean?
A. John Brown and Mr. Hillmon.
Q. About what time did they come to your place, if you remember?
A. They came to my place about the latter part of February or the first of March somewhere along there. I could not tell exactly the dates.
Q. Did they live at your house? A. Yes, sir.
Q. Did they sleep there?
A. Yes, sir, part of the time. They would go down in the morning and they probably would not come back for dinner. Be back probably after dinner.
Q. Who was living with you there at that time, if any one?
A. My half-brother, Michael Mesh.
Q. The witness who has just testified? A. Yes, sir.
Q. Were there any other members of your family at that time? A. No, sir.
Q. During the time that they were there at your house, did they have a team? A. Yes, sir.
Q. Where was the team kept?
A. Well, it was kept on the outside of my stable.
Q. Whereabouts with reference to your place, on your place or somebody else's? A. On my place.
Q. In regard to their sleeping, where did they sleep and where did you sleep during the nights that they stayed there?
A. They had their bed and they made their bed on the floor and we slept in our own bed.
1943 Q. I wish you would give us an estimate about the size of the room that you occupied at that time.
A. I built the house myself. It was twelve by sixteen.
Q. You four occupied the room? A. Yes, sir.
Q. Did you do your cooking in there? A. Yes, sir.
Q. Who was acting as cook at that time?
A. My brother Mike Mesh.
Q. You mean by your brother, your half-brother?
A. Yes, sir.
Q. Is he older or younger than you?
A. He is younger than me, about nine years I think.
Q. Now during the time that they were staying there at your house did either Hillmon or Brown have any conversation with you in regard to your working for them or going with them?
A. Yes, sir, I had a conversation with Mr. Brown.
Q. What did Brown say to you during that time?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled. The plaintiff excepts.

Q. State as near as you can the substance of his conversation.

A. Well the subject of conversation,—he askew me if I would not like to go out West with them and I told him—

Q. What else did he say if anything?

A. He said they would like for me to go along, for me to sell out and go along with them. He says, you can make more money than you can staying here in this business. I told him I was satisfied there.

Q. Did you have more than one conversation with him on the subjects?

A. Oh, I don't know. I think he talked to me frequently.

1944 Q. About what?

A. About going along. Trying to get me to sell out and go with him.

Q. What, if anything, was said about what he and Hillmon were going to do?

A. He told me they were going into the catttle business and he said "We have got plenty of money," and he says, "The old man will stock the ranch." I do not know, I could not be positive what old man he meant, whether it was Hillmon, but that was the conversation. He says, "The old man has got plenty of money and will stock the ranch.

Q. You know Brown? A. Yes sir.

Q. You knew Brown's father? A. Yes sir.

Q. Did you have any acquaintance with Hillmon before he came there? A. Never.

Q. That is the first time you havemet him?

A. Yes sir, the time when I saw him with Mr. Brown.

Q. Did you have more than one conversation to that effect, that is, in regard to where they were going, and means to start a ranch? A. Yes sir.

Q. How long was that after Brown and Hillmon first came to your place that you had this conversation with John Brown? How long had he been there?

A. Oh, he had been there four or five days.

Q. Did you see them when they started away from your place? A. Yes sir.

Q. How were they travelling?

A. They travelled with a team.

Q. What kind of a team?

A. Well they had one flea-bitten gray, and the other one I am not positive, I think it was a kind of a dun or a kind of a light color.

1945 Q. Do you know where they got either one of those horses or ponies or both?

A. I do not. They got one of me of them. I swapped those flea-bitten gray to them because one of their horses was lame, —got kicked.

Q. Do you know about what time they went away?
A. They went away sometime—of course, I cannot really be positive, but I think some time about the tenth or eleventh of March, somewhere along in there.
Q. Have you seen Hillmon since that time? A. No sir.
Q. How long was it after they went away before you heard, if you did hear, of a party being killed over in Barber county?
A. Well, I could not tell exactly but I think it was about ten days or so. I happened to see it in the paper, when I first heard of it.
Q. What business are you engaged in now?
A. I am fishing a little and gardening.

Cross-Examination

By Mr. Atwood:

Q. You do some fishing, you say. Where is your home, Mr. Helda? A. At present?
Q. Yes. A. Ponca City, Oklahoma, Kay county.
Q. When did you come to Leavenworth this time?
A. I came here last—yesterday a week ago.
Q. Did you ever return to Wyandotte after leaving it to go to Wichita? A. No sir.
Q. Did you ever live in Wyandotte? A. Yes sir.
Q. When did you live there, Mr. Helda?
A. I said I came to Wyandotte the latter part of 1865.
Q. When did you come to Leavenworth this time?
A. I was about twenty or twenty-one, somewhere along there.
1946 Q. How long did you remain at Wyandotte after you went there?
A. Well, I lived there in 1877, I think I lived there in 1877.
Q. Where did you go from there?
A. Went to Wichita.
Q. What time in the year in 1877 did you go to Wichita, spring, fall, summer or when? A. I went in the fall.
Q. Got there in the fal? A. Yes sir.
Q. What did you do when you first went there, if anything?
A. I rented a piece of land to start a vegetable garden on.
Q. You were a farmer or gardener by trade?
A. Yes sir.
Q. Was that the same tract that you had in 1878 and 1879?
A. Yes sir.
Q. How many acres was there in it?
A. On the tract I rented was five acres where I built the house, and then I rented twenty-one acres north of them.
Q. When did you rent that?
A. The twenty-one acres?
Q. Yes.
A. I rented that after my brother came down there.

Q. That would be in 1878? A. Yes sir.
Q. Did you send for him or come for him?
A. I went up there on a visit.
Q. And got him to come back with you? A. Yes sir.
Q. Took him into partnership with you? A. Yes sir.
Q. You carried on the business in partnership as you have stated, from the spring, I suppose, of 1878? A. Yes sir.
Q. During the summer and fall and into the early part of 1879? A. Yes sir.
Q. You had known John Brown in Wyandotte county?
A. Yes sir.
Q. And perhaps his family, I think you said so. You do not remember whether you met Brown in the City of Wichita or whether you met him by his coming to your house?
A. No sir, I do not.
1947 Q. Which way from the center of town was it that your rented place was, north, south, east or west?
A. It was on the northwest corner of the city. Of course Wichita is bigger now; what they call Riverside Park.
Q. That, of course, does not mean anything to me. What I want to know is what direction it was from the center of the town?
A. From the center of the town it would be northwest.
Q. How far do you say it was from the center of the town?
A. Well, from the center of the town at that time would have been about three quarters of a mile, I should judge.
Q. The first you recollect of seeing either Hillmon or Brown there in Wichita,—that is you clearly remember,—was their being at your house? A. Yes sir.
Q. You could not say but what you might have seen them before but you do not remember? A. I do not remember.
Q. But you do know they came to your place?
A. Yes sir.
Q. And arranagements were made whereby they stayed there? A. Yes sir.
Q. You knew Brown quite a while, I think you said?
A. Yes sir, we were intimate friends.
Q. Consequently you have a distinct recollection of these occurrences connected with him, because you knew him so well. Is that a fact? A. Yes sir.
Q. What is your best recollection as to the time he came there?
A. My best recollection is, I think, about the latter part of February or first of March. I could not just come right down to the date.
Q. Does that mean, Mr. Helda, any time after the middle of February? In one sense any time after the midle is late.
A. The last part, yes sir.

1948 Q. Your brother thought it was in the neighborhood of the twentieth or thereabouts, or perhaps a little later. What would your recollection be?

The defendants object to the question as an improper method of examination. Objection overruled. Defendants and each of them duly except.

1949 Q. As near as you recollect, it would be some time along the first of March that they came there?

A. Yes sir.

Q. Then the month of February had passed before they came there, and it was into the month of March before they came to your place at all?

A. I think between the last and the first, I would judge.

Q. Between the last and the first of what?

A. As near as I know, because we always commenced making hot-beds the first of March there and I know it was just at that time.

Q. See if I get it right. You would fix the time that they came there some time into the first of March, that is, the early days of March? A. Yes sir.

Q. You would not be of opinon that they came there as early as the 20th or 25th of February?

A. No sir, I would not.

Q. Now how long did they stay there, Mr. Helda?

A. They stayed there, I should say, about ten days anyhow. Somewheres in that neighborhood.

Q. What were they doing during that time that they stayed there? Were they doing any work of any kind?

A. Not doing anything only going up town and back.

Q. They had not any work or business particularly?

A. No sir.

Q. They contributed their share of the provisions to the general stock, and you lived in that way? A. Yes sir.

Q. No regular board was paid, as I understand it?

A. No sir.

Q. You were with them and talked with [—] frequently?

A. I never run around with them any—of course, Mr. Brown, I was well acquainted with him, and me and him had a good deal of talk about old things.

Q. What did your outfit consist of at that time? How many horses and wagons had you?

A. I had two wagons, I think.

Q. And I suppose some farming tools?

A. Yes sir, and garden tools.

Q. Mr. Brown wanted you to sell out and go with them?

A. Yes sir.

Q. Hillmon talked with you about the same thing, did he?

A. Not Hillmon, never said a word to me. He seemed to be kind of reticent for me.

1950 Q. Didn't they ask you to be vaccinated?

A. No sir.

Q. Well, didn't Hillmon measure you? Ans. No sir.

Q. Do you know his height?

A. Why I don't know, but I would judge about five feet nine,—somewhere along there.

Q. You saw his hand, of course, Mr. Helda?

A. I suppose I did.

Q. Did you notice a scar on his hand? A. No sir.

Q. You have quite a distinct recollection of the man?

A. Yes sir.

Q. Do you remember of seeing a scar on his hand?

A. No sir.

Q. Do you remember about his teeth? A. No sir.

Q. Had bad teeth, did he not?

A. Not to my recollection he had not.

Q. Let me ask you this question, you say you have quite a distinct recollection of the way Mr. Hillmon appeared. I will ask you the question that I asked your brother, whether or not he was one of those whose teeth showed plainly, or did not show plainly when he talked or smiled. You know there is a great difference in people in that way?

A. Yes, I know that.

Q. What sort was he?

A. No sir, I do not think he showed his teeth at all.

Q. That is the reason you don't remember what his teeth were like, is it? A. Yes sir.

Q. If he had been one who showed his teeth very plainly, you would have noticed it, and you would have remembered it? A. I should have noticed it certainly.

Q. When did you close out your business in Wichita,—how long after this occurrence?

A. I think I moved to Wellington in 1870.

Q. You and your brother went to Wellington?

A. Yes sir.

Q. You do not mean 1870,—you mean 1880?

A. 1880, yes sir.

Q. Well, you remained in Wichita that would be the summer and fall of '79, and some time into 1880? A. Yes sir.

Q. Did you meet a man named Wiseman who was down there looking and asking what had become of Hillmon?

1951 A. No sir.

Q. A man who was a representative of the insurance company? A. No sir.

Q. A man six feet high, with reddish hair and beard?

A. No sir.

Q. Don't remember of seeing any such man as that?
A. No sir.
Q. Did you see any one of the persons representing or claiming to represent these insurance companies while you were in Wichita?
A. There was a man came there one time, and wanted to know if Mr. Brown and Mr. Hillmon had stayed at my place.
Q. You don't know whether he was an insurance man or not? A. No sir, I do not know who he was.
Q. Wasn't that the man your brother spoke of?
A. I rather think it was.
Q. After you went to Wellington, did you see and talk with any of these insurance agents? A. No sir.
Q. That is, anybody you knew was an insurance agent?
A. No sir.
Q. Then where did you go from Wellington,—how long did you stay there?
A. I stayed in Wellington seven years.
Q. While you were there did you talk with any of these agents or people belonging to the insurance company?
A. No sir.
Q. From there where did you go?
A. I moved to Clark county, Kansas.
Q. So you remained in Wellington from '80 to '87, and then in '87 you left Wellington?
A. I left Wellington, yes sir.
Q. And how far was Clark county from there. What part of the state is that in?
A. Clark county is south of Dodge City 80 miles.
Q. How long did you stay in Clark county?
A. I stayed three years.
Q. Did you talk with any of these insurance people about the case while you were there? A. No sir.
Q. Then where did you go?—That would bring it up to about 1890?
A. Well sir, in 1890 I think I came back here to Arkansas City, Kansas, down on the nation border.
1952 Q. How long did you stay there?
A. I stayed there until the opening of the strip, five years ago.
Q. Did you meet and tell this story to any of the insurance agents or attorneys while you were there? A. No sir.
Q. Then you went into the strip when that was opened, did you? A. Yes sir.
Q. Located in Oklahoma City, I think you said?
A. No sir, Ponca City.
Q. And have been there ever since?
A. Yes sir, that is my home.

Q. Who was down there and talked with you about this matter,—what agent of the company did you meet down there? A. I did not meet anybody.

Q. Who was the first one of the attorneys or agents of the insurance people that talked to you about this matter?

A. I have not talked to anybody down there.

Q. I mean anywhere?

A. No sir, I have not talked to no agent.

Q. Or attorney, or anybody representing or whom you understood to represent the insurance companies? A. No sir.

Q. You know what I mean? A. I know what you mean.

Q. I understood you saw no one down there. I will ask you the question again? A. I understood you.

Q. You did not talk to anyone? A. No sir.

Q. You have not talked to anyone? A. No sir.

Q. Not until you got upon the witness stand? A. No sir.

Q. And questions were propounded to you by Mr. Barker just now? A. I have talked to them since I came here.

Q. You were sent for to come here? A. Yes sir.

Q. Communication by letter?

A. Not a letter. There was a letter written to Ponca City to find where any man was by the name of Holda.

Q. You were the man? A. I was the man.

1953 Q. You came up here?

A. They requested me to come here.

Q. How frequently have you talked this matter over? This is the first time you have testified, if I am not wrong about it? A. Yes, sir.

Q. You frequently talked the matter over during the time that has elapsed since the time you were at Wichita?

A. Oh, yes, lots of times. A man would talk about the case to somebody. Particularly in Ponca City.

Q. Is that the place where you live ? A. Yes, sir.

Q. You went there what year, did you say?

A. I went there at the opening.

Q. That would be '91? A. '93, it opened in '93.

Q. And you have resided there ever since? A. Yes, sir.

Q. In the city proper?

A. No, sir, five miles east of the city.

Q. Carrying on whatever business you did in the way of fishing, &c, from that point? A. Yes, sir.

Redirect Examination

By Mr. Barker:

Q. At the time Mr. Hillmon was at your place, did he wear a mustache? A. Yes, sir.

Q. By Mr. Atwood: Did he wear any other beard besides a a mustache? A. Yes, sir.

Witness Excused.

1954 The defendant next offered in evidence the testimony of C. E. Tillinghast given upon the trial in 1896.

It is admitted by the parties that Mr. Tillinghast is not within the jurisdiction of the court.

Said testimony was thereupon read to the court and jury and is in words and figures as follows, to wit:

C. E. Tillinghast, called and duly sworn, on behalf of the defendants, deposes and says:

Direct Examination

By Mr. Barker:

Q. State your name and residence?

A. C. E. Tillinghast; Cleveland, Ohio.

Q. Where were you living in 1878-9?

A. In Leavenworth, Kansas.

Q. Do you remember what position you occupied at that time—in what business you were engaged in 1878?

A. I was agent of the New York Life Insurance Company.

Q. At Leavenworth? A. At Leavenworth, yes, sir.

Q. Do you remember the circumstances of a dead body being brought to Lawrence, on or about the first of April, 1879? A. Yes, sir.

Q. Were you at Lawrence about that time, or just before the body was brought there? A. Yes, sir.

Q. Do you remember of meeting the plaintiff in this case, Mrs. Hillmon? A. I did; I called on her.

Q. Do you remember when was the first time you met her, and where?

A. Well it was in Lawrence, and must have been I suppose about the 26th or 27th of March.

Q. 1879? A. 1879, yes, sir.

Q. You may state if you knew the party going to Medicine Lodge, of which Major Wiseman was one? A. Yes, sir.

1955 Q. Did you go with that party? A. Yes, sir.

Q. That was the party of which Col. Walker was one? A. Yes, sir.

Q. You went to Hutchinson by rail? A. Yes, sir.

Q. And from there by team? A. Yes, sir.

Q. Do you remember of being at the cemetery shortly after your arrival in Medicine Lodge?

A. I was at the cemetary, yes, sir.

Q. State [the] the jury as definitely as you can how long it was from the time you arrived at Medicine Lodge with these parties, until you were at the cemetery?

A. I think we arrived at Medicine Lodge on Monday, and stayed over night, and it was the next day we went to the cemetery.

Q. Now, up to that time had you met a man called Levi Baldwin, John H. Brown and Alva Baldwin?

A. No, sir; well, I met Mr. Brown before we went to the cemetery; I saw Brown Monday.

Q. I will ask you if you met a party at the cemetery?

A. Yes, sir.

Q. Do you know now, or did you know at the time, or have you learned since who they were?

A. Well I was made aware of Levi Baldwin and his brother being there, and as I say, I met John H. Brown the day before. I talked with him. Mr. Wiseman and Col. Walker went with me, and I think there were two or three others there, maybe a doctor.

Q. Do you remember what, if anything, had been done in reference to fencing the grave at that time?

A. I think there was some stuff about there, and possibly partly put up. At any rate I think there was some material there for a fence.

Q. Was the grave opened on that occasion?

A. Yes, sir.

1956 Q. The coffin taken out?

A. I think the grave was opened fairly before we got there, and the parties were ready for the coffin to be lifted out at that time.

[—] Do you remember the coffin being taken out?

A. Yes, sir.

Q. And opened? A. Yes, sir.

Q. Do you remember the cloth upon the face of the body?

A. It had a cloth over the face.

Q. Do you remember about where you were standing at the time this body was taken out, and the cloth removed?

A. It would be very difficult for me to fix the exact place. I remember we were gathered there all of us, and I remember also that there was quite a strong wind blowing; I think I was on the side against the wind.

Q. Do you know, or do you remember when that coffin was taken up, and the cloth removed, an exclamation, or anything being said there?

A. I remember I think the first word that was said there.

Q. Do you remember by whom it was said—you knew Levi Baldwin and Brown.

Plaintiff objects to the question as incompetent, irrelevant and immaterial, and calling for hearsay evidence. Objection overruled. Plaintiff excepts.

A. I think it was said by the brother of Baldwin; the first word that was said. Of course we were all quiet and anxious for that's what we were doing down there, and the first word

I think said, which was,—using some prefix, I don't know that —"That's not Baldwin!"

Q. Baldwin, or Hillmon?

A. O, "That's not Hillmon!" I mean.

1957 Q. Well was that immediately upon the removal of the cloth? A. Yes, sir.

Q. State what, if anything did you see Col. Walker do?

A. Col. Walker immediately, I think, or at least very promptly, put his finger in the mouth of the dead body and felt.

Q. Now you remember the circumstance, do you, of the sleeve being opened there?

Q. Well, you remember the circumstance, do you of the sleeve being opened there?

A. I remember seeing the doctor rip the sleeve, yes, sir.

Q. Now what was done with the body, do you remember?

A. Well, the body so far as I am aware, was left there, and it was arranged, the time to move, —

Q. Was the body afterwards removed? A. Yes, sir.

Q. And taken to Lawrence?

A. I afterwards saw it in Lawrence.

Q. You were agent of the company at that time?

A. Yes, sir.

Q. Do you remember the fact of the coroner's inquest being held in Lawrence over this body? A. Yes, sir.

Q. Were you present on that occasion?

A. Most of the time.

Q. You remember when you got back from Medicine Lodge?

A. It must have been the morning of the 2nd or 3rd of April.

Q. State whether or not you returned to Leavenworth, or remained in Lawrence?

A. For some time I remained in Lawrence.

Q. How long did you remain there?

A. Seven or eight days.

Q. How, with reference to the coroner's inquest?

A. Until it was done.

Q. Do you remember the plaintiff testifying at the coroner's inquest? A. She did testify, yes, sir.

1958 Q. Had you observed the teeth of the dead body there at Medicine Lodge?

A. I did, observe them very carefully.

Q. Now I will ask you if you remember Mrs. Hillmon being interrogated in regard to the condition of her husband's teeth at that time or not? A. I do.

Q. Do you remember in answer to what kind of teeth her husband had, what her reply was? A. She did not know.

Q. Was that what she said?
A. Yes, sir; she said she did not know.
Q. Do you remember her being interrogated in regard to the question of height? A. Yes, sir.
Q. Do you remember what her reply was to that?
A. That she didn't know—never measured him.

Cross-examination

By Mr. Hutchings:
Q. Where do you live? A. Cleveland, Ohio.
Q. You came out on purpose to testify in this case?
A. I came because I was asked to come.
Q. You are in the employ of this company yet?
A. No, sir.
Q. This inquest took place in 1879? A. Yes, sir.
Q. You remember now just the questions asked Mrs. Hillmon? A. I remember some of them very carefully.
Q. Do you remember any other questions except the ones you have testified to? A. Yes, sir.
Q. Was any question asked her as to the color of the hair of her husband? A. Yes, sir.
Q. You have been in the court house and heard Dr. Morris testify?
A. No, sir; I was here, but I didn't hear Dr. Morris.
Q. The same question was asked her in reference to height? A. Yes, sir.
1959 Q. And you have remembered these things 17 years?
A. I remember she didn't seem to know anything about her husband, and I remember several questions.
Q. You have never been a witness in this case before?
A. No, sir.
Q. When did you leave Leavenworth?
A. When did I leave Leavenworth? The summer of 1879.
Q. The summer of 1879?
A. Yes, sir; a few months after this inquest.
Q. Did you go from there to Toledo?
A. From Cleveland? No, sir; I went from there to Chicago.
Q. You went to Ft. Madison, did you not?
A. I was in Ft. Madison.
Q. When was it you were in Ft. Madison?
A. You say what time?
Q. Yes, sir. A. In the summer of 1880.
Q. Summer of '80? A. Yes, sir.
Q. Were you not there before the summer of '80?
A. I don't recollect that I was; couldn't have been.

Q. You are quite sure you were not there until the summer of '80? A. Yes, sir.

Q. What month in 1880?

A. I wouldn't try to give the month.

Q. What time of year? A. Some time in the summer.

Q. Now you were not acquainted with Mrs. Hillmon until you went to her house? A. No, sir.

* * * * * * * * *

1960 Q. You went with Major Wiseman and Col. Walker?

A. To Medicine Lodge, with them?

Q. Yes, sir. A. Yes, sir.

Q. You say when you got there you and Major Wiseman had some conversation with John H. Brown?

A. I don't think I said that.

Q. Didn't you state you had a conversation with John H. Brown?

A. I stated I met him the day before or the same one.

Q. Did you not state to the jury on direct examination that you had a conversation with John H. Brown? time? A. No, sir.

Q. Did you have any conversation with them that time?

A. No, sir; I didn't see them except at the grave—I had no conversation—Mr. Walker and Wiseman was acquainted with them and they talked mainly.

Q. Did you go out to the cemetery with Col. Walker and Mr. Wiseman? A. I think I did.

Q. Is your recollection pretty clear upon that?

A. I don't think I did, but it is a fact that I did.

Q. Major Wiseman was present?

A. He might have been some of the time.

Q. You don't remember?

A. I don't remember; Col. Walker was present; I remember having a conversation when Col. Walker was present.

Q. You never saw Levi and Alva Baldwin before that?

A. Well I am quite clear, but I won't say which parties went out—two or three parties went together.

Q. Did you,—how did you go—ride out?

A. I think we rode out.

1961 Q. In what kind of conveyance?

A. Well, horse and buggy.

Q. Now when you got out to the cemetery this body was partially dug up? A. Yes, sir.

Q. Do you remember that distinctly? A. Yes, sir.

Q. Your recolletion is that Major Wiseman and Col. Walker went along with you, and got to the cemetery the same time you did?

A. As near as I remember somebody went in a wagon, and I wouldn't be quite positive who it was now; we were all at the grave together.

Q. And you couldn't remember now whether you went with Walker or Wiseman, or which went along?

A. Do you mean from the—

Q. From Medicine Lodge to the cemetery?

A. I wouldn't be positive, now, it's a good while ago.

Q. But you say you remember when you got there the body was partially dug up?

A. Yes, sir, I know we had to wait.

Q. Levi Baldwin and Alva Baldwin were there?

A. Yes, sir.

Q. And John H. Brown was there?

A. Yes, sir; they were; just which was there—which got there first I wouldn't say; they were all there together.

Q. Now when the body was taken out of the grave, and the face exposed, where was John H. Brown—was he there?

A. Yes, sir.

Q. Close by? A. Close by.

Q. He was as close as any in the group?

A. No, sir, he was not; he didn't seem to have any interest in the affair.

Q. I didn't ask you that.

A. He was not closer to the grave, no sir.

Q. How much farther was he away than the rest?

A. Well, 3 or 4 steps.

1962 Q. Have you read Major Wiseman's testimony?

A. No, sir.

Q. Have you read over any memorandum of testimony?

A. No, sir.

Q. Have you talked with counsel on the other side?

A. Counsel asked me what I knew about the case.

Q. Has any one read over to you Major Wiseman's testimony? A. No, sir.

Q. Or what purports to be his testimony?

A. No, sir, I remember these facts.

Q. Have you converesed with Major Wiseman?

A. No, sir, I haven't seen him from the time of the coroner's inquest until this day.

Q. Go on and state how far John H. Brown was from the coffin, when it was opened? A. Three or four steps back.

Q. Isn't it a fact he was out holding the team, at some distance? A. No, sir.

Q. Are you clear about that? A. Yes, sir.

Q. He was there looking on as the others? A. Yes, sir.

Q. So far as you were concerned he was not?

A. I was paying careful atetntion to Brown at that moment.

Q. You are clear about that? A. Yes, sir.

Q. He was there where he could hear what Alva Baldwin said?

A. I don't think that, the wind was blowing the other way; he might have heard it, I couldn't say.

Q. The wind was blowing very hard?

A. The wind was blowing quite hard, yes, sir.

Q. You say there was some material on the ground for building a fence?

A. Yes, sir, stuff about there; scantlings, or something of that sort.

Q. Did you see it taken out there? A. No, sir.

Q. Was it close to this grave?

1963 A. Well, it was not particularly close, perhaps, but laying around about it.

Q. Just how—show what it looked like now?

A. Well, it showed more particularly for its—

Q. Was there any posts?

A. I wouldn't try to tell whether there were any posts there or not.

Q. Any fence boards?

A. I wouldn't say just what it consisted of—my best recollection would be it was what I call sort of scantlings; but I have some faint recollection that possibly there in it was posts—must have been posts, but I don't definitely remember the condition it was in.

Q. Did you notice any wire there?

A. I can't say that I did; I was not there on that business.

Q. How long were you there during the progress of this inquiry? A. Well, most of the time.

Q. Well, how long was that?

A. I don't know how long a time.

Q. How long did you attend the inquest?

A. I was there until it closed.

Q. At the court house or around where it was in progress?

A. I was there most of the time; I couldn't say how long.

Q. How long was that; one or ten days?

A. My recollection is I got out in about 7 or 8 days.

Q. How long was Mrs. Hillmon being examined?

A. Well quite a time.

Q. Well, what time would you say?

A. O perhaps an hour and a half—something like that.

Q. You were there all the time were you?

A. During her examination.

Q. During her examination? A. Yes, sir.

Q. Did you see her at the inquest any other time?

A. I think she was there, yes, sir.

1964 Q. Is your recollection clear about that?

A. Well, I wouldn't undertake to say how long I saw her there; I think she was there considerable time.

Q. During these 7 or 8 days? A. Yes, sir.

Q. Most of the time? A. Well, considerable of the time.

Q. Do you remember any body else there was there?

A. Yes, sir.

Q. Was Major Wiseman there? A. Yes, sir.

Q. Mr. Selig there? A. I think so, yes, sir.

Q. Was Dr. Stewart there? A. Yes, sir.

Q. All of these persons testified at the coroner's inquest?

A. Yes, sir.

Q. You remember that, do you? A. Yes, sir.

Q. Did you testify? A. No, sir.

Q. Dr. Miller there? A. I think so, yes, sir.

Q. Didn't testify? A. I think so.

Q. Did he testify?

A. I think so, yes sir, I wouldn't have remembered the name if you had not called it, I think.

Q. Was Mr. Griffith there?

A. I wouldn't be positive; I couldn't say. Quite a great many there; a good many testified. I wouldn't undertake to tell who they were so much, except the principal ones.

Q. You do remember that Major Wiseman, Dr. Stewart, and Mr. Selig testified? A. I wouldn't say so positively.

Redirect Examination

Q. Have you any connection with any of these companies whatever? A. No, sir.

Q. No interest in them? A. No, sir.

Q. How long since you ceased all connection?

A. I ceased my connection with the New York Life in 1881, about a year after that.

Q. And you never had any connection with the other defendants? A. No, sir.

Excused.

1965 By Mr. Barker: We now offer in evidence, Exhibit T, being a duly certified copy of the enlistment of J. W. Hillmon, to show a description of John W. Hillmon.

By Mr. Hutchings: Any statement in that paper of description of John W. Hillmon is hearsay; it was not made by him, nor by his direction nor with his knowledge, so far as it appears. We object to it as incompetent, irrelevant and immaterial and hearsay.

By the Court: That is, you offer the certificate of the recruiting officer; that is the part of it you claim is material?

By Mr. Barker: Yes, sir.

The Court sustained the objection, to which action and ruling of the court, the defendants and each of them then and there duly excepted.

Said enlistment is in words and figures as follows, to wit:

1966 No. ....OPS. (Exhibit "T" Nov. 99, W. C. H.)

United States of America,
War Department,
Washington City, February 17th, 1888.

Pursuant to Section 882 of the Revised Statutes, I hereby [1]
certify that it appears from the records of the office of the Adjutant General of the Army that the accompanying paper is a true copy of the enlistment paper of John W. Hillmon, Company I, 1st Nebraska Cavalry. [2]

R. C. DRUM,
Adjutant General.

Be it known, that R. C. Drum, who signed the foregoing certificate, is the Adjutant General U. S. Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this 18th day of February, one thousand eight hundred and eighty-eight.

[Seal] WM. E. ENDICOTT,
Secretary of War.

1. Insert title of office.
2. To be signed by the officer in charge of the office. (Form No. 9.)

Copy.

Volunteer Enlistment.

Territory of Nebraska. Town of Omaha.

I, John W. Hillmon born in Montgomery Co. in the State of Indiana aged eighteen years, and by occupation a farmer do hereby acknowledge to have volunteered this twentieth (20) day of September 1864, to serve as a Soldier in the Army of the United States of America, for the period of one year, unless sooner discharged by proper authority. Do also agree to accept such bounty, pay, rations and clothing, as are, or may be, established by law for volunteers. And I, John W. Hillman do solemnly swear, that I will bear true faith and alle-
1967 giance to the United States of America, and that I will serve them honestly and faithfully against all their enemies or opposers whomsoever; and that I will observe and

obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

Sworn and subscribed to, at Omaha, N. T., this 20th day of September, 1864.

JOHN W. HILLMON.

Before Lieut. S. W. Moore.

I certify, on honor, That I have carefully examined the above-named Volunteer, agree ably to the General Regulations of the Army, and that, in my opinion, he is free from all bodily defects and mental infirmity, which would in any way disqualify him from performing the duties of a soldier.

N. B. LARSH,
Asst. Surgn. 1st Neb. Vet. Cav.
Examining Surgeon.

I, certify, on honor, That I have minutely inspected the Volunteer, John W. Hillmon previously to his enlistment, and that he was entirely sober when enlisted; that, to the best of my judgment and belief, he is of lawful age; and that, in accepting him as duly qualified to perform the duties of an able-bodied soldier, I have strictly observed the Regulations which govern the recruiting service. This soldier has Brown eyes, Brown hair, Dark complexion, is five feet eight inches high.

S. W. MOORE, 2d Lieut.,
1st Regiment of Neb. Cav.
Vet. Volunteers,
Recruiting Officer.

Mustered into the service of the United States, for three years or during the war, from the date of enlistment, in Company —— First Regiment of Neb. Cav. Vet. Volunteers, on the 20 day of September, 1864, at Omaha, N. T.

1968

OSCAR F. DAVIS,
Capt. & Pro. Mar. Dist. Neb.
Mustering Officer.

Declaration of Recruit.

I, John W. Hillmon desiring to volunteer as a soldier in the Army of the United States for the term of one year, do declare, That I am eighteen years and —— months of age; that I have never been discharged from the United States service on account of disability or by sentence of a court-martial, or by order before the expiration of a term of enlistment; and I know

of no impediment to my serving honestly and faithfully as a soldier for three years.

Given at Omaha Nebraska Ter. the 20th day of September, 1864.

JOHN W. HILLMON.

Witness:

Josiah Burton, 1 reg. neb. v. v. Co. H.

Consent in Case of Minor.

I ..... do certify, That I am the ..... of .....; that the said ..... is ..... years of age; that I do hereby freely give my consent to his volunteering as a soldier in the Army of the United States for the period of three years.

Given at ..... the ..... day of .....

Witness:

.....

No. 9.

John W. Hillmon, Volunteered at Omaha, N. T., September 20th, 1864, By Lieut. S. W. Moore, 1st Regiment of Neb. Cav. v. v.

one year

.....enlistment; last served in Company (....) .... Reg't. of .....

1969 Discharged .....18....

Note 1.—This blank will be used for both enlistments and re-enlistments—enlistments of veterans, &c., &c., in the volunteer service. They will be made out in duplicate in all cases—one to accompany the recruiting return of the superintendent (not the recruiting officer) to the Adjutant General, and one to accompany the accounts of the officer who pays bounty, &c. The Regiment and Company in which the soldier last served should be given on the back.

Note 2.—An enlistment holds to service. A muster-in must, in all cases, precede payment of pay, bounty, pension, &c. A muster-in roll must, in all cases, be filed in the Adjutant General's Office as evidence of muster-in. The mustering officer, com-issary, or assistant commissary of musters as the case may be, will countersign both enlistments as having mustered the soldier into the service of the United States before either of them is given to the disbursing officer.

Ex. D. D.—1. A. S.

(A. G. O. N. 74 & 76.)

1970 J. Q. Norton, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interroga-

tories propounded to him by Geo. J. Barker, counsel for the defendants, testified as follows, to wit:

Q. State your name and residence?

A. My name is John Q. A. Norton, my residence is Lawrence, Kansas.

Q. What official position do you now hold in Douglas County, Kansas?

[—] I am now probate judge of Douglas County.

Q. I will ask you what official position you held in October, 1878? A. I was probate judge then.

Q. Are you acquainted with the plaintiff in this case, Mrs. Hillmon? A. I knew her; I could hardly say acquainted.

Q. Do you know her by sight?

A. Yes, I knew her by sight.

Q. Did you have any acquaintnace with John W. Hillmon?

A. No, sir.

Q. Did you issue to them a marriage license?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff excepts.

A. I issued a marriage license to John W. Hillmon and Sadie E. Quinn.

Q. Was there an application for a license made to you?

A. There was. I don't remember whether the law required any sworn statement at that time or not; I did not look to see what the law was at this time.

Q. Have you a certified copy of the marriage license that you issued to John W. Hillmon and Sadie E. Quinn?

A. Yes, sir, I have a certified copy of the marriage license.

By the Court: Was the information upon which this license was based obtained from Hillmon?

A. Well, I cannot say that at this time, the length of time that has elapsed.

197P Q. Did Hillmon get the license himself?

A. Why, I should say I think he did.

By Mr. Hutchings:

Q. Have you any recollection of Hillmon coming and getting it personally?

A. No, I have no recollection any more than I have the entries that it was issued at that time.

Q. State if it was not a common practice for others than the parties interested to apply for a license?

A. Not a common practice; sometimes the father or some relative would come but very seldom.

Q. You have no recollection of John W. Hillmon applying for that license himself? A. I have not.

Q. Did he make any statement to you whatever in relation to it?

A. No; I have no personal recollection; in the time that has elapsed since I cannot remember.

By Mr. Barker:

Q. But you have no recollection either of any one applying in his behalf, his father or relative or her father or mother or relative have you? A. No, I have not.

The defendants offer the license identified by the witness in evidence.

The [—] makes no objection to it because it is a certified copy, but objects to its admission in evidence upon the ground that it is hearsay, and wholly incompetent, irrelevant and immaterial, and because the statements contained in it are not based upon any information furnished by John W. Hillmon. Objection overruled, the plaintiff excepts.

Said license was thereupon read in evidence to the jury and is in words and figures as follows, to wit:

"State of Kansas,
Douglas County.

October 3rd, 1878.

1972 To any person authorized by law to perform the marriage ceremony:

You are hereby authorized to join in marriage John W. Hillmon, of New Mexico, age 30, and Sadie E. Quinn, of Lawrence, age 27 years, and of this license you will make due return to my office in 30 days.

J. Q. A. NORTON, Probate Judge.

I, George W. Henning, in accordance with the authority of the within license, did on the 3rd day of October, 1878, at Lawrence, Kansas, join and unite in marriage the within named John W. Hillmon and Sadie E. Quinn.

Witness my hand and seal the day and year first above written.

GEORGE W. HENNING,
Minister of the Gospel.

Witness excused.

1973 The defendants, and each of them, next offered in evidence the testimony of W. O. Hubbell, given upon the trial of 1896.

It is admitted by the parties that Mr. Hubbell is not within the jurisdiction of the court.

Said testimony was thereupon read in evidence to the court and jury, and is in words and figures as follows, to wit:

W. O. Hubbell.

W. O. Hubbell, called on behalf of defense, being duly sworn, testified as follows:

Direct Examination by Mr. Barker.

Q. State your name, Mr. Hubbell, in full?
A. W. O. Hubbell.
Q. Where do you live? A. Kansas City, Kansas.
Q. Where were you living in 1878-9?
A. Lawrence, Kansas.
Q. How long had you, or did you live in the City of Lawrence? A. From 1874 to '85.
Q. Do you remember the fact of a body being brought to Lawrence in April, 1879? A. I do.
Q. Do you remember the fact of a coroner's inquest being held over that body? A. There was.
Q. You may state whether or not you were one of the jurymen? A. I was.
Q. At that coroner's inquest? A. Yes, sir.
Q. Do you remember where it was held?
A. In the courtroom in the city of Lawrence.
Q. Do you know the plaintiff, Mrs. Hillmon? A. Yes, sir.
Q. Do you remember of her testifying before you at that coroner's inquest? A. She did.
Q. Were you acquainted at that time with an attorney by the name of Borgalthaus? A. I did.
Q. Do you remember whether he was with her at that inquest?
A. He was there part of the time, I don't know whether he was there all the time.

1974 Q. Do you know his initials? A. I do not.
Q. You stated you remember the plaintiff testified on that occasion? A. I do.
Q. Do you remember the question being asked her as to how high or tall her husband was?
A. Some question like that, yes sir.
Q. Do you remember her answer to that?
A. That she did not know his height.
Q. Do you remember her being inquired of in regard to the condition of her husband's teeth? Do you remember that inquiry? A. Yes sir.

Q. To the question as to the condition of his teeth what did she say? A. That she didn't know.

Q. Well, the question is, what did she say to that? The question as to the condition of his teeth, or how tall he was, what did she say?

A. Well, she didn't know; she didn't know about the teeth nor height.

Q. Now in regard, when it was asked her in regard to the condition of his teeth, what reply did she make; that she knew, or didn't know? A. She didn't know.

Q. Did she say she didn't know?

A. She said she didn't know.

Q. That is what I want to get at; that was the reply she made? A. Yes sir.

Q. Do you remember her being inquired of in regard to the character or color of his hair, and what reply she made to that inquiry?

Objected to. Overruled.

Q. Do you remember her being asked in regard to that?

A. She was asked that question.

Q. What reply did she make to that?

A. She didn't know the color.

Q. That was what she said? A. Yes sir.

Q. I wish you would state, Mr. Hubbell, the general demeanor and conduct of Mrs. Hillmon during the time of the inquest, particularly the time she was testifying there, as to expression of grief and sorrow upon her part, and whether or not she made any manifestations of grief or sorrow;
1975 state what her demeanor was in that respect?

The plaintiff objects to the testimnoy as incompetent, irrelevant and immaterial, and as calling for the opinion of the witness.

Objection overruled.

The plaintiff excepts.

By Mr. Barker: That was what I asked for.

A. She didn't seem to be grieved at all in any way of looking at it.

Q. You may state what her general bearing was; whether it was light or serious on that occasion?

Same objection—same ruling.

A. Not very serious.

Q. Do you remember her answer in regard to the inquiry as to whether or not that was the body of her husband, John W. Hillmon?

Objected to as assuming such a question was asked.

By Mr. Barker: I will withdraw that question.

Q. Do you remember this question being asked her in substance: "Do you recognize that body" referring to the body at the undertaking establishment "as the body of your husband, John W. Hillmon?" Do you remember that question being asked her in substance?

A. Well, I do not, because she didn't—

By the Court: It is simply a question of whether you remember not?

A. I don't remember at what time that came in.

Q. What I want to know is if it was any time during the coroner's inquest, if she was asked that question in substance—if she recognized that body at Bailey & Smith's as Hillmon's? A. Yes sir she did.

Q. To that, what reply did she make?

A. She said "If that was not John W. Hillmon, whose was it?"

Cross-Examination

By Mr. Hutchings:

Q. Can you state to this jury a single question that was asked Mrs. Hillmon before that coroner's inquest?

A. I can.

1976 Q. Put one question in form that was asked there?

A. Well just ask the questions.

Q. I want you to state one question, the form of one single question that was asked her at that time?

A. There was a great many questions asked.

Q. Can you state one of them?

A. I can't, as the attorney asked the questions.

Q. You can't tell this jury the form, or anything like the form Mr. Barker put the questions to her? A. No sir.

Q. When he asked her about the teeth, you didn't know whether he referred to all the teeth, or some of the teeth—What did he ask her about the teeth; did he say 'Were Mr. Hillmon's front teeth gone?'

A. No, he said one front tooth—that's just speaking of the teeth.

Q. You are sure that question was asked as to his front tooth? A. Only simply the teeth.

Q. Including the back teeth and all?

A. Just the teeth; I don't know about the back teeth.

Q. Didn't she say his front teeth were good?

A. She says I don't know.

Q. And she didn't know anything about the color of the hair or mustache? A. No sir, she did not.

Q. Mr. Barker was there, attorney for the company, examining her?

A. Mr. Green; Mr. Barker might have been there.
Q. Was Mr. Barker there?
A. He might have been part of the time.
Q. Was Mr. Barker there at all during the examination?
A. I think he was.
Q. Are you sure of it?
A. He was there part of the time.
Q. Will you swear to this jury that Mr. Barker was there, there examining witnesses before that jury?
A. I wouldn't swear; he might have been there; my recollection is he was there.
Q. That is your recollection; that Mr. Barker was there examining witnesses?
A. No, I don't think Mr. Barker was examining the witnesses.
Q. You don't think Mr. Barker examined several wit-
1977 nesses?
A. I don't know; Mr. Green examined most of them.
Q. As a matter of fact, Mr. Barker never examined a single witness?

Objected to—overruled.

A. I don't know.
Q. How long was Mrs. Hillmon there?
A. Well I don't know; she was there I guess most of the time of the coroner's inquest.
Q. Was she there more than one day?
A. I think she was, yes, sir.
Q. You won't pretend to give the form of any question given Mrs. Hilmon then?
A. No, I wouldn't say the exact form.

Objected to as having repeated several times.

Q. You remember Mr. Green examining Mrs. Hilmon?
A. Yes, sir.
Q. You can't be mistaken about that?
A. Mr. Green examined the witnesses.
Q. You are sure about that? A. Yes, sir, sure.
Q. You are just as certain about that as you are that Mrs. Hilmon said that she didn't know the color of her husband's hair—just as sure about the one as about the other?
A. That is my recollection, yes, sir.
Witness excused.

1978 The defendants, and each of them, next offered in evidence the testimony of Frank W. Todd given upon the trial of 1896.

It is admitted by the parties that Mr. Todd is not within the jurisdiction of the court.

Said testimony was thereupon read in evidence to the court and jury, and is in words and figures as follows, to wit:

Frank W. Todd.

Frank W. Todd, called on behalf of defendants, being duly sworn, deposes and says:

Direct Examination

By Mr. Barker:

Q. State where you live Mr. Todd? A. Chicago.
Q. What are your initials? A. Frank W.
Q. Where were you living in 1878-9?
A. In Wichita, Kansas.
Q. In what business were you engaged?
A. I was employed in the postoffice.
Q. In what capacity?
A. I had charge of the postoffice.
Q. Who was postmaster at that time?
A. Mr. H. Murdock.
Q. I will ask you if in 1878 you became acquainted with one John W. Hillmon? A. 1878?
Q. Yes sir, or 1879?
A. I don't know; there was a man by the name of Hillmon called for his mail in 1878 and 9.
Q. Well, did you become acquainted with him in that way?
A. Yes sir.
Q. State whether he called for mail often or seldom?
A. Every two or three days I should think.
Q. When he called for mail was he accompanied by any person? A. Usually there was a man with him.
Q. For about how long did he continue to come in often for mail; that is, from what time to what time, if you remember? A. I can't remember exactly, for several weeks.
Q. I will ask you if at any time he gave any order with reference to his mail, and if so what?

1979 Objected to as hearsay and incompetent—overruled.

A. Mr. Hillmon gave me orders to hold his mail.
Q. Well, what, if anything did he say about delivering it to anybody else; state all he said?

Objected to on same ground and as leading—overruled.

A. He came to me and said that he was going out of town a few days, and asked me to hold this mail, and not deliver it over to anyone, not even with an order; he would call for it himself.
Q. Do you remember the last time you saw him?
A. Yes sir.
Q. When,—about when was that?

A. Well, it was near the latter part of February, or the first of March, 1879.

Q. Where was it?

A. At the postoffice; side door of the postoffice.

Q. The postoffice at Wichita? A. Yes sir.

Q. What time of day or night was it when he was [—]?

A. I think about 8 o'clock in the evening.

Q. What was his business on that occasion?

A. He asked if there was any mail for him if I would give him his mail.

Q. Did he state why he came at that time?

Objected to as leading, and same reason—overruled.

A. He stated that he just come in from a trip of 30 or 40 miles, and there was a letter that he expected, and he wanted to leave the city in the morning to go west, and by getting his mail he could get away an hour or two sooner.

Q. Was that after office hours?

A. About two hours after the office was closed.

Q. What did you do in reference to getting the mail?

A. I gave him either one or two letters; I don't remember which.

Q. Did you observe who, if anybody was with him on that occasion?

A. There was a man, but not the same man it was usually before.

Q. Can you give a general description of the man who was with him?

A. Not any more than as to the size; about the size I should think or height of Mr. Hillmon; further than that I can't say.

1980 Q. Did you observe any peculiarity that fixed itself in your mind?

A. Yes sir he had long dark, what I would call curly hair.

Q. When he was in there did he do anything, and was you in any other transaction with him?

A. No more than he asked me to step out and have a cigar—there was a cigar store in the front of the postoffice.

Q. Was it at that time that you observed this man?

A. Yes sir.

Q. Up to that time had you become quite well acquainted with this man who usually accompanied Mr. Hillmon?

A. Well just from seeing him along every day with Mr. Hillmon.

Q. And you say it was not the same man?

Objected to as leading.

By the Court: I don't like to have it repeated.

Q. At the time you say; this time at the postoffice there; this man who accompanied Mr. Hillmon on that occasion, where was he standing?

A. He was standing alongside the cigar case.

Q. Now from that time until this have you seen Mr. Hillmon? A. No sir, I have not.

Q. How long did you remain in Wichita after that time?

A. I remained there until the winter of 1891, or '92.

Q. How long did you continue in the same employment in the postoffice? A. Three or four months after that.

Q. After that, did you go into business at Wichita?

A. Yes sir.

Q. Do you remember of hearing of the circumstance of a man being killed in Barbour County about that time?

Objected to as hearsay.

By Mr. Barker: We want to strike out "about that time". I will ask you if you remember of hearing of the circumstance of a man being killed in Barbour County?

Objection pressed—overruled.

Q. Do you remember hearing of it? A. I do.

Q. Can you give court and jury any definite information as to how long it was from the time you saw Mr. Hillmon
1981 and this man at the postoffice, until you heard of this accident in Barbour County?

A. I can't give the exact time; I should think it was,—might have been ten days or two weeks; might be longer.

Q. That's as definite as you can be with reference to it?

A. Yes sir.

Cross-examination

By Mr. Hutchings:

Q. You continued to live in Wichita and remained in the postoffice until 1891 or 2? A. No sir.

Q. Until what time?

A. I remained in the postoffice two or three months after that; I remained in Wichita until 1891 or 2.

Q. You heard of the trial of this case three times—1882-5-8? A. Saw accounts of it, yes sir.

Q. You were not a witness in this case at all until the last trial about a year ago? A. No sir.

Q. You live now in Chicago? A. Yes sir.

Q. It was about 17 years after this event before you ever testified or something about that? A. Yes sir.

Q. The Wichita postoffice at that time was quite a large office? A. Yes sir.

Q. A great many strangers coming in from all sections of the country and calling for their mail? A. Yes sir.
Q. And you delivered mail to hundreds in a day?
A. Yes sir, to thousands.

Witness excused.

1982 The testimony of Dr. Phillips appearing on pages 1730 to the middle of page 1733, follows in point of time the conclusion of the proceeding relative to, and the testimony of J. S. Crew ending on page 1752.

E. D. F. Phillips, M. D., a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by George J. Barker, Esq., counsel for the defendants, testified as follows, to wit:

Q. State your name and residence.
A. E. D. F. Phillips, Lawrence, Kansas.
Q. What is your profession?
A. Practicing medicine 27 years.
Q. Are you still engaged in the practice? A. I am.
Q. At what place? A. Lawrence, Kansas.
Q. Did you ever reside in Tonganoxie in this county, Leavenworth county? A. I did.
Q. I will ask you if you are familiar in your practice with the process of vaccination? A. I am.
Q. I will ask you to state whether or not a a person may be successfully vaccinated more than once? A. Yes, sir.
Q. Is it an unusual thing for vaccination to take twice, as we say? A. It very often takes a second time.
Q. Would there be anything unusual in a person being vaccinated say,when he was nine or ten years old, and it taking successfully, and then being re-vaccinated when he was a man 20 or 22 years old and it also taking successfully?
A. Why no, not very unusual.

And in answer to cross-interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. What experience have you had in vaccinating persons?
A. Well, I have vaccinated a great many persons.
Q. When did you go to Lawrence? A. 20 years ago.
Q. From what school did you graduate, if any?
A. Kansas City Medical College.
1983 Q. When? A. 1876.
Q. Where is that college situated?
A. Kansas City.
Q. You know, then, all about vaccination?

A. Oh, I don't know that I know all about it.
Q. You know what the result of vaccination is as to subsequent appearance; it leaves a scar, does it not?
A. It leaves a scar, a characteristic scar.
Q. What makes this scar?
A. The pustule that forms as the result of the vaccination.
Q. It is the destruction of a part of the skin?
A. It destroys the skin.
Q. It is a prominent mark, is it not?
A. It is a prominent mark.
Q. Did you ever know of a vaccination mark growing out, or disappearing? A. Not a true vaccination scar.
Q. If a patient was vaccinated and the vaccination took, and made a characteristic vaccination scar, that would remain there until his death, would it not? A. Yes, sir.

Here the witness [witness] was excused, but afterwards being recalled by the defendants, testified in answer to direct interrogatories propounded to him by Mr. J. W. Green, counsel for the defendants, as follows, to wit:

Q. You have said that you were living in Tonganoxie in 1878, I believe? A. Yes, sir.
Q. In what business were you engaged at that time?
A. I was in the drug business from the fall of 1870 until the fall of 1874.
Q. In what business were you engaged in Tonganoxie in 1878 and '79? A. Practicing medicine.
Q. Were you acquainted with one Levi Baldwin?
A. I was.
1984 Q. About how far did he reside from Tonganoxie?
A. About four or five miles west.
Q. In what business was he engaged at that time?
A. Farming and stock raising.
Q. I will ask you if in the summer or fall of 1878, you were at his residence? A. I was.
Q. You may state if you remember for what purpose you went there? A. He had a boy injured; dislocated elbow.
Q. Did you reduce the fracture or dislocation? A. I did.
Q. After that, did you have a talk with Mr. Levi Baldwin?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection overruled; the plaintiff duly excepting.

A. I did.
Q. Now, you may state what that conversation was so far as it relates to any inquiries he made of you of the effect of death upon bodies?

The plaintiff objects to the question as incompetent, irrelevant and immaterial, calling for hearsay and because no foundation has been laid. Objection sustained, the defendants and each of them duly excepting.

Q. I will ask you this question then: At that time was inquiry made of you by Levi Baldwin in regard to the length of time which would be required for a body to decompose [—] as to become not recognizable?

By the Court: Mr. Barker, the purpose seems to be—I may be wrong,—to get this evidence that is within the objection, before the jury notwithstanding the court has ruled it out.

By Mr. Barker: I wish to disclaim once for all, any such intention.

By the Court: The point you make is preserved adequately and absolutely by the transcript of the evidence of Mr.
1985 Blythe and by the deposition of Mr. Crew, and it seems to me if you add to that, it is not for the purpose of preserving any point but for some other purpose.

By Mr. Barker: I can assure you it is not. The only purpose is to show the court the character of the testimony excluded.

The testimony of this witness at a previous trial is right here and we offer to prove that by the testimony of this witness.

The plaintiff objects to the offer as incompetent, irrelevant and immaterial, calling for hearsay and because no proper foundation has been laid. The Court sustained the objection, to which action and ruling the Court, the defendants and each of them at the time duly excepted.

By the Court: That is the transcript of the trial of 1896?

By Mr. Barker: Yes, sir.

Witness excused.

And thereupon the defendants and each of them offered to read in evidence the written evidence given by the witness, Phillips, upon the trial of 1896, for the purpose of showing what the witness would have testified to if he had been allowed to answer the questions above set forth put to him by the defendants upon his direct examination, and excluded by the court upon the objections of the plaintiff. The court refused to permit said evidence to be read as requested by the defendants to which action and ruling of the court the defendants and each of them then and there duly excepted.

The said evidence so offered and rejected is in words and figures as follows, to wit:

1986 Dr. E. D. F. Phillips, called as a witness on behalf of the defendant, being sworn, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name? A. E. D. F. Phillips.
Q. Where do you reside? A. Lawrence, Kansas.
Q. What is your business? A. Physician and surgeon.
Q. Where were you residing in 1878?
A. In Tongamoxie, Kansas.
Q. What was your business at that time?
A. Physician and surgeon.
Q. Did you know one Levi Baldwin at that time?
A. I did.
Q. Do you remember how long you knew him?
A. Since 1870.
Q. Where was he living?
A. Living west of Tonganoxie about 4 or 5 miles.
Q. What was his business at that time, do you know?
A. Farming and stock usually.
Q. Were you at his place any time in 1878? A. I was.
Q. About what time of the year was it you were there?
A. In the fall of 1878.
Q. What was the occasion of your visit to his place at that time?
A. To place a lotion on a cut on the elbow of his little boy.
Q. Did you see Mr. Levi Baldwin there at that time that you visited his place? A. Not that day.
Q. Were you there after that?
A. I was there the next day.
Q. You saw Mr. Levi Baldwin there the next day after you were first called? A. Yes, sir.
Q. Do you remember who came for you to go out there?

Objected to as incompetent and immaterial—sustained.

Q. Did you know one John W. Hillmon? A. I did.
Q. Did you see him in the year 1878 any time?
A. I did.
Q. Where did you see him?
A. I saw him at Mr. Baldwin's.
Q. Now on the occasion of your last visit, or second visit, which you spoke of, you may state whether you had any
1987 conversation with Mr. Levi Baldwin on the subject of life insurance?

Objected to as incompetent and hearsay. Overruled. Ex.

Q. You may state Dr. fully what that conversation was.

A. He asked me if I had any insurance, and whether I knew about certain insurance companies, whether they were safe or not. He said he had been thinking about taking out some insurance; and in the same conversation, or at the same time, he asked me how long a dead body would,—how long before a dead body would decompose after it was buried.

Q. What did you say to him?

A. I said it would depend on whether decomposition had set in before the body was buried or not. And it would depend on the condition of the body when buried.

Q. What further conversation, if any, did you have?

Same objection—same ruling.

A. He said wouldn't,—in connection with the conversation of insurance, he said wouldn't it be a good scheme to get a good insurance on your life and go south and get the body of a greaser and pass it off as your body,—wouldn't it be a good scheme to go down south and get the body of a "Greaser," or get a large amount of insurance on your life and go down south and get the body of some "Greaser" and palm it off as your body and get the money.

Q. Have you stated the language, of the substance of the conversation you had with him that time?

A. That is the substance; I can't remember exactly the words, of course it was fresher in my mind then than now.

Q. Did you ever have any further conversation with him in regard to the subject of life insurance? A. Not after that.

Cross-Examination

By Mr. Hutchings:

Q. How long had you been acquainted with Mr. Baldwin?

A. The spring of 1878.

1988 Q. He was a large farmer in the neighborhood?

A. Yes, sir, he owned two farms.

Q. He sent for you as a physician? A. He did, in 1878.

Q. What time was this in 1878?

A. In October, I think, the fall; I think it was October.

Q. And you had this conversation with him? A. Yes, sir.

Q. Was anybody present?

A. His wife was in the room, part of the time.

Q. Anybody else?

A. And the little boy, the injured one, lay on the bed; we was sitting in the room where it was.

Q. Was his wife present when he said it would be a good scheme to pass of- the body of a "greaser,"—to get a "greaser" and pass it off on the company?

A. I don't remember, she was getting dinner, and was in and out.

Q. He spoke right out—made no effort to conceal any of it?

A. Yes, sir, I didn't notice any inclination on his part to conceal anything he was saying.

By Mr. Hutchings: We would like to ask Dr. Phillips one more question. Dr. Phillips, you have testified at all previous trials of this case? A. Not the first one.

Q. In all but the first? A. This is the third one.

Q. Well, you testified at the last trial had about a year ago? A. Yes, sir.

Witness excused.

1989 The defendants and each of them offered in evidence the deposition of James S. Crew, taken before E. W. Levy, a notary public within and for the city and county of San Francisco, State of California, on the 19th day of August, 1892. The plaintiff objected to the admission of said deposition in evidence, to the entire scope of the deposition, for the reason that it is incompetent, irrelevant and immaterial, hearsay, a conversation between Levi Baldwin and James S. Crew which has no bearing whatever upon the case, not within any rule of evidence, and certainly not within the definition or meaning of the law concerning declarations of co-conspirators.

1990 And the plaintiff further objected thereto so far as the same related to any statement of Levi Baldwin or conversation with him in the absence of John W. Hillmon or to any mortgage or indebtedness of Levi Baldwin, because the same was incompetent and hearsay, indebtedness not described mortgage not produced, and such statements and conversation not being competent against this plaintiff, not being in the presence of the plaintiff or even of John W. Hillmon, and as to any mortgages, because oral evidence is not competent to prove same without accounting for non-production thereof. And because it has not been shown by evidence competent against said plaintiff that there was any conspiracy between any persons, and defendants have not alleged that plaintiff was a conspirator, but have impliedly alleged that she was not a party to any conspiracy but not alleging she was and by not naming her with the other named alleged conspirators in their answers, they at the time of filing their answers actually knowing her, and therefore she was not to them then unknown, so that she could not have been one of these referred to in their answers as "divers other persons to the defendants unknown," and because the whole matter relating to the alleged conspiracy is immaterial and irrelevant, the real question involved in these cases being whether John W. Hillmon did or did not die in

March, A. D., 1879. Practically speaking and when considered with the evidence before the Court and the statements of parties in their opening statements to the Court and jury—the practical question being whether the corpse mentioned by the witnesses as having been brought in the spring of 1879 from Medicine Lodge to Lawrence, was or was not the corpse of John W. Hillmon.

The Court reserved its ruling upon said objection.

The defendants and each of them next offered in evidence the written testimony of J. H. Blythe, given upon the trial of the causes in 1896. The plaintiff thereupon admitted that Blythe is dead, but objected to the entire deposition on the ground that it is incompetent, irrelevant and immaterial, hearsay and not within the definition or meaning of the law concerning declarations of co-conspirators. The Court reserved its ruling upon the objection.

And thereupon, on Friday, November 10, 1899, the Court rendered its decision upon the objections of plaintiff to the deposition of James S. Crew and the testimony of J. H. Blythe in the following words:

As counsel for defendants has said, it is not necessary to plead an element of illegality in a transaction, at least not in every instance, to enable the defendant to avail himself of such illegality. But where it is contended that the
1991 illegality of others attaches to and affects the rights of a party to the suit, I have yet to learn that it is not necessary to connect the plaintiff or other party to the suit with such illegality, so I cannot see wherein the decision of the Supreme Court of Kansas in the tax matter, where the plaintiff confessed upon the witness-stand that he put securities out of his own name in order to defraud the state of its revenue has any application whatever to this case. The answers in these cases are substantially the same in respect of [of] the charge of conspiracy. In the answer of the Mutual Life it is said: Said defendant further answering says, that on or before the 30th day of November A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin, and directs other persons to the defendant unknown, unlawfully and fraudulently confederated together to cheat and defraud this defendant by procuring a large amount of insurance to be taken on the life of said Hillmon, to wit: then mentioning policies—that thereafter and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin, not others—falsely and fraudulently pretended and represented unto this defendont and others that said Hillmon was dead, etc.

It is one of the cardinal rules of interpretation that a pleading must be taken most strongly against the pleader; he is not entitled to have anything ambiguous in a pleading construed in his favor. Now, if it is necessary at all to connect Mrs. Hillmon with this conspiracy, it must be done in more affirmative and more positive language. It is said by Mrs. Hillmon's counsel that the evidence in this case has disclosed that practically all that was known of Mrs. Hillmon's connection with the case was known to the defendant companies at the time of the preparation of these answers. It is not necessary to consider whether that is so or not, because the very pleadings that were filed in this case show that if it had been intended to charge Mrs. Hillmon as a party to this conspiracy everything that was necessary for that purpose to show her connection with the transaction appeared right in her petition; that is to say, the policies that were sued upon were made out for her exclusive use and benefit, she was the sole beneficiary under the policies, and upon the alleged death of Hill-
1992 mon she made out and sent to the companies the purported proofs of loss. Now it goes without saying that no party alleged to be connected with this conspiracy could have touched a dollar of that money without the participation, without the consent and assistance of Mrs. Hillmon. Now, in all candor and in all fairness, with that knowledge before counsel, if it were intended to charge this plaintiff with being a party to a conspiracy that might involve murder, that at least involved fraud, perjury and subornation of perjury, her name should have been mentioned affirmatively as a party to this conspiracy. A conspiracy or a charge of conspiracy is not, as Judge Isham would have it, an ambulatory thing that runs indefinitely and vaguely through the progress of the case, and allows counsel to attach any party to that conspiracy at some indefinite time during the progress of the trial or investigation. If at any time during the course of the investigation that lead up to the trial counsel had then learned that sufficient had been developed that they did not know before that justified them in charging Mrs. Hillmon, counsel could have obtained an order of the court authorizing an amendment of their pleadings.

I have been somewhat curious to know how the other judges who have tried this case look at this question of consipracy. I read last evening and this morning the only three charges I have been able to procure. One was the first by Judge Foster, the next that of Judge Shiras and the last that of Judge Williams.

By Mr. Isham: We have Judge Brewer's.
By the Court: That has not been furnished me.

Judge Foster dismisses it altogether, that is to say, it is referred to but once in his charge, and that in a recitation of the Insurance companies' claim in their answer, and when he refers to it in that way, he simply says that the Insurance Companies' claim that there was a conspiracy to do certain things mentioning them, between Hilmon, Brown and Baldwin. That is all the mention, so far as I can recall, and I read it with that idea in view, that was made of this question of conspiracy.

Judge Williams in 1896, in reciting what the contentions of the parties were as shown by their pleadings, recited
1993 that the defendants claim that there was a conspiracy between Brown, Hilmon and Baldwin—not and others; Mrs. Hillmon's name was not mentioned in connection with the conspiracy, and Judge Williams said that if there was a conspiracy, if the jury found that there was a conspiracy as charged, that the fact of such conspiracy might be considered as evidence tending to determine the identity of the body; in other words, it was what I suggested to counsel perhaps a week ago, that possibly the existence of a conspiracy might have an evidential weight upon the question of identity.

Judge Shiras, in referring to the contentions of counsel as shown by their pleadings did use the word "and others;" that is to say, he said that it was contended by the Insurance Companies in their answers that there was a conspiracy between Brown, Hillmon, Baldwin, and others, but in no [please] is Mrs. Hillmon's name connected with that conspiracy and Judge Shiras's charge; but Judge Shiras says that: if the jury believe from the evidence that there was a conspiracy, and that certain other things, I have forgotten them now, existed, and that Hillmon was alive, then their verdict should be for the defendants; but it all came down to the question whether Hillmon was alive at the time the suits were brought, and the recitation as regards the conspiracy might well have been left out. Now a conspiracy may be an unlawful combination through possible murder, perjury or subornation of perjury to create a pretended cause of action; that, it is charged, was the conspiracy in this case—possibly not that it involved murder in the first instance, but that murder was the result of it. Now, there might be a conspiracy as was contended by counsel for plaintiff in this case and argued vehemently at one time—a conspiracy to prevent the enforcement of a just cause of action; in other words, you will recall that Mr. Wheat contended that there was a conspiracy in this case between Tillinghast, Wiseman, Selig, Munn and possibly Buchan. To do what? By the perjury and subornation of perjury to suppress the plaintiff's evidence and to make it appear that there was a body other than that of Hillmon. They sought to introduce in evidence conversations that occurred at Mrs. Hillmon's house.

Counsel objected to the introduction of that evidence,—as Judge Isham would say,—not that it was not pleaded—because Judge Isham says that it is not necessary to plead
1994 those things—counsel for the defendants objected to the introduction of those things, and the court excluded them because it was thought that they had no place in this case.

Now, you have got to look at this conspiracy question from all views. It is not a thing that can be availed of on one side to the exclusion of the other. Now, if as I believe, the allegation in the answers that there was a conspiracy between Hillmon, Brown, Baldwin and others to do certain things, is not a sufficient allegation to include Mrs. Hillmon, the plaintiff, and if this is a contract between the insurance companies and Mrs. Hillmon, what is the effect of that conspiracy in this case? That perhaps has given me more trouble than all the other questions connected with this case. I believe, as I said perhaps a week ago, that if the jury believe that there was a conspiracy between others than the plaintiff to substitute the body of another than Hillmon, that that might be taken into consideration as tending to show the identity of this body, but that does not authorize the admission of declarations of alleged conspirators. The admission of the declarations of alleged conspirators is upon this point of law; first, the conspiracy is established by extraneous evidence. A conspiracy can never be established by acts and declarations of the conspirators. The acts and the declarations of the conspirators are not admissible for the purpose of establishing the conspiracy; but the conspiracy having been established and a prima facie case made then the declarations of the acts of one conspirator are admissible, not against a party who is not a party to that conspiracy, but as against each other, and that upon the theory that the acts and declarations of one of the conspirators are pursuant to the conspiracy, and they must be within those lines; they must be in aid of the conspiracy; then the acts and the declarations of one conspirator in aid of the carrying out of the conspiracy are evidence against the others, and the application of that would be confined necessarily to a proceeding against one of the conspirators, or a proceeding which one of the conspirators was a party. Consequently I believe that the declarations of Levi Baldwin have no proper place in this case.

I do not desire to put it upon that basis altogether. I
1995 believe that it is objectionable upon the other grounds mentioned by the plaintiff. If counsel will go through these depositions and these transcripts and will eliminate such portions as are within this ruling, then the balance may

be read. To which action and ruling of the court the defendants and each of them then and there duly excepted.

And thereupon the defendant read in evidence pursuant to the ruling of the court the testimony of J. H. Blythe heretofore offered, which testimony is in words and figures as follows, to wit:

J. H. Blythe, called on behalf of the defendants, being sworn, testified as follows:

Direct Examination

By Mr. Green:

Q. State your name? A. J. H. Blythe.

Q. Where do you reside? A. At Argentine, Kansas.

Q. What is your business? A. I am a lawyer.

Q. Where were you residing in the years 1878 and 9?

A. I was residing in Leavenworth County, at Tonganoxie.

Q. What was your business there? A. Practicing law.

Q. Did you do any other business in connection with it?

A. Yes, sir, I represented a fire insurance company, I believe, or two or three.

Q. Did you know one Levi Baldwin at that time?

A. I did, yes, sir.

Q. Where did he reside?

A. About four miles west of Tonganoxie, four or five miles west of Tonganoxie.

Q. Did you know one John W. Hillmon?

A. I became acquainted with him about that time, yes sir.

Q. Where did you make his acquaintance?

A. I think on the street. I was introduced to him either there or in my office, I don't remember which; I think it was on the street.

Q. Do you remember who introduced you?

A. Yes, sir, Mr. Baldwin, Levi Baldwin.

Q. Now, was Mr. Baldwin and John W. Hillmon at your office at any time? A. Yes, sir.

Q. About when was that do you remember?

A. I can't state exactly, but I think it was in the fall of 1878 sometime; I am not sure but what it might have
1996 been in the spring, but I think it was in 1878.

Q. What business if any, did they have at your office?

A. Well, to answer that I would have to go back a little to explain it. Mr. Baldwin met me on the street—

A. Well they came to my office together on one occasion and asked me concerning life insurance.

Q. What conversation did you have with him, Mr. Blythe, in regard to life insurance?

A. They talked to me a number of times about insurance; how to get it and if I was acquainted with good companies and could recommend a good company to insure in; and how they should make application to get insurance and how payments should be made and whether a person could travel in different countries and different climates without forfeiting the insurance, and various questions of that kind; I don't remember exactly; about such questions as a person would naturally ask who wanted to obtain insurance.

Q. What, if anything, was said about how to collect insurance?

A. They talked to me a number of times about insurance. They asked me if it became necessary to collect insurance what proceedings would be had to get at it, and what time it would take and so on, such questions as a person would naturally ask about such things, business; of course, I can't state the exact words. It is sixteen years ago or more. I could not give the exact words used, but this is the substantial conversation.

Q. Now were you representing any life insurance company? A. No, sir.

[—] Had you had any conversation with either of these parties prior to that time they came in your office in reference to this subject? A. Yes, sir.

Q. Mr. Blythe, had you had any talk with either of these parties prior to that time in regard to the subject-matter of life insurance? A. Yes, sir.

Q. When?

A. Well, a few days before that—I can't say exactly, along probably a week probably a week or ten days.

Q. Where was it?

A. I think on the street. That was the time with Mr. Baldwin, alone, however.

Q. With which of these parties? A. Mr. Baldwin.

1997 Q. What was said by Mr. Baldwin on that occasion.

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection sustained, defendants and each of them duly except.

A. Mr. Baldwin on that occasion asked me if I knew anything about life insurance and about the companies; that a friend of his wanted to get some insurance and he wanted to know if I could recommend some good company to him and I told him how to do it.

Q. Did he say a friend?

The plaintiff objects to the question as incompetent, irrelevant, immaterial and hearsay. Objection sustained, defendants and each of them duly except.

A. No, sir, not on that occasion. I think the gentleman said it was a relative of his or connection; I don't know who it was; I didn't know Mr. Hillmon then.

Q. That was a few days before these parties came to your office?

The plaintiff objects to the question as incompetent, irrelevant immaterial and hearsay. Objection sustained, defendants and each of them duly except.

A. Yes, sir.

Cross-examination

By Mr. Hutchings:

Q. You live at Tonganoxie?

A. Yes, sir, I lived at Tonganoxie at that time.

Q. You knew Mr. Baldwin there as a large farmer there in that neighborhood? A. Yes, sir, he was a cattle dealer.

Q. And he and Mr. Hillmon came there and asked you such questions as you would naturally expect such persons to ask desirous of obtaining life insurance? A. Yes, sir.

Q. And no more?

A. Yes, sir, there was other conversation.

Q. I mean about life insurance? A. I think not.

Q. They just asked you such questions as you would expect a man to ask who wanted to get life insurance in a good company?

A. Yes, sir, a little more than that, because Mr. Baldwin was a man of good understanding and asked pertinent questions.

Q. Didn't you state to the jury that they asked such
1998 questions as a man would ask who wanted information on that subject?

A. Yes, sir, a man of ability as he was, I would not expect an ordinary man to ask such questions. He was not an ordinary man.

Q. And as to the time they asked this; what time did you say it was?

A. I can't state the exact time, but I think it was in 1878.

Q. What time of the year?

A. I think it was in the fall; might have been spring, I know it was chilly weather, but whether it was spring or fall I could not state.

Redirect Examination.

Q. You were asked if Mr. Baldwin was not a large farmer residing in your vicinity. I will ask you further if you didn't know at that time that he was heavily involved?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection overruled. The plaintiff excepts.

A. Well, I don't know whether I ought to explain to the court why I should answer that question. Mr. Baldwin in certain business matters at that time was a client of mine.

Q. That is for you to know whether you will answer or not.

A. I knew a good deal about his business and I knew it in a financial way. I knew he was a large farmer and doing a large business.

Q. Well, you may state whether or not he was not largely indebted and in embarrassed circumstances at that time?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. The court overruled the objection, to which ruling the plaintiff then and there duly excepted.

A. He was involved, yes, sir.

The question was read to the witness and he answered further: I suppose he was.

The plaintiff moved to strike out the answer because it is not evidence but a mere supposition of the witness. The court sustained the motion, to which action and ruling of the court the defendants and each of them duly excepted.

Q. Is it a fact that his creditors were pressing him?

No answer.

Q. You were in a condition to know and ought to know in regard to that matter, Mr. Blythe? A. Yes, sir.

1999 Recross-Examination.

Q. You say you were his attorney?

A. In some matters.

Q. In relation to his financial matters what information you had you got as his attorney? A. Yes, sir.

Witness excused.

And thereupon the defendants again offered to read in evidence the deposition of James S. Crew, heretofore offered, whereupon the court said, "The deposition of James S. Crew is excluded as being within the decision of the court yesterday excepting certain preliminary questions, and they become immaterial in view of the exclusion of the remainder."

To which action and ruling of the court in excluding the said deposition of James S. Crew the defendants and each of them then and there duly excepted. Said deposition so excluded is in words and figures as follows, to wit:

Deposition of James S. Crew taken before me, E. W.
2000 Levy, a notary public within and for the city and county of San Francisco, state of California, between the hours of 10 A. M. and 6 P. M. of the 19th day of August, 1892, at the

law office of Lucius S. Solomons, in the said city and county, pursuant to the annexed notice, to be read in evidence on behalf of the defendant in said action. James S. Crew, of lawful age, was by me first duly examined cautioned and solemnly sworn to testify to the truth, the whole truth and nothing but the truth, and being so sworn, testified as follows:

Testimony of James S. Crew, called for defendant—sworn.

Mr. Green:

1 Q. Will you state your name, age and place of residence?

A. James S. Crew, age 49 years, residence Oakland, California, at present.

2 Q. Where were you residing in the spring of 1879?

A. Lawrence, Kansas.

3 Q. What business were you engaged in, if any, at that place.

A. Bookseller and stationery, and I was also at that time the receiver for the Simpson Bank.

4 Q. Do you know the plaintiff in this action?

A. I know her by sight, yes, sir.

2001 5 Q. Are you acquainted with one Levi Baldwin?

A. I am.

Q. Were you acquainted with him in the year 1879?

A. I was and for a long time before.

6 Q. Did you have any business transaction with him in that year, and if so, state in general what it was.

7 A. I was receiver of the Simpson Bank. I had 2 or more notes of Levi Baldwin as receiver of the Simpson Bank for collection.

8 Q. You may state whether those notes were due at that time?

A. They were. They had been due for some little time.

9 Q. You may state what, if anything, you had done towards collecting those notes?

A. My recollection of it is that there were 3 notes, 2 of which were secured by mortgage on real estate, and one chattel mortgage on live stock. I had talked of taking action for the foreclosure of these various mortgages and I had a great many consultations with Baldwin, both by going to his house which was about 12 miles north of Lawrence, and at my place of business, the office of the Simpson Bank. I had been unable to collect either principal or interest.

10 Q. About what time in the spring of that year was this, and what month?

A. Well, it was running through a number of months before the spring of 1879. The notes were due some time prior to that, and it began as was necessary at the time that the notes were due.

11 Q. You may state if you had any conversation with Mr. evi Baldwin as to how his indebtedness with the Simpson ank arose? A. I had.

12 Q. You may state what that conversation was?

A. I cannot give the words of the conversation, nor per- ips all of the items, which made up this indebtedness, but nong others was the statement that a part of this money had een furnished to insure the life of John W. Hillmon.

13 Q. About what time in the spring was this conversa- on?

A. It was near the 1st of March, I would say, shortly after y return to Illinois, which was the 20th of February.

14 Q. Do you remember of the circumstance of the reputed eath of John W. Hillmon? A. I do.

15 Q. Can you state about when you first heard of that rcumstance?

A. It was within a few days of the time of his death.

16 Q. In the latter part of March?

A. Yes, sir, the latter part of March.

17 Q. You may state if you had a conversation with Levi aldwin in regard to this indebtedness of his to the Simpson Bank, after you had heard of the reputed death of Hill- 902 mon? A. I had.

18 Q. State under what circumstances you had at, and the conversation as nearly as you can?

A. It was in the morning. I was in my store, and Mr. aldwin came in [eery] hurriedly, and stated to me to let our atters rest, as he was then on the way west after the body John W. Hillman, that he had arranged for a portion of e life insurance on the life of Mr. Hillman, and that as soon he got that, he would be able to straighten up all his affairs.

19 Q. What amount, if any, did he say he was to have of is insurance on the life of Hillmon?

A. My recollection is $10,000.

20 Q. You may state if you know what Levi Baldwin's nancial circumstances were at this time?

A. I tried to acquaint myself thoroughly with that in my tempts to collect his indebtedness, and I found him in very raitened circumstances, having quite an amount of prop- ty, but all mortgaged, and mostly mortgaged twice—first d second mortgages.

21 Q. You may state if you know whether or not this in- btedness was pressing him at this time?

A. It was severely.

JAMES S. CREW.

2003 The defendants and each of them next offered in evidence the testimony of Alexander Carr given upon the trial in 1896.

No objection was made to the reading of the same upon the ground of Mr. Carr's citizenship or whereabouts, but the plaintiff objected to the reading of said testimony because the same is incompetent, irrelevant and immaterial. The court overruled the objection, to which ruling, the plaintiff duly excepted.

Said testimony was thereupon read to the jury, and is in words and figures as follows, to wit:

Alexander Carr.

Alexander Carr, called on behalf of defendants, being sworn, testified as follows:

Direct Examination

By Mr. Green:

Q. Mr. Carr where do you reside?

A. Leavenworth county.

Q. How long have you resided in Leavenworth county?

A. About 19 years.

Q. What portion of Leavenworth county do you reside in?

A. In Tonganoxie Township—western part.

Q. Were you acquainted with one Levi Baldwin who lived near Tonganoxie? A. Yes sir.

Q. Do you remember about when you became acquainted with him?

A. I was acquainted with him,—about 1877 I got acquainted with him.

Q. Did you have any business transactions with him?

A. Yes sir.

Q. What was your business along in 1878-9?

A. Farming and feeding cattle and buying stock.

Q. Now do you remember of being with Mr. Baldwin at the time, along say the month of March, 1879? A. Yes sir.

Q. Where did you see him then?

A. Me and him was out buying stock together.

2004 Q. Now do you remember when that was?

A. It was in March—we started about March 10th.

Q. Now did you know Mr. John W. Hillmon?

A. Yes sir.

Q. Now you may state, if you please, what conversation, if any you had with Mr. Baldwin in regard to any business transaction that he and Mr. Hillmon were in?

The plaintiff objected to the question as incompetent, irrelevant, immaterial, and calling for hearsay evidence. The

court sustained the objection, to which action and ruling of the court, the defendants and each of them then and there duly excepted.

A. I had one or two; he was talking to me a couple of times about his and John Hillmon's business—speaking about John Hillmon as much as a couple or three times.

Q. On that trip? A. Yes sir.

Q. Now you may state what he said?

The plaintiff objected to the question as incompetent, irrelevant, immaterial and calling for hearsay evidence. The court sustained the objection, to which action and ruling of the court, the defendants and each of them then and there duly excepted.

A. Well, he was talking one day about him and Mr. Hillmon going into a sheep ranch together, talking about going into a sheep ranch together; and one day he was speaking about that he was under "brogue" with John W. Hillmon, and he said him and Hillmon had a scheme "under brogue", and he said if that worked out all right that he was all right.

Q. Now you may state Mr. Carr whether,—Had you at the time loaned Mr. Levi Baldwin any money?

The plaintiff objected to the question as incompetent, irrelevant, immaterial, and calling for hearsay evidence. The court sustained the objection, to which action and ruling of the court, the defendants and each of them then and there duly excepted.

2005

A. I let him have money on that trip, and then after that

Cross-examination

By Mr. Hutchings: I want to ask the witness one question: You testified at the last trial of this case? A. Yes sir.

Witness excused.

2006 Each of the defendants ask leave of the Court to amend their answers instanter by charging Mrs. Hillmon with being a conspirator, with Baldwin, Hillmon and Brown, to cheat and defraud the defendants by the procurement of the policies, etc.

By the Court: I cannot do that at this late day.

To which action and ruling of the Court the defendants and each of them then and there duly excepted.

2007 The defendants, and each of them, next read in evidence, the deposition of Daniel Walters, taken before Sabert M. Casey, a Notary Public at Fort Madison, Iowa, on May 25" & 26" 1881.

Said deposition is in words and figures as follows, to wit:

2008 Daniel Walters, a witness on behalf of defendant being duly sworn testified as follows:

No. 1 Question. State your name, age occupation and place of residence?

Ans. My name is Daniel Walters; age, 54 years, 55 years; am a gardner; reside at Fort Madison, Lee County, Iowa.

The hour of adjournment having arrived, it now being seven o'clock the taking of further evidence in this case is now adjourned until 8 o'clock to-morrow morning, Thursday May 26th, 1881, at same place.

May 25th, 1881.

[Seal] SABERT M. CASEY,
Notary Public.

The hour to which the taking of these depositions was adjourned, to wit, 8 o'clock a. m. Thursday May 26th, 1881, having arrived, the testimony of Daniel Walters was resumed. John Hutchings, Esq., appearing for the plaintiff and J. W. Green for the Defendant.

Question 2. What country are you a native of?

Ans. Germany.

Ques. 3. Are you a married man? Ans. Yes sir.

Ques. 4. Of what country is your wife a native?

Ans. Germany.

Ques. 5. When did you come to this country?

2009 Ans. In 1849.

Ques. 6. Have you any children, and if so, how many?

Ans. Four children living.

Ques. 7. You say you have four children living, have you lost any by death? Ans. I lost three.

Ques. 8. Give their names?

Ans. The first two I have forgotten, they died as babies very young. The last ones name was Frederick Adolph.

Ques. 9. How old would Frederick Adolph be if living now?

Ans. Well he was born in 1855, twenty-six years old.

Ques. 10. When did you see Frederick Adolph last living?

Ans. It was when he started for the West in March 1877 or 1878. I think it was in 1877, my memory is so poor as to dates and names I can't recollect.

Ques. 11. Where was he when you last saw him?

Ans. At home in Fort Madison Iowa.

Ques. 12. Were you in the habit of hearing from Frederick Adolphus after he left home, and if so in what manner?

Ans. I heard regularly by letters every week or two.

Ques. 13. Up to what time?

Ans. I can't recollect the date, it was the first week in March, 1879 since we last heard from him.

Ques. 14. Where was he when you last heard from him?

Ans. In Wichita, Kansas.

Ques. 15. Will you describe the personal appearance of Frederick Adolph Walters?

Ans. He was a heavy built man, about five feet ten or eleven inches high, weight about one hundred and sixty (160) pounds, dark wavy hair, hazel eyes, nose heavy, sandy mustache. I think that is all.

Ques. 16. State as to the shape of the nose, as to whether it was of the roman or grecian type, State what the shape of his nose was?

Ans. Roman I suppose you call it.

Ques. 17. State as to his cheek bones whether they were low or prominent? Ans. Prominent.

Ques. 18. State whether or not he was broader through the the cheek bones than he was through the temples, or the broader part of his forehead?

Ans. Broader through the cheek bones.

Ques. 19. You have stated that his hair was wavy, was it slighty wavy or was it very wavy, and if so state the extent and how you know it? Ans. Very wavy, nearly curly.

Ques. 20. Will you describe his teeth; what was the character of his teeth?

2010 Ans. Sound, large white teeth, he took considerable pains with them.

Ques. 21. Will you describe his hands and feet?

Ans. Large heavy and long, like a large man will have. He wore a No. nine boot.

Ques. 22. State whether his fingers were long or short in comparison with the rest of his hand.

Ans. Long.

Ques. 23. What was his occupation?

Ans. Cigar maker.

Ques. 24. You have stated that you last heard from your son in Wichita, Kansas, about the first week of March 1879, what efforts if any have you made since that time to discover his whereabouts and whether living or not?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial.

The Court sustained the objection to that part of the answer included within parenthesis.

To which ruling of the Court the defendants and each of them at the time duly excepted.

Ans. Since his letters failed to come, we were anxious that something happened to him he was a member of the odd-fel-

lows. We made inquiries through his lodge about him, without any result, and then I made inquiries through my lodge the masonic lodge, to Wichita, Kansas, (which resulted in exchanging letters between the masters of the lodge at Fort Madison and the Master of the lodge there. At the same time the masters corresponded together and exchanged photographs, in which finally we recognized our son, as a dead man).

Ques. 25. Look at the photograph or picture which is now shown you by J. W. Green defts. attorney, and upon which he now requests the notary to place his official signature and seal and mark Exhibit "A," and state whether you recognize it to be the picture of any one you have ever seen, and if so, as the picture of whom?

Ans. It is the picture of my son Frederick Adolph Walters.

Ques. 26. You may state whether or not it is the picture of the person whom you have described?

Ans. It is.

The defendant now offers the picture or photograph marked Exhibit "A," in evidence. (Side view of cadaver.)

Cross-Examination

By counsel for Plaintiff:

Ques. 27. When did you come to Fort Madison, Iowa?

Ans. In 1853.

Ques. 28. Have you resided in the City of Fort Madison ever since? Ans. Yes sir.

2011 Ques. 29. Where did you reside previous to 1853, after you came to this country from Germany?

Ans. In St. Louis, Missouri.

Ques. 30. Were you a married man when you came from Germany? Ans. No sir.

Ques. 31. How old were you when you came from Germany? Ans. Twenty-three years.

Ques. 32. What part of Germany did you come from?

Ans. Grand Duchy of Baden.

Ques. 33. When were you married? Ans. In 1851.

Ques. 34. Where? Ans. St. Louis.

Ques. 35 Is the wife you then married still living?

Ans. Yes, sir, she is now living with me.

Ques. 36. How many children did you say you had lost?

Ans. Three.

Ques. 37. Two of these you say died in infancy, had they any names?

Ans. They had but I have forgotten one of them at least.

Ques. 38. Was the one whose name you have forgotten a boy or a agirl? Ans. A girl.

Ques. 39. What was the name of the other infant?

Ans. Adolph.

Ques. 40. Was it a boy? Ans. Yes sir.

Ques. 41. Were these two infants your first children?

Ans. No sir.

Ques. 43. About how long ago did you die?

Ans. Well I could not tell the year, as I told you before my memory is not good as to figures.

Ques. 48. About how long ago did they die.

Ans. About in 1856, one died in 1854, the other I think in 1856. I have my family record and can shown the dates exactly by it.

Ques. 44. What is the names of your other children, the four you refer to as now living?

Ans. Charles Robert Walters; Elizabeth Walters, Fanny Walters; and Anna Walters.

Ques. 45. Are they all unmarried? Ans. No sir.

Ques. 46. Which ones aremarried?

Ans. Elizabeth, my oldest daughter is married, her married name is Reifenach.

Ques. 47. Any of the rest married?

2012 Ans. No, sir.

Ques. 48. Where is Charles Robert Walters?

Ans. In Rich Hill, Missouri.

Ques. 49. Is he your oldest son? Ans. Yes, sir.

Ques. 50. What is his age? Ans. About 28 or 29.

Ques. 51. Is he the oldest of the family? Ans. Yes, sir.

Ques. 52. Was he the first child you had born?

Ans. Yes, sir.

Ques. 53. Which one is the youngest? Ans. Annie.

Ques. 54. Which one next to Charles Robert?

Ans. Elizabeth.

Ques. 55. Which was next to Elizabeth? Ans. Fannie.

Ques. 56. You speak of one Frederick Adolph, where was he born? Ans. At Ft. Madison.

Ques. 57. What was his business? Ans. A cigar maker.

Ques. 58. Where and of whom did he learn his trade?

Ans. Of Charles Hinzie, Fort Madison.

Ques. 59. When did he commence learning this trade with Hinzie?

Ans. About 1872-3-or 4. I could not tell exactly.

Ques. 60. During the time he was learning his trade did he board at your house? Ans. Yes, sir.

Ques. 61. Previous to the time he went to learn his trade of Hinzie what did he do?

Ans. He went to school and worked on my farm.

Ques. 62. Where is your farm?

Ans. One mile east of here on the Burlington road.

Ques. 63. How long have you had that farm?

Ans. Well about twenty years.

Ques. 64. Did your son Frederick Adolph ever do anything else or follow any other business but what you have stated?

Ans. No, sir.

Ques. 65. While working on the farm was he ever in the habit of driving horses? Ans. No, sir.

Ques. 66. Did you ever know of his being kicked by a horse?

2013 Ans. Yes, he was either kicked or thrown off of a mule.

Ques. 67. How much was he hurt?

Ans. Nothing at the time, we didn't know it until he told it himself some months afterwards.

Ques. 68. Do you know whereabouts on his body he was kicked? Ans. No, sir.

Ques. 69. Do you know whether any mark was left on his body resulting from that kick? Ans. No, sir.

Ques. 70. Did you ever know of his being bitten by a dog?

Ans. Yes, sir.

Ques. 71. On what part of his body was he bitten?

Ans. On one of his calves on one of his legs I don't know which.

Ques. 72. About how far up on his leg, from his heel.

Ans. Near under the calf. I can't tell whether it was six inches or a foot from his heel.

Ques. 73. When was he so bitten?

Ans. As a boy about eight or ten years old.

Ques. 74. Did you see the wound after he was bitten?

Ans. Yes, sir.

Ques. 75. Do you remember of looking at it after it healed up? Ans. Yes, sir.

Ques. 76. Did you see it frequently after it healed up?

Ans. Yes, sir.

Ques. 77. Do you remember of seeing the scar after he was almost grown up? Ans. Yes, sir.

Ques. 78. When was the last time you saw that scar, resulting from the bite of that dog?

Ans. I could not tell within five or eight years when I saw it last.

Ques. 79. How long do you think it was before he went away from home.

Ans. Well it might have been five or six years before, since I saw the scar last.

Ques. 80. Was the bite a pretty severe one?

Ans. It was at the time when he was a boy.

Ques. 81. Did you ever know of his having fallen in a barn down from above, at any time? Ans. No, sir.

Ques. 82. Did you ever know of his receiving any injury by falling or being accidentally hit by some machinery while he worked at the farm? Ans. No, sir.

Ques. 83. While he was at work learning his trade did you ever know of or have any intimation of his having cut his hand by a knife used in making cigars.

2014 Ans. No, sir; not to any importance that I know of.

Ques. 84. Don't you know that he had a scar on the back of his hand that was occasioned by the cut of a knife, on the back side of his hands or fingers.

Ans. No, sir, I do not.

Ques. 85. Mr. Walters do you remember of your son Frederick Adolph Walters being vaccinated at any time when he was a boy? Ans. Yes, sir.

Ques. 85. Do you remember whether it worked or not?

Ans. Yes, sir; it worked well.

Ques. 87. About how old was he when this was done?

Ans. From one to three years old, I suppose.

Ques. 88. Was he vaccinated in more than one place?

Ans. No, sir.

Ques. 89. Can you tell which arm the vaccination was made on? Ans. No, sir.

Ques. 90. You stated that when you last saw him, that it was in March, 1877 or 1878, when he started for the west, was he well, in good health at that time when he left Fort Madison and left your place? Ans. Yes, sir.

Ques. 91. Do you know where he went to when he left here, if so, state.

Ans. I think he went directly to Kansas.

Ques. 92. Can you tell from what point you first received news from him?

Ans. Not exactly, without having the letter on hand.

Ques. 93. Can you tell when you first heard from him after he went away? Ans. The first two weeks after.

Ques. 94. How did you hear from him? Ans. By letters.

Ques. 95. To whom?

Ans. I don't know whether to myself or his sister.

Ques. 96. Do you know where those letters are that you received from him after he went away?

Ans. Some are at home and some are lost.

Ques. 97. Who had charge and possession of these letters after they were received? Ans. My daughter Fannie.

Ques. 98. Does your daughter Fannie live with you?

Ans. Yes, sir.

Ques. 99. Do you know where the letters are that were received from Wichita? Ans. Yes, sir.

Ques. 100. Where are they?

2015 Ans. Fannie has one and Miss Kasten has one, that's all.

Ques. 101. Are those all the letters you know of received from Wichita? Ans. They are all.

Ques. 102. Where does Miss Kasten reside?

Ans. Up on Second street in Fort Madison.

Ques. 103. Who was the master of the masonic lodge here you referred to in your direct examination?

Ans. W. C. Hobbs.

Ques. 104. Where does he reside? Ans. St. Louis.

Ques. 105. Where did he reside at the time you said he communicated with the master of the lodge at Wichita?

Ans. Fort Madison.

Ques. 106. Did you ever see any letters that were written from Wichita here in relation to your son Frederick Adolph except the one to your daughter Fannie and the one to Miss Kasten? Ans. No, sir.

Ques. 107. Can you now state what month and year it was your son left? Ans. In March, 1876 or 1877.

Ques. 108. It was in the month of March you are sure?

Ans. Yes, sir.

Ques. 109. Where are the letters that you received from your son, after he left, before he went to Wichita?

Ans. At home.

Ques. 110. All of them? Ans. No, some are lost.

Ques. 111. Do you know how many are lost?

Ans. No, sir.

Ques. 112. Do you know how many you have that are not lost? Ans. No, sir.

Ques. 113. Do you know how long it was after your son left home, up to the time you say you received the last letter from him from Wichita? Ans. One or two years.

Ques. 114. Can you not state nearer than that?

Ans. No, sir, I have stated he left home in 1876 or 1877.

Ques. 115. Mr. Walters you never made a measurement of your son's height? Ans. Not positive, no, sir.

Ques. 116. Did you ever weigh him at or about the time he left? Ans. Yes, sir.

Ques. 117. When did you weigh him?

Ans. I never kept a record. I don't know. Within the last year or two when he was home I saw him weighed.

Ques. 118. When did you weigh your son Frederick Adolph Walters yourself? Ans. About in 1876.

2016 Ques. 119. What month in 1876?

Ans. I could not tell the month.

Ques. 120. Where did you weigh him? Ans. At home.

Ques. 121. What did you weigh him with?

Ans. With a standard scales.

Ques. 122. What kind of standard scales?
Ans. I don't know the name of it.
Ques. 123. Who did the scales belong to?
Ans. To myself.
Ques. 124. Where are these scales now?
Ans. I sold them to Ed Hoffman.
Ques. 125. How much did your son weigh at that time you weighed him yourself?
Ans. One hundred and some sixty-odd pounds.
Ques. 126. Did you keep any memorandum of that weight?
Ans. No, sir.
Ques. 127. When was your attention first called to the fact of your weighing him in 1876 since?
Ans. I don't understand the question.
Ques. 128. Since you weighed your son in 1876, when was your attention called to the transaction of weighing him?
Ans. Nobody ever called my attention to it.
Ques. 129. Have you ever had any conversation with anybody about his weight since he left Fort Madison?
Ans. Yes.
Ques. 130. Who have you had such conversation with?
Ans. With his brother Robert, with his old comrades and the family generally.
Ques. 131. Have you had a conversation with anybody else in regard to his weight?
Ans. I suppose I did. I could not mention anybody especially.
Ques. 132. In any of these conversations was anything said about your weighing him in 1876? Ans. I don't know.
Ques. 133. You stated that he had a Roman nose as distinguished from a Grecian nose, what do you mean by Roman nose?
Ans. I suppose I mean what everybody else means by a Roman nose.
Ques. 134. What do you understand or mean by a Roman nose?
Ans. It is the bend that we call a Roman nose. The witness here showed that a Roman nose is one that is not straight but bends up a little.
Ques. 135. What do you understand or mean by a
2017 Grecian nose?
Ans. I don't know, I am not much of a judge of noses, there are so many styles of noses.
Ques. 136. Was your son's nose crooked?
Ans. Yes, sir.
Ques. 137. How was it crooked?
Ans. I could not tell how much.

Ques. 138. How do you mean by crooked, do you mean it wsa crooked sideways or on his face or otherwise?

Ans. It was not crooked sideways, but only bent as stated above, like a Roman nose generally is.

Ques. 139. You stated his mustache was sandy, was his mustache light or dark in color?

Ans. It is a little lighter than his hair was.

Ques. 140. Was his hair sandy? Ans. No, sir; dark.

Ques. 141. Was his hair on his head sandy at all?

Ans. No, sir.

Ques. 142 Did he generally call his hair black?

Ans. No, sir.

Ques. 143. What color did you call his hair?

Ans. Dark brown.

Ques. 144. Was it coarse or fine? Ans. Coarse.

Ques. 145. Did you ever examine his teeth after he was grown up? Ans. Not examine them; I saw them.

Ques. 146. You saw them just as you would see anybody's with whom you were talking and saw laugh?

Ans. Not exactly.

Ques. 147. How do you know he wore No. 9 boots?

Ans. Because I just know it.

Ques. 148. Did you ever measure his boots to see what the length of them were? Ans. No, sir.

Ques. 149. Do you know who made his boots the last years he lived here?

Ans. Not exactly. It could be found out if necessary.

Ques. 150. Have you stated now all the marks or scars that you knew of on your son's body, marks or scars.

Ans. I think so, all that was asked.

Ques. 151. Do you know of any other marks or scars that were upon your son's body, more than you have already stated? Ans. I do not.

Ques. 152. Mr. Walters, do you remember or did
2018 you ever know of any scar anywhere on your son's forehead? Ans. No.

Ques. 153. When did you first see the photograph marked Exhibit "A" shown to you this forenoon by defendants counsel, and by him offered in evidence.

Ans. This morning.

Ques. 154. How long did you look and examine that photograph before you gave your testimony in regard to it?

Ans. About only one minute.

Ques. 155. Do you read with spectacles or glasses?

Ans. Yes, sir.

Ques. 156. Did you have any glasses on when you looked at that picture? Ans. No, sir.

Ques. 157. Do you know where and when that photograph was made? Ans. I do not positively.

Ques. 158. Have you any knowledge of your own as to where and when that photograph was made?

Ans. I believe I do, I suppose I have.

Ques. 159. Were you present when that photograph was made? Ans. No, sir.

Ques. 160. Did you ever see the man that made it?

Ans. No, sir.

Ques. 161. Did you ever have any conversation or communication with the man that made it? Ans. No, sir.

Ques. 162. Were you ever in Lawrence, Kansas?

Ans. No, sir.

Ques. 163. Who showed you this photograph the first time you ever saw it.

Ans. Mr. Green, attorney for the defendant.

Ques. 164. Did any one ever show it to you before Mr. Green showed it to you on the witness stand? Ans. No, sir.

Ques. 165. Mr. Walters have you had any conversation with anybody about your testimony in this case or about the case since we adjourned to go to dinner? Ans. No, sir.

Ques. 166. Have you had any conversation with anybody about this case since March, 1879? Ans. Yes, sir.

Ques. 167. Did those conversations or any of them have any reference to the facts you have testified to?

Ans. No, sir.

2019 Ques. 168. Have you had any conversation with any parties whomsoever since January 1st, 1880, in relation to the facts you have been asked to testify about here today, and that you have testified about?

Ans. Of course I have.

Ques. 169. When did you have the first conversation of that kind. Ans. I could not tell. It was the whole talk.

Ques. 170. Now, Mr. Walters, what business did you follow in Germany before you came to this country?

Ans. Tailoring business.

Ques. 171. What business did you follow in St. Louis before you came to Fort Madison? Ans. Tailoring.

Ques. 172. What business did you follow in Fort Madison when you first came here? Ans. Merchant tailoring.

Ques. 173. How long did you follow that business?

Ans. About fifteen years.

Ques. 174. What did you do next after that.

Ans. Kept a saloon for one year about, then went to farming.

Ques. 175. Which business you have followed ever since?

Ans. Yes, sir.

Ques. 176. State whether during last season 1880 or this season previous hereto, you were visited by any of the attor-

neys or parties representing the defendants, in regard to this matter? Ans. Yes.

Ques. 177. When was that, state as near as you can?

Ans. Well, it was right after the discovery of my son's death. It was soon after the discovery of my son's death from Jan. 1880, ever since.

Ques. 178. The last time you saw your son he was alive and well, was he not? Ans. Yes, sir.

Q. And that was at Fort Madison, Iowa? Ans. Yes, sir.

Redirect Examination

By Defts. Counsel:

Ques. 180. You may state whether or not it was after the correspondence had between the master of the lodge at Fort Madison and the master of the lodge at Wichita, that you first had any conversation with the attorneys or parties representing the defendant in regard to the facts about which you have testified. Ans. After the correspondence.

Ques. 181. You may now state whether you have had any conversation or correspondence with the attorneys or parties representing the plaintiff Sallie E. Hillmon in respect
2020 to the facts and circumstances to which you have testified? Ans. Yes, sir.

Ques. 182. You stated in your cross-examination in response to the question as to whether you had any knowledge where the photograph marked Exhibit "A" was made in answer that. I believe I do, state where you first saw a photograph similar to the one marked Exhibit "A" and from whom you received it or by whom was it shown to you?

Question withdrawn.

Ques. 183. You stated in your cross-examination in answer to the question (have you any knowledge of your own as to when and where that photograph was made, answered, I believe I do. I suppose I have). State when if any time you ever saw a picture identical to the one marked Exhibit "A" if so, from whom did you receive it or by whom was it shown to you?

Ans. I received one in January, 1880, it was sent to me, from the master of the lodge in Wichita.

Ques. 184. You stated in your cross-examination in substance that you only looked at the picture marked Exhibit "A" about one minute, state if you ever saw a picture similar to the one marked Exhibit "A" and identical with it prior to the time that the picture marked Exhibit "A" was shown to you, and if so when did you receive it and from whom?

Ans. Yes sir I did. I received it from the master of the Wichita lodge in January, 1880.

Ques. 185. State whether or not you ever saw a picture similar and identical to the one marked Exhibit "A", and if so when did you see it and from whom did you receive it?

Ans. In January, 1880, received from the master of the Wichita lodge.

Ques. 186. What became of that picture.

Ans. I had to send it back.

Ques. 187. When you state that your son's nose bent up, to what portion of the nose do you refer, that which is designated as the end of the nose or the bridge or the middle of the nose? Ans. The bridge towards the middle.

Ques. 188. Look at Exhibit "A" and state whether the curve in the nose of the body there exhibited is the same as the curve which you have described?

Ans. It is the same.

Recross-examination

By Plff. Counsel:

Ques. 189. State who it was you had conversations with or correspondence with representing the plaintiff Sallie E. Hillmon in respect to the facts and circumstances to which you have testified?

2021 Ans. I received a letter—Mr. Clark—

Ques. 190. Can you give his full name?

Ans. I can give it within three or four days.

Ques. 191. Was that letter addressed to you?

Ans. I do not know positively. It was handed to me if not addressed to me.

Ques. 192. If it was handed to you who handed it to you?

Ans. Mr. Munn, our sheriff.

Ques. 193. Have you got that letter in your possession?

Ans. I don't know, I believe not.

Ques. 194. What did you do with the letter?

Ans. Don't know.

Ques. 195. Will you make a search for that letter and find it and produce it here to the Notary Public?

Ans. I will if I can.

Ques. 196. Where is the letter you received with the photograph you speak of, in Janaary, 1880?

Ans. I was looking for those letters this morning but could not find them.

Ques. 197. Do you know whose name was signed to that letter? Ans. I do not remember.

Ques. 198. Can you remember where that letter was mailed?

Ans. I think it was Wichita, but can't say positively.

Ques. 199. Was it addressed to you?

Ans. No, it was addressed to Mr. Hobbs.

Ques. 200. Can you swear that that letter was not mailed at Lawrence, Kansas? Ans. I can not.

Ques. 201. Will you make further search for that letter and try to produce it here to the notary public.

Ans. I will if necessary.

Ques. 202. How long did you retain the photograph you speak of having received in January, 1880?

Ans. About a week or ten days.

Ques. 203. Who did you send it to?

Ans. I think Mr. Hobbs sent them back to Wichita or Lawrence, I don't know.

Ques. 204. Have you seen that photograph since?

Ans. No sir.

Ques. 205. What was the name of the master of the Wichita lodge? Ans. I do not remember.

Ques. 206. Do you know whether there was anything else papers or anything else, that was sent when the photograph was returned in January, 1880?

2022 Ans. I do not know.

Ques. 207. Was there more than one photograph?

Ans. Yes, there were two.

Ques. 208. Were they both returned? Ans. Yes sir.

Ques. 209. Do you know of anybody having obtained possession from your house of any of the letters you have spoken of? Ans. Nobody but some of my family.

Ques. 210. Do you know whether Mr. Munn here present one of the attorneys representing the deft., has any of these letters in his possession?

Ans. He has not. I did not give up any of the letters.

Ques. 211. Did you have any knowledge or information that Mr. Munn went to your house and took a portion of these letters into his possession?

Ans. I know he has not to my knowledge.

Ques. 212. Do you remember when your son C. R. Walters was at home last? Ans. Last summer.

Ques. 213. Did Mr. Munn come to your house while your son was home? Ans. Yes sir.

Ques. 214. Did you hear any conversation between your son and Mr. Munn in regard to these letters?

Ans. No special conversation took place, we talked all together.

Ques. 215. Was anything said about these letters or any of them? Ans. I do not remember.

Ques. 216. Do you not know that Mr. Munn went back to the house for the purpose of getting some of them?

Ans. I do not.

Ques. 217. If you have never given Mr. Munn any of these letters and he has none as you say you know how do you account for his statement made in your presence a few moments

ago that he was able to show us what they contained and that he would do so some time hereafter.

Ans. I do not know.

Ques. 218. You have stated that quite a number of these letters are lost, how did they become to be lost?

Ans. Taken as being of no interest I suppose. I don't keep a letter if it is of no interest to me.

Ques. 219. These letters then written about matters connected with matters relating to your lost and as you supposed dead son, were of no interest to you were they, not sufficient to require you to take care of them?

Ans. I don't know what to answer in that, because all the letters that I received would not alter the case.

2023 Ques. 220. What did you save any of them for then, why didn't you destroy them all?

Ans. No answer to that question.

Ques. 221. You stated that your memory for dates and figures was very poor did you not? Ans. It is.

Ques. 222. You can't remember so as to swear positively when your son left home, can you?

Ans. No, not by one year at least as I stated 76 or 77.

Ques. 223. Didn't you first state 1877 or 1878?

Ans. No sir.

Ques. 224. Now if you can't remember within a year how long your son went away from home how are you able to state that he weighed one hundred and sixty odd pounds in 1876 as a matter of memory?

Ans. Because I weighed the whole family at that time and heard it repeated so often. That's all.

Ques. 225. Didn't you state that you had no conversation with anybody on that subject and that the matter of your weighing him had not been called to your attention from that time up to last summer?

Ans. As I stated before I heard it stated so often in the family.

Ques. 226. Didn't you state that you had no conversation with anybody on that subject, and that the matter of your weighing him had not been called to your attention from that time up to last summer.

Ans. I don't exactly know. I don't know positively whether I stated so or not.

Redirect Examination

By Defts. Counsel:

Ques. 227. State if at the time you speak of when your son was at home, and that Mr. Munn was here, the conversation between Mr. Munn and your son, if any there was, was

not mostly held in your absence or not directly in your presence?

Ans. I think the whole conversation took place in my presence.

Not being able to complete the taking of these depositions by reason of the lateness of the hour, it now being six o'clock, the further taking thereof is adjourned until tomorrow morning, Friday morning, May 27th, 1881, at eight o'clock at same place. May 26th, 1881.

[Seal] SABERT M. CASEY, Notary Public.

The taking of these depositions was resumed pursuant to adjournment Friday morning, May 27th, 1881.

Ques. 228. Mr. Walters have you made search for those letters, the one accompanying the photograph received by you in January, 1880, and the one you state you received from Mr. Clark? Ans. I have.

2024 Ques. 229. Have you found them?

Ans. I found one. I haven't found them. I found one of Mr. Clark's letters, addressed to my son C. R. Walters, St. Louis.

Ques. 230. You say of the two letters I referred to you have you not found either of them? Ans. No, sir.

Ques. 231. The letter you have found was not sent to you was it? Ans. No, sir.

Ques. 232. It was not written to you was it?

Ans. No, sir.

Ques. 233. How do you come to have it?

Ans. By searching for those letters. It was in a package of letters that my son left here last summer concerning the Hilmon case.

Ques. 234. How many letters have you got of your son's concerning the Hilmon case? Ans. I don't know.

Ques. 235. Did you read all the letters in the package out of which you took this one? Ans. No, sir.

Ques. 236. How do you know then that they are concerning the Hilmon case.

Ans. The package is marked as such.

Ques. 237. And out of that whole package of letters you only found one letter from Mr. Clark. Ans. Yes, sir.

Ques. 238. You mean you only found that.

Ans. Yes, sir, that is all.

Re-examination

By Counsel for Defendant:

Ques. 240. Have you the letter which you state you have in your possession written by H. S. Clark to your son C. R. Walters here present with you? Ans. Yes, sir.

Ques. 241. Are you willing to produce it?
Ans. Yes, sir.

Re-cross examination.

Ques. 242. Who found this letter. Ans. I did.
Ques. 243. Did you take the letter out of the package?
Ans. Yes, sir.
Ques. 244. Where did you get the package?
Ans. My son left it here I got it at home up-stairs in a little trunk of his own, my son Roberts.
2025 Ques. 245. What time did you find it last night?
Ans. About seven o'clock.
Ques. 246. This trunk contains things which belong to your son, does it not? A. Yes, sir.
Ques. 247. Then you did not find this letter among your own letters and papers. Ans. No, sir.
Ques. 248. Have you shown this letter to Mr. Munn or Mr. Green? Ans. I have shown it to Mr. Munn.
Ques. 249. When? Ans. Last night.
[—] Where? Ans. At the Central Hotel.
Ques. 251. Did you offer to show it at any time to the attorney of or any one representing the plff. in this action?
Ans. No, sir. I will answer in full, as I was to sign. I took that letter along as I was to sign my deposition.
Ques. 252. You knew this was not one of the letters I requested you to bring in didn't you? Ans. Yes, sir.
Ques. 253. Mr. Walters did you ever receive any other photographs than those you received through the master of the Lodge in Jan. 1880? Ans. No, sir, I think not.

Redirect Examination

By Counsel for Defendant:
Ques. 254. Is it not a fact Mr. Walters that counsel for the plaintiff instructed you to search for any letters which you might have in your possession from H. S. Clark, and especially the letter which you stated Mr. Clark wrote to you and also the letter accompanying the photograph sent you by the master of the lodge at Wichita. Ans. Yes, sir.
Ques. 255. Now you may state Mr. Walters how you came to go to the Central Hotel last night?
Ans. As I was instructed to sign the deposition and bring some letters which it was requested, that's all.
Ques. 256. Was the signing of the deposition postponed for the purpose that you might search for and produce these letters if you could find them? Ans. Yes, sir.
Ques. 257. How often did you come to the hotel last night in pursuance of this appointment?

2026 Ans. Twice.

Ques. 258. Did you find either Mr. Hutchings or Mr. Clark there at either of these times you were there?

Ans. No, sir.

Ques. 259. Did you find the Notary Mr. Casey there at either of these times? Ans. Yes, sir.

Ques. 260. Where did you understand Mr. Hutchings counsel for plff. to be?

Ans. At the Central. I understood he was sick in bed; went to bed.

Ques. 261. How did it come that you did not sign your deposition last evening according to appointment.

Ans. Because Mr. Green nor Mr. Hutchings was there.

Ques. 263. Was not the further reason given to you that Mr. Hutchings was sick and they did not want to disturb him.

Ans. Don't know of any.

Ques. 263. Did not Mr. Munn inform you and the Notary that Mr. Hutchings was sick up-stairs, and that you had better wait until morning and come in and sign the deposition?

Ans. Yes, sir. DANIEL WALTER.

2027 The defendants, and each of them, next read in evidence the deposition of William H. Timpe, taken at Ft. Madison, Ia., May 25, et seq. 1881, which is in words and figures as follows, to wit:

William H. Timpe, a witness of lawful age being produced by defendant duly sworn, testified as follows:

Ques. 1 State your name, age, place of residence, and occupation?

A. William H. Timpe, age 29 years the 8th day of next August; occupation, cigar making, reside in Fort Madison, Iowa.

Ques. 2. State whether or not you were every acquainted with a man by the name of Frederick Adolph Walters?

A. Yes, sir.

Ques. 3. State where you last saw Frederick Adolph Walters.

A. I seen Adolph Walters the last in Wichita, Kansas, the middle part of February, from the first to the last part of February, this last February two years ago.

Ques. 4. Where was he when you first became acquainted with him?

A. Fort Madison, Iowa, about eleven years ago.

Ques. 5. What was he doing, if anything, when you saw him in Wichita, Kansas, in February, two years ago?

A. He was back in the shop working at his trade, making cigars.

Ques. 6. Look at the picture now shown you by J. W. Green one of defendant's attorneys and state whether or not you recognize it as the picture or photograph of any one you have heretofore seen and if so of whom is it a photograph?

A. Yes, sir. I recognize the photograph Adolph Walters.

Ques. 7. Is that the person you say you became acquainted with at Fort Madison, and afterwards saw at Wichita, Kansas?

A. Yes, sir.

Ques. 8. State if you can the name of the father of this Frederick Adolph Walters?

A. The first name I couldnt say; I never took much notice.

Ques. 9. Do you know in what town and state the father of this Frederick Adolph Walters resides, if so please state?

A. Fort Madison, State of Iowa, Lee County.

Cross-examination.

By Plaintiff's Attorney:

2028 Ques. 10. How long have you lived in Fort Madison?

A. Off and on eleven years.

Ques. 11. Where have you been when you were off?

A. I have traveled through different parts of the country.

Ques. 12. State when you first came to Fort Madison, give us the year, month and the day as near as you can?

A. I came to Fort Madison in 1870, on the 14th day of December.

Ques. 12. Where did you come from when you came to Fort Madison? A. From St. Louis, Missouri.

Ques. 13. How long did you live in St. Louis?

A. About three years.

Ques. 14. What did you do while you were in St. Louis?

A. I learned the cigarmaking trade.

Ques. 15. Who with?

A. Alex. Ehler; it was between Barry and Maryon street, 1506 Carondelet avenue at that time.

Ques. 16. Where did you come from when you went to St. Louis? A. Germany.

Ques. 17. How old was you then?

A. About fifteen, a little over.

Ques. 18. From what part of Germany did you come?

A. Brunswick.

Ques. 19. Did your parents come with you? A. No, sir.

Ques. 20. Any relatives come with you?

A. No, sir, I came by myself.

Ques. 21. When you came to Fort Madison, what did you do? A. I worked some time at my trade at Charles Hinze.

Ques. 22. How long? A. About two months the first time.

Ques 23. What did you then do?

A. I went to work at the Metropolitan Hotel, worked there for about nine months as nightwatch.

Ques. 24. What next did you do?

A. After that I went to work for Mr. Hinze again.

Ques. 25. How long? A. About a year.

Ques. 26. What next did you do?

A. After I left him I went four months on the railroad as newsboy and peanut boy.

Ques. 27. What road was that? A. On the C. B. & Q.

Ques. 28. What next did you do?

2029 Ans. From that I went up to Burlington.

Ques. 29. What did you do in Burlington?

Ans. Worked at my trade, cigar making, about a year, for Dempsy and Heitmeyer.

Ques. 30. How long did you remain in Burlington?

Ans. All that time.

Ques. 31. Where did you go to from Burlington?

Ans. St. Louis.

Q. 32. How long did you stay in St. Louis?

Ans. For some time; I can't state how long.

Ques. 33. About how long? Ans. About three months.

Ques. 34. What did you do while you were in St. Louis at that time? Ans. Worked at my trade.

Ques. 35. Did you work at your trade all the time you were in St. Louis, last mentioned? Ans. Yes, sir, up to day.

Ques. 36. Where did you go to from St. Louis?

Ans. Came back home to Fort Madison.

Ques. 37. Who did you work for while you worked in St. Louis, at the last time mentioned?

Ans. William Grenninger.

Ques. 38. What did you do after you came back to Fort Madison? Ans. Worked for Charlie Hinze.

Ques. 39. How long? Ans. About six months.

Ques. 40. Where did you go to then, and what did you do?

Ans. Stayed here in town; worked for Mr. Temmel.

Ques. 41. How long? Ans. About three months.

Ques. 42. Where did you go then, and what next did you do?

Ans. I left, went to Montrose, Iowa, worked at my trade, for George W. Kiel, about nine months, came back to Fort Madison.

Ques. 43. What then did you do?

Ans. I started in business for myself.

Ques. 44. How long did you run it?

Ans. About, some over a year, here in Fort Madison, and about four months in Bloomfield, Iowa.

2030 Ques. 45. Where then did you go and what then did you do?

Ans. I came back home, went to Burlington, worked there about a week, left from there, went to Keokuk, worked there about four months for Mrs. Stebblemen.

Ques. 46. From Keokuk where did you go and what next did you do? Ans. Left Keokuk, went to Chicago.

Ques. 47. What did you do?

Ans. Worked at my trade, for, first went to work for Louis Timpe, who was known here as Temmel, here went under an assumed name. He was no relation of mine. Next worked for Goldsmith & Brothers, Klages, I left them and went to Milwaukee.

Ques. 48. How long were you there in Chicago?

Ans. About seven months.

Ques. 49. What did you do in Milwaukee, who did you work for, and how long?

Ans. Didn't work for anybody, didn't stay there but three days.

Ques. 50. Where did you go next?

Ans. From that time till up to August 17th of last year I traveled through the country, different parts.

Ques. 51. What time was it you left Milwaukee, what year and month at that time?

Ans. Three years ago last 27th day of February.

Ques. 52. Now, just tell us where you traveled to after you left Milwaukee. Give us your routes.

Ans. From Milwaukee back to Chicago. From Chicago to Aurora. From Aurora to Ottawa. From Ottawa to Galesburg. At Galesburg I met a partner of mine named Johnnie Smith, lived in Kansas City, we used to call him Jack Smith, he was an Irishman. From Galesburg him and I went to Quincy. From Quincy to St. Jo. From St. Jo. to Atchison. He went to Leavenworth. I went with him and I left him there. I went to Kansas City. I took work there.

Ques. 53. Was Johnnie Smith a cigarmaker?

Ans. Yes, sir.

2031 Ques. 54. In what were you and Johnnie Smith partners? Ans. Just for company sake.

Ques. 55. Did you and he have any arrangements or business together of any kind in which you were partners?

Ans. Yes, sir. He asked me to go out west with him.

Ques. 56. Was that all the interest or arrangements you had together as partners?

Ans. Yes, sir. He told me we could get work there.

Ques. 57. Did you and he work at your trade any from the time you left Galesburg until you got to Leavenworth?

Ans. I haven't worked any between that time.

Ques. 58. Do you know where Johnnie Smith now is?

Ans. No, sir, don't keep track of him.

Ques. 59. Whereabouts in Kansas City did he live?
Ans. I never was to his house.
Ques. 60. Have you any information as to where he lived?
Ans. No, sir.
Ques. 61. Had you ever seen him before you struck him as a partner at Galesburg? Ans. No, sir.
Ques. 62. Why did you leave him at Leavenworth?
Ans. He got work and I could not get any, that's all the reason.
Ques. 63. Did you have any other reason than simply because you could not get work?
Ans. That's the only reason I left.
Ques. 64. Who did he go to work for? Ans. Wetzel.
Ques. 65. Now about what time and month was it you left Leavenworth?
Ans. It was in the Fall, somewhere around there, the same year I left Milwaukee, 1878.
Ques. 66. About what month was it you left Leavenworth?
Ans. Somewhere about the 1st part of November. It was Fall, there was snow on the ground.
Ques. 67. Now, how long did you stay in Kansas City?
Ans. About till the 1st part of February. I left there in February some time.
2032 Ques. 68. What year? Ans. 1879.
Ques. 69. What did you do while you were in Kansas City? Ans. Worked at my trade.
Ques. 70. For whom? Ans. John Meyer.
Ques. 71. How long did you work for Meyer?
Ans. All that time I was in Kansas City.
Ques. 72. About how many months?
Ans. Well, about three months and a half.
Ques. 73. From Kansas City where did you go?
Ans. I went to the State of Kansas, to Wichita.
Ques. 74. Did you stop any place between Kansas City and Wichita?
Ans. Not at that time. I beat my way and stopped at several places, but didn't know the names of the places and didn't take any work.
Ques. 75. What do you mean by beating your way?
Ans. Don't pay no railroad fare.
Ques. 76. What day of the month did you arrive in Wichita.
Ans. It was the middle of the week, don't know whether it was Wednesday or Thursday. I left the fore part of the week from Kansas City.
Ques. 77. Can you state the day of the month you arrived at Wichita?
Ans. Well, I stated once before I came there the middle of February. It was the middle of the month.

Ques. 78. Where did you go to after you got to Wichita?
Ans. I stayed there a while in Wichita. I staid with a friend of mine from Fort Madison, name of Adolph Walter. That's the only name I know of him.
Ques. 79. Where did Adolph Walter board?
Ans. I didn't find him at a boarding house, I found him where he worked.
Ques. 80. Where did he work?
Ans. He worked for a man named Holdschnieder, he carried on business at that time I was there.
2033 Ques. 81. Did you eat with Walters, at the same place?
Ans. I eat with him where he boarded.
Ques. 82. Where did he board?
Ans. I don't know the name of the house; it was on the same street where the livery stable is on, on the left hand side, when you come from the shop to go to the boarding house, it is above livery stagle.
Ques. 83. Was it a hotel? Ans. No, sir.
Ques. 84. Do you remember the name of the man who kept it?
Ans. No, sir. I only staid there a few days.
Ques. 85. How many days did you take your meals there with Walters?
Ans. I had dinner, supper, lodging, breakfast, dinner and supper.
Ques. 86. That was with Walters, at his expense?
Ans. That I don't know anything about.
Ques. 87. Then you don't know whether your bill was ever paid or not?
Ans. No, sir, he asked me as a friend to stay with him. He gave me $2.00 which he borrowed of his friends.
Ques. 88. Where did you go to board after you left that boarding house? Ans. I left Wichita.
Ques 79. Where did you go to from Wichita?
Ans. I went to Topeka.
Ques. 80. Did you beat your way to Topeka?
Ans. It is no one's business.
Ques. 81. Did you beat your way to Topeka?
Ans. I beat my way, of course. I didn't have any money in the first place except what I got from Walters.
Ques. 82. How long did you stay in Topeka?
Ans. Several days.
Ques. 83. What did you do while there? Ans. Nothing.
Ques. 84. Where did you get your board and lodging?
Ans. I got it from friends.
Ques. 85. Who were your friends at Topeka?
Ans. Cigarmakers.

2034 Ques. 86. Name them.
Ans. Don't keep track of them.
Ques. 87. Give us the name of a single cigar maker friend in Topeka that you met at that time that you had ever seen before.
Ans. The one that asked me, Stavelin—there was none.
Ques. 88. Then the cigar makers in Topeka when you arrived there were all strangers to you, were they not?
Ans. Yes, sir.
Ques. 89. Where did you go to from Topeka?
Ans. Fort Scott.
Ques. 90. Did you beat your way to that place?
Ans. Yes, sir.
Ques. 91. How long did you stay in Fort Scott?
Ans. About a day.
Ques. 92. Did you stay over night at that place?
Ans. Yes, sir.
Ques. 93. Where did you sleep?
Ans. At a boarding house or hotel, whatever it was.
Ques. 94. Just tell us where the boarding house or hotel was situated in Fort Scott. Ans. I couldn't tell you.
Ques. 95. Who paid the bill?
Ans. Cigar makers, I guess.
Ques. 96. Do you know whether it was ever paid at all?
Ans. No, I don't know anything about it and don't care either.
Ques. 97. Where did you go to from Fort Scott?
Ans. Atchison.
Ques. 98. How far was it from Fort Scott to Atchison?
Ans. Don't know how many miles; never counted them.
Ques. 99. About how far?
Ans. Couldn't tell anything about it.
Ques. 100. Did you beat your way from Fort Scott to Atchison. Ans. Yes, sir.
Ques. 101. About how many days did it take you to make the trip from Fort Scott to Atchison?
Ans. Well, I didn't keep track. I can't do it, it is too long ago.
Ques. 102. It is so long ago that you can't tell how many days it took you to travel from Fort Scott to Atchison, as a matter of memory can you? Ans. No, sir.
Ques. 103. Where did you go to from Atchison?
Ans. Went to Leavenworth.
Ques. 104. Did you beat your way from Atchison to Leavenworth. Ans. Correct. I did.
2035 Ques. 105. How long did you remain in Leavenworth? Ans. For some five or six weeks.
Ques. 106. Did you come across Jonnie Smith while there?
Ans. No, sir.

Ques. 107. What did you do while in Leavenworth?
Ans. Worked at my trade.
Ques. 108. Who for. Ans. Simmons and Staiger.
Ques. 109. How long did you work for them?
Ans. All the time I stayed in Leavenworth, 5 or 6 weeks.
Ques. 110. Where did you go to from Leavenworth?
Ans. To Troy, Kansas.
Ques. 111. Did you beat your way to Troy, Kansas?
Ans. No, sir, I paid my fare just the same as any other person.
Ques. 112. How far is it from Leavenworth to Troy?
Ans. Sixteen miles from Atchison; don't know how far from Leavenworth.
Ques. 113. [redacted] long did you stay in Troy?
Ans. About a week.
Ques. 114. What did you do while there?
Ans. Worked at my trade.
Ques. 115. Who for?
Ans. I know one of them, they was partners, Wilson; don't know the other's name.
Ques. 116. Where did you go to from Troy?
Ans. Tecumseh, Nebraska.
Ques. 117. How long did you remain in Tecumseh?
Ans. About three or four days.
Ques. 118. What did you do while you were there?
Ans. Nothing.
Ques. 119. Where did you go to from Tecumseh?
Ans. Lincoln.
Ques. 120. Did you beat your way up to Lincoln?
Ans. No, sir.
Ques. 121. How much fare did you pay from Tecumseh to Lincoln?
Ans. Five cents a mile. I gave a five dollar bill and got change back and a ticket. I think it is sixty miles. Paid somewhere about $3.00. From Tecumseh to Lincoln, that is, from Troy to Tecumseh. From Tecumseh to Lincoln it is somewhere around 30 odd miles, if I am right. I paid somewhere around $2.00 and over, about $2.00 is as near as I can get at it.
2036
Ques. 122. How much did you pay for your board and lodging while in Tecumseh? Ans. Nothing.
Ques. 123. Who did pay for it? Ans. Nobody.
Ques. 124. How much fare did you pay from Troy to Tecumseh?
Ans. I stated that once before. I gave a $5 bill and got a ticket and change back. I paid about $3.00.
Ques. 125. How much did you pay for board and lodging in Troy?

Ans. I worked there, I paid three dollars and a half a week; only staid one week.

Ques. 126. How much did your wages amount to while you worked at Troy? Ans. Eleven or twelve dollars.

Ques. 127. Did you work by the week or by the piece?

Ans. Worked by the piece.

Ques. 128. How many cigars did you make while at Troy?

Ans. One thousand.

Ques. 129. How much do you get a thousand? What is the usual price?

Ans. I got nine dollars for them, and had to do my own stripping and packing and got extra for that.

Ques. 130. How much extra?

Ans. About three dollars, somewheres around there.

Ques. 131. Did you spend any money in Troy for anything, except three dollars and a half for board and lodging?

Ans. Not as I know of except a little washing.

Ques. 132. How much fare did you pay from Leavenworth to Troy?

Ans. Well, just as I stated before, I did not remember the number.

Ques. 133. Have you any recollection of the amount you paid from Leavenworth to Troy? Ans. No, sir.

Ques. 134. How much did your wages amount to at Simmons and Staiger's?

Ans. I made about seven hundred a week there, at $12 a thousand.

2037 Ques. 135. How much money did you receive from Simmons & Staigers for wages?

Ans. I didn't keep account of it.

Ques. 136. Can you state anywhere near the amount of money you received from Simmons and Staigers?

Ans. No, sir.

Ques. 137. How much did you pay for board and lodging while at Leavenworth at that time

Ans. Four dollars a week.

Ques. 138. How many weeks were you there?

Ans. I stated once before five or six weeks.

Ques. 139. Where did you board?

Ans. At the Wetzel house, the same man whose son kept the cigar shop.

Ques. 140. Will you state about the day of the month you left Leavenworth?

Ans. It was after I came back from Fort Scott, about the spring, the first part, same year when I left Walter, two years ago, in Wichita.

Ques. 141. Did you spend any money in Leavenworth for anything besides paying for your board and lodging?

Ans. Yes, sir.
Ques. 142. What for, and how much?
Ans. I can't keep count of it.
Ques. 143. What did you spend it for?
Ans. O, for luxury.
Ques. 144. What is luxury?
Ans. Drinking beer, playing pool and billiards; that is all.
Ques. 145. Did you spend any money for any other kind of luxury that you can't remember about? Ans. No.
Ques. 146. Where did you go to from Lincoln?
Ans. Plattsmouth.
Ques. 147. How far is it from Lincoln to Plattsmouth?
Ans. About forty miles.
Ques. 148. How long did you remain in Lincoln?
Ans. About two weeks.
Ques. 149. What did you do while there?
Ans. Worked at my trade.
Ques. 150. Who for?
Ans. A man by the name of Woolenberg, kept [kept] under the opera house.
2038 Ques. 151. What did your wages amount to there?
Ans. Eleven dollars a thousand. I received between $18 and $20.
Ques. 152. What did you pay for board and lodging while there? Ans. About nine dollars.
Ques. 153. Did you spend any money there for anything else? Ans. I spent all my money there.
Ques. 154. Did you beat your way from Lincoln to Plattsmouth? Ans. Yes, sir.
Ques. 155. How long did you remain in Plattsmouth?
Ans. About a week.
Ques. 156. What did you do while at Plattsmouth?
Ans. Worked at my trade.
Ques. 157. Who for?
Ans. Don't know his name; he was a Jew.
Ques. 158. How did you come to leave Lincoln so soon?
Ans. Didn't want to stay there.
Ques. 159. Please to state the reason why you didn't want to stay there? A. Oh, I wanted to see the country.
Ques. 160. Now state why it was you left Lincoln as you did at the time you did?
A. I stated once before, I can't state any more.
Ques. 161. Do you refuse to state the reasons why you left Lincoln?
A. That is the only reason what I stated before.
Ques. 162. Did you have any trouble while you were in Lincoln?
A. Didn't have no trouble; I just didn't want to stay there, that's all.

Ques. 163. Did you have any trouble or get into any difficulty while in Lincoln?

A. Got a little intoxicated, or was a little intoxicated.

Ques. 164. Now, while you were intoxicated what did you do or attempt to do? A. Leave town, that's all.

Ques. 165. While you were intoxicated, did you do or attempt to do any thing else except to leave the town?

A. I was discharged.

Ques. 166. From Plattsmouth, where did you go to?

A. Across the Missouri river on the transfer.

2039 Ques. 167. To what place?

A. To Council Bluffs, Iowa.

Ques. 168. How long did you stay at Council Bluffs?

A. One day, same day I got there I left.

Ques. 169. Where did you go to from Council Bluffs?

A. Across the Missouri river in a skiff to Omaha, Nebraska.

Ques. 170. How long did you stay in Omaha?

A. Staid until about August, from the time I left Simmon's & Staiger's; I was only four weeks on the road until I got there.

Ques. 171. Who did you work for?

A. Simmons; worked there about three weeks; I left and went to work for a man by the name of Schultz; I worked there until August.

Ques. 172. Where did you go to from Omaha?

A. Came home.

Ques. 173. Where have you been since that time?

A. I came home, and staid here in town; then worked here one week again; left home then and I went out East. I staid out East.

Ques. 174. What time did you get home from Omaha?

A. About latter part of August, or first part of September, in 1879.

Ques. 175. After you worked here a week where did you then go to?

A. I traveled in the state of Illinois, Monmouth, Bushnell, Galesburg, Peoria, Lincoln, Decatur, Champaign, Alabama, Ill., Danville, Mattoon, Pana, Taylorville, Decatur, Decatur to Terra Haute, Terra Haute to Indianapolis, Indianapolis to St. Louis, St. Louis to Alton, Alton to Greenville, from Greenville to Indianapolis again, Indianapolis to Warren, Pa., from there to Coldwater, Mich., struck through Mich. down into Little Rock, Arkansas; from Little Rock right straight to St. Louis, St. Louis to Alton, Alton to Bushnell, Bushnell to Quincy, Quincy to Hannibal, and from there I left in first part of August, 1880; came back home to Fort Madison and took a job in Montrose; worked from August to November in Montrose, 1880; in November, 1880, I came to Fort Madison again and have been there ever since working at my trade.

2040 Ques. 176. Who have you been working for?
A. First I worked for L. B. Reader, I worked there until March, went to work for Charles Johns where I am working now.
Ques. 177. How long previous to the time that you saw Frederick A. Walters at Wichita had it been that you had last seen him?
A. It was two years ago, that I saw him at Wichita, the middle part of February.
Ques. 178. How long before that had you last seen him?
A. In 1876 when I was carrying on business here in this town; he was carrying on business too.
Ques. 179. How often did you see him in 1876?
A. Well I saw him nearly every day, sometimes not for a week.
Ques. 180. You were not here all the year 1876, were you?
A. Yes, sir.
Ques. 181. When did you start business?
A. About April; first part of April.
Ques. 182. What had you been doing before you started in business? A. Worked at Montrose with George W. Kiel.
Ques. 183. Were you on very intimate terms with Frederick Adolph Walters?
A. We always were friendly when we met each other; always met as friends.
Ques. 184. Were you in the habit of staying at his house and he with you?
A. No, sir; I have been to his store many times; he borrowed stamps from me sometimes and I borrowed stamps from him sometimes.
Ques. 185. Where was his store?
A. Between Pine and Market, on Second.
Ques. 186. Was it at his fathers house?
A. Yes, sir; his father kept a grocery store in front and he kept a shop back of it.
Ques. 187. You are a good deal near sighted are you not, and have always been so?
A. Yes, sir; since I was 9 years of age.
Ques. 188. You have to bring things close to your face to get a good look at them? A. Yes, sir.
[—] When did you first see this photograph marked
2041 Exhibit "A" that was shown to you this morning?
A. Last week.
Ques. 189. Who showed it to you?
A. Mr. Green, one of the attorneys for the defendant.
Ques. 190. How many times did you see it before you saw it here in Court? A. Once I reckon.
Ques. 191. How long did you examine it at that time?

A. Oh, about a few minutes; five minutes.

Ques. 192. And didn't see it again until it was shown you after you were sworn? A. Yes, sir.

Ques. 193. How do you know it is the same photograph?

A. The face is a good deal like the face when he was alive.

Ques. 194. How do you know that the photograph shown you this morning by Mr. Green is the same photograph as shown you last week?

A. The photograph shown me this morning had a stamp on the back of it, the notaries seal.

Ques. 195. Is that the only mark by which you recognize it as the photograph shown you last week? A. No, sir.

Ques. 196. Are there any other marks?

A. All I noticed was that seal. I didn't notice any other marks; I just looked at the picture.

Ques. 197. Where was this shown you by Mr. Green last week?

A. At the place where I work; at Mr. John's cigar store.

Ques. 198. What day of the week was it shown you?

A. About Thursday if I am right.

Ques. 199. What time in the day was it?

A. In the forenoon, I reckon.

Ques. 200. Was Mr. Casey, the Notary Public, present when you saw it?

A. I could not say; I did not know who came in with Mr. Green.

Q. Ques. 201. Did anyone come in with him?

A. I didn't see; I work back in the shop.

Ques. 202. Are you sure that it was last Thursday?

A. I guess it was, I didn't take notice of the day.

2042 Ques. 203. And on last Thursday you swear those stamps were on there?

A. No, sir; I said they were on this morning.

Ques. 204. You never noticed those stamps on there until this morning?

A. The first time was this morning.

Ques. 205. If you only saw the stamp on the photograph this morning for the first time, how do you swear that you recognize it as being the same photograph shown you last week by that stamp?

[Ques. 206.] Well the pictures looks the same, that is how I recognize it; because the stamp was on there this morning; I don't look at the stamp; I look at the picture. The picture is the same as I looked at last week.

Ques. 207. Then you don't recognize the picture at all by the stamp as being the picture shown you last week do you?

A. Yes, sir.

Ques. 208. Was the stamp on the picture when it was shown to you last week? A. I didn't take notice.

Ques. 209. Did you see the stamp on the picture last week?

A. I didn't take notice; I can't say; I recognize the picture.

Ques. 210. Do you remember of seeing the stamp on the picture when it was shown you last week?

A. I saw it this morning.

Ques. 211. You say then do you, that when you get stubborn nothing can be done with you?

A. It is if I don't get abused and don't get a person to bull doze me, I can't do anything more than I have said.

Ques. 212. Do you remember of seeing the stamp on this photograph when it was shown to you by Mr. Green last week?

A. The first time I remember the stamp was when I saw it this morning.

Ques. 213. Then you don't remember of seeing the stamp on the picture before to-day, do you?

A. I didn't take notice of it last week, the first time I saw it was this morning.

Ques. 214. Then you don't remember of seeing the
2043 stamp on the picture before to-day, do you?

A. The first time I remember of seeing the stamp was this morning when I saw the picture, didn't notice it last week.

The notary again requests the witness to answer the question directly just as asked by the plaintiffs attorney, if he can answer more directly than before. In again asking the question, the notary holds that the question may be more directly answered than the witness has done, if he does fully understand the purport of the question.

A. The first time I remember of seeing the stamp on the picture is this morning.

Ques. 215. Will you please to state what marks there are about that photograph marked Exhibit "A" shown you by Mr. Green, defendant's attorney, that lead you to swear that it is the photograph of Frederick Adolph Walters?

A. First is the nose, on account of being crooked which he always had, when alive; when I saw him alive; and the last time I saw him having a mustache, which the photograph shows to me. The color of his hair I can't tell by the picture, the photograph shows to me the same kind of hair what he had the time I seen him, or curly. The jaw-bone is same as he had when I seen him; they were high; the same as what the picture is; his forehead was always thin, just above the eyes; thinner than the jaw-bones even. Well that is about all I recollect or know about the picture.

Ques. 216. Now have you stated all the reasons why you think this photograph is a photograph of Frederick Adolph Walters? A. Yes, sir.

Ques. 217. Did you ever know about his having been bitten by a dog? A. No, sir.

Ques. 218. Did his mustache always look just as it looks in this picture when ever you saw it?

A. No, it didn't look on him like it looks on the picture.

2044 Ques. 219. Did his hair always look as the hair looks in this photograph?

A. Yes, sir; always had his hair combed back.

Ques. 220. Was his nose crooked sidewise on his face?

A. Yes, sir; it was on top here, a kind of Roman nose you might call it.

Ques. 221. Will you please to state how you can tell by looking at this photograph, that the person photographed is thin through the forehead?

A. It looks to me like the same as he looked to me; it looks as if he was fat where the jaw-bones are high.

Ques. 222. Is there any other way you can tell by the photograph whether he was thin through the forehead?

A. He always was poor; the same as the photograph shows me he is in through the forehead.

Ques. 223. Does the photograph show that he was thin through the forehead? A. Yes, sir.

Ques. 224. The photograph is a square side view to you is it not?

A. It is a side view to me; he looks like he always did to me from the side.

Ques. 225. You have seen other people with such shaped noses have you not? A. No sir; not like that.

Ques. 226. You never saw another nose in all your life and travel shaped from the top down to the end like the one in this photograph, have you? Ans. No sir, I have not.

Ques. 227. Are you a pretty observant man of noses?

A. Yes sir.

Ques. 228. Have you a pretty good memory of noses after you have seen them once?

A. Well, I have a pretty good memory of persons I have known, Yes sir.

Ques. 229. Have you ever been engaged in any other business but what you have stated to-day? If so please state what it was.

A. I have been in business besides what I am now; as newsboy and night-watch; in Germany I worked six months for my father at the tailoring business.

WM. H. TIMPE.

2045 The defendants, and each of them, next read in evidence the deposition of Charles Johns, taken at Ft. Madison, Ia., May 25 et seq 1881, which is in words and figures as follows, to wit:

Charles Johns, a witness of lawful age, produced by defendant, being duly sworn, testified as follows:

Charles Johns:

Ques. 1. State your name, age, occupation, and place of residence?

Ans. Charles Johns, age twenty-three, occupation cigar manufacturer, residence Fort Madison, Iowa.

Ques. 2. State how long you have resided at Fort Madison?

Ans. My life time.

Ques. 3. State if you knew a young man by the name of Frederick Adolph Walters? Ans. I have known him.

Ques. 4. Where did you know him? Where was he living when you knew him? Ans. In this City.

Ques. 5. How long did you know him?

Ans. To the best of my recollection about 15 years.

Ques. 6. State how intimately you knew him?

Ans. I went to school with him, went in swimming with him, turned with him, slept with him two or three evenings, worked with him on two different occasions.

Ques. 7. When did you last see him?

Ans. I couldn't exactly tell, I think it was about three years ago. I might have seen him occasionally afterwards.

Ques. 8. State whether or not about three years ago he left Fort Madison? Ans. He did.

Ques. 9. Have you at any time seen him since he left Fort Madison about three years ago?

Ans. I have not to my knowledge.

Ques. 10. Has he ever returned to Fort Madison since he left at the time you have mentioned?

Ans. Not to my knowledge.

2046 Ques. 11. Have you resided here continually during that time Ans. I have.

Ques. 12. Look upon the picture or photograph marked Exhibit "A," by Mr. Cesey, the notary public, examine the same carefully and state if you recognize it to be the picture or photograph of any person whom you have heretofore seen living, and if so state of whom it is a picture or photograph.

Ans. I recognize it as the picture of Adolph Walters.

Ques. 13. Can you state the full name of the person you call Adolph Walters? If so state.

Ans. His initials were F. A. Walters, did not know what his first name was, knew it was F.

Ques. 14. State the name he was usually called and known by among his companions in Fort Madison?

Ans. Adolph Walters.

Ques. 15. Can you state the name of his father, if so, state.

Ans. Daniel Walters.

Ques. 16. Where does he reside?

Ans. In Fort Madison, Iowa.

Ques. 17. Will you describe the person whom you call Adolph Walters, as he appeared when you last saw him, and first state his height if you can?

Ans. His height was five foot eleven, when I saw him last measured. His hair was dark, wavy, wore them long generally. He was a raw boned man, what I would call a raw boned man. He had pretty large shoulders and he wore a light mustache which was lighter colored than his hair, he had a thin mustache. His nose was kind of a rounding nose, what they call a Roman nose I guess. He had high cheek bones. He had a large, long hand, it was bigger across the knuckles here the second and third joints, than it was back where his thumb was. That's about all about his hands. He wore a shoe, I should judge No. eights or nines. He was bothered very much by corns. That's about all the features I could give of him, excepting a mole which he had on his back about
the size of the end of my little finger, couldn't say
2047 whether it was right in the center of his back or whether under his left shoulder, which was dark in color. That is all the features I would know about him, to the best of my knowledge, at the present time.

Ques. 18. State whether you ever or not observed his teeth and if so describe them.

Ans. I have not, only by hearsay, I heard them say.

Ques. 19. Can you state which of his lips was the shortest, the upper or the lower, and which of them was most protruding, and if so, state. Ans. I could not.

Ques. 20. State, if you can in respect to his arms, whether they were long or short. Ans. They were long.

Ques. 21. Please state in respect to his fingers in proportion to his hand, whether he had long or short fingers.

Ans. They were long.

Ques. 22. Will you state as to his physical development?

Ans. He was well developed.

Ques. 23. Can you state as to his complexion, whether he was light or dark or otherwise and if so state.

Ans. He was slightly dark.

Ques. 24. Mr. Johns, can you state when you last saw Adolph Walters?

Ans. To the best of my knowledge about three years ago.

Ques. 25. Will you please state more definitely, if you can, giving the year and the month?

Ans. To the best of my knowledge it was in the Spring of 1878. Couldn't say what month.

Ques. 26. How frequently had you seen him that Spring before you last saw him? A. Four times a week.

Ques. 27. Where did you see him?

Ans. In the Turner Hall.

Ques. 28. You and he were both members of the Turner Society? Ans. Yes, sir.

Ques. 29. Have you always lived at Fort Madison?

A. I have.

Ques. 30. Have you been here all of the time or away a part of the time?

2048 Ans. I was away twice for one week each.

Ques. 31. Where was it you saw Adolph Walters the last time?

Ans. In my store when he bid me good-by.

Ques. 32. He left your store and that is the last you saw of him? Ans. Yes, sir.

Ques. 33. When was it you saw him measured?

Ans. In the year of 1873.

Ques. 34. Where was it?

Ans. In Mr. Hinzie's cigar shop, where he was workinig at the time.

Ques. 35. Who measured him?

Ans. Myself and Mr. Ellwanger, I think.

Ques. 36. How did you measure him, just state.

Ans. He backed up again a door, by holding a square box on top of his head and against the door and then making a mark beneath the box.

Ques. 37. He had his boots on?

Ans. He had light shoes on, with not much of a heel.

Ques. 38. He was a large man was he? Ans. Yes sir.

Ques. 39. What next was done, after the mark was made under the bottom of the box? Ans. I was measured next.

Ques. 40. Who measured the distance then from the floor up to the mark, and what was it measured with?

Ans. Myself, with a foot rule.

Ques. 41. What has become of that foot rule?

Ans. I could not say.

Ques. 42. What kind of a foot rule was it?

Ans. It was a one foot rule that you close up as you do ordinary rules, it was made of wood bounded by brass.

Ques. 43. Was it an old rule or a new one?

Ans. It was tolerably new.

Ques. 44. To whom did the rule belong?

Ans. Charles Hinze.

Ques. 45. Adolph measured, as I understand you to state, by that measurement, five feet and eleven inches?

Ans. He did.

2049 Ques. Did you keep any memorandum of the measurement at the time?

Ans. Only in my mind, being at the time—I did not.

Ques. 47. How many years ago was that?

Ans. That was in 1873, eight years ago.

Ques. 48. State about what month it was in 1873?

Ans. To the best of my knowledge, it was May or June.

Ques. 49. Had you previously measured him or seen him measured when he measured less?

Ans. Not to my knowledge.

Ques. 50. Had you ever seen him measured before?

Ans. Not to my knowledge.

Ques. 51. Do you know how old he was at that time?

Ans. I do not.

Ques. 52. He had a large, broad foot, hadn't he?

Ans. Not that I know of, he had a large foot.

Ques. 53. His foot was not broad then?

Ans. Not to my knowledge.

Ques. 54. When did you last see his feet bare?

Ans. In the summer of 1877.

Ques. 55. Where was that? Ans. While in swimming.

Ques. 56. Do you know of your own knowledge what the size of his boots were? Ans. I did not.

Ques. 57. Will you state when you saw the mole, on his back, you speak of?

Ans. In the summer of 1873, while at work.

Ques. 58. Did you ever see it before that?

Ans. I did not.

Ques. 59. How did you come to see it at that time?

Ans. Having a shirt opened in the back, and his vest off, going by him from the shop into the store, I would frequently pull it when going from the shop to the store.

Ques. 60. You saw it through the opening in his shirt behind?

Ans. I did, being his shirts were opened away down to his pants.

2050. Ques. 61. The opening you refer to is the opening made by the shirt makers, to button it up by?

Ans. It is.

Ques. 62. Please to state as definitely as you can just where that mole was located on his back?

Ans. It was located, to the best of my knowledge, in the center or under the left shoulder.

Ques. 63. About how how far from the neck down?

Ans. It was a foot and a half or maybe only a foot, having not measured it.

Ques. 64. If it was located under the left shoulder, how close would you say it was to the shoulder blade?

Ans. From two to three inches I should judge.

Ques. 65. How old were you in the summer of 1873?

Ans. Fifteen years of age.

Ques. 66. Did you know anything about his having been bitten by a dog? Ans. I did not.

Ques. 67. Had you ever been informed that he had such a bite?

Ans. I have of late, by poor authority, being by a man who did not know him at the time.

Ques. 68. Would you consider his father good authority on that question?

Question objected to by defendant's counsel as calling for incompetent testimony.

The court sustained the objection, to which ruling of the Court the defendants, and each of them, duly excepted.

Ans. I would.

Ques. 69. When you say "by parties who did not know him at that time," to what time do you refer?

Ans. In the last four years.

Ques. 70. When did you first see this photograph, marked Exhibit "A" shown you by the defendant's counsel, since you were sworn? Ans. Here at the present time.

Ques. 71. Mr. Johns, will you please to state what
2051 there is about that photograph which leads you to say that it is a photograph of Adolph Walters?

Ans. The general appearance. His hair, and face in general.

Ques. 72. Does the hair look there as his hair always looked before he left Fort Madison?

Ans. Not altogether, being a little more kinked.

Ques. 73. What particular thing about the hair do you recognize? Ans. The color.

Ques. 74. Can you tell the color of a person's hair by his photograph? Ans. Most generally, when they are dark.

Ques. 75. Can you tell the difference between red hair and black in a photograph? Ans. I can not if they are dark red.

Ques. 76. Can you tell the difference between light red hair and dark red hair in a photograph? Ans. I think I can.

Ques. 77. Will you please to state the difference in the looks in a photograph between light red hair and dark red hair?

Ans. When a dark hair is much oiled they will look light and when not oiled they will look dark.

Plaintiff's counsel moves to strike out the answer of the witness as irresponsive to the question, and asks that the question be again read to the witness for a direct answer.

Ans. One is light and the other dark.

Ques. 78. Please to state what color you mean it shows in the photograph, light red hair or dark red hair?

Ans. Dark red hair shows dark color, black, and a light red would show light brown.

Ques. 79. About how red must a person's hair be to take black? Ans. It would have to be a dark red.

Ques. 80. Will you please to state the degree of redness of a person's hair where it ceases to take brown and commences to take black in a photograph?

Ans. I don't believe I ever said the picture would take brown. I said the hair would take light and dark and didn't say anything about brown.

Ques. 81. Did you not a few moments ago in answer to this question: "Will you please to state the difference in the looks in a photograph between light red hair and dark red hair," testify "Dark red hair shows dark color, black, and light red would show light brown?" Ans. I did.

Ques. 82. Can you testify under oath with any certainty as to the color of any person's hair from a photograph of that person? Ans. I can when dry; when the hair is dry.

Ques. 83. Can you tell from the photograph or not, whether the hair was dry when the photograph was taken?

Ans. I can not, unless I know the color of the person's hair.

Ques. 84. Have you now stated all the reasons from the photograph why you say that it is a photograph of Adolph Walters? Ans. I have.

Re-examination of the witness by defendant's counsel.

Ques. 85. You desired when asked the question as to whether you kept a memorandum of the height of Adolph Walters, to make an explanation as to how you came to remember it, which was not allowed. You may now state upon what grounds if any you recollected the fact?

Ans. There still being the mark in the shop now occupied by F. D. Ellwanger, formerly occupied by Charles Hinze, of the same, at the present time, having seen it last Friday.

Ques. 86. State whether or not you recognize the photographs of your friends taken while living without reference to the color of the hair, or shape of any [specify] feature?

Ans. I do when intimately acquainted with them.

Ques. 87. State whether or not you recognize in the same

way the photographs of your friends taken after death,
2053 that is without reference to the color of the hair, or the shape of any specific feature?

Ans. I do, when taken shortly after death, before they are disfigured.

Recross-examination of witness by plaintiff's counsel:

Ques. 88. Will you please to state the name and residence of any dead friends of yours, whose photograph was taken after his or her death, that you have ever been called upon to recognize?

Ans. I don't know how long ago it is, several children related to my wife, at one time living in Fort Madison, now living out in the western part of the state named Koehler.

Ques. 89. Give the full name of those children, state their ages, when and where they died?

Ans. I can not give their initials or full names or their exact age, they being about two years old, in my opinion.

Ques. 90. How many children were there and what was their sex?

Ans. I do not know how many children there were.

Ques. 91. What was their sex? Ans. Male.

Ques. 92. How long ago did they die and where?

Ans. Some three years ago, in the western part of this state.

Ques. 93. Were their names all Koehler?

Ans. They were.

Ques. 94. What was the father's first name?

Ans. I can't say.

Ques. 95. How do you spell Koehler? A. Koeler.

Ques. 96. Whereabouts did he live in Fort Madison?

Ans. He lived on the outskirts of the city.

Ques. 97. Which direction from the court house?

Ans. West.

Ques. 98. What was Koeler's business?

Ans. He was a farmer.

Ques. 99. What relation was he to your wife?

Ans. An uncle.

Ques. 100. When did he go out in the western part of the state? Ans. I can not say.

2054 Ques. 101. About when, state as near as you can?

Ans. About six years ago, or seven.

Ques. 102. And he had three children die, photographs of which were taken of all of them after they were dead, did he?

Ans. No, sir, there were two who had photographs taken.

Ques. 103. When did you receive the photographs of the two dead children?

Ans. I did not receive them myself, but were shown to me.

Ques. 104. By whom and when?

Ans. By my wife, at present.

Ques. 105. How long ago?

Ans. I would judge three or four years.

Ques. 106. You had not seen the children since they moved away from here? Ans. I had not.

Ques. 107. Were you intimate with them before they went away?

Ans. I knew them personally, having seen them quite often.

Ques. 108. Your wife showed you these pictures and told you they were pictures of Koeler's children?

Ans. After I had recognized them, she having asked me if I knew who they were.

Ques. 109. You can swear positively now from your recollection that you were shown the pictures and was asked to tell who they were before you knew the children were dead and before any one had informed you who the photographs were taken from, can you? Ans. I can.

Ques. 110. And this you can do after not having seen the children for about three years, can you? Ans. I did.

Ques. 111. Now this matter in regard to the alleged death of Adolph Walters, has been a subject of common discussion in this place in Fort Madison, for months, has it not?

Ans. Of late, only within the last week. It was some time ago but had died out and was renewed here last week.

2055 Ques. 112. When did you hear of it?

Ans. I should judge about two years ago, maybe only one year ago, can't positively say.

Ques. 113. Can you tell whether it was one year ago or two years ago? Ans. I could not positively.

Ques. 114. You have had various conversations with Mr. Walters' family about it, have you not? Ans. I have not.

Ques. 115. No one of the family ever spoke to you on the subject, I suppose?

Ans. The son-in-law of Mr. Walters asked me in regard to the case, yesterday evening.

Ques. 116. Was that the first and only time any one of them ever spoke to you on the subject?

Ans. It was, of the Walters family.

CHAS. JOHNS.

2056 The defendants next read in evidence the deposition of Charles Hoessig, taken at Ft. Madison, Ia., May 25, et seq., 1881, which in words and figures as follows, to-wit:

Charles Hoessig, a witness of lawful age, produced by defendnt, being duly sworn, testified as follows:

Ques. 1. State your name, age, occupation and place of esidence.

Ans. Charles Hoessig, age twenty-two, am in the saloon usiness at present, am a carpenter by trade, reside at Fort Iadison, Iowa.

Ques. 2. How long have you resided at Fort Madison?

Ans. Twenty-two years.

Ques. 3. Did you ever know a person by the name of Fredrick Adolph Walters? Ans. I did.

Ques. 4. Where was he living at the time you knew him?

Ans. At Fort Madison.

Ques. 5. What was he commonly called and known by, by is companions at Fort Madison?

Ans. Governor, we used to call him, in the last few years; t was a nickname.

Ques. 6. I refer to which of his given names, if he was alled by either alone? Ans. Adolph.

Ques. 7. Can you state the name of the father of this Fredrick Adolph Walters, to whom you refer, if so, state?

Ans. Daniel Walters.

Ques. 8. About when was it that you last saw Frederick Adolph Walters?

Ans. I couldnt remember the exact time, it was the day efore he left Fort Madison. I think it was about three years ow.

Ques. 9. Has he returned to Fort Madison since that time?

Ans. No, sir.

Ques. 10. Look at the picture or photograph now shown ou by J. W. Green, one of the defendant's attorneys, examine it carefully and state whether or not you recognize it as 057 the picture or photograph of any person whom you have heretofore seen, and if so, state of whom it is a photoraph. Ans. I do; of F. Adolph Walters.

Ques. 11. Describe this Frederick Adolph Walters, as he ppeared when you last saw him alive, commencing with his air?

Ans. His hair was dark brown, his mustache was a little ighter than his hair in color. His nose was slightly Roman. le had high cheek bones. He had a good set of teeth. He was ve feet eleven inches and a half high. Broad shoulders. His rms were long. His fingers were long and thin.

Ques. 12. State, or describe rather, his feet, if you can?

Ans. Rather large, wore about a number nine boot.

Ques. 13. State as to his hair; whether it was straight or therwise? Ans. They were a little curly.

Ques. 14. State as to his mustache, in regard to the heft of it. Ans. His mustache was rather thin.

Ques. 15. State, if you know, whether or not there were any marks on his back, and, if so, state what they were and where they were located?

Ans. There was a small mole right under the left shoulder blade, right next to the center of the back.

Ques. 16. State if you can, the size of that mole, and the shape?

Ans. It was about a quarter of an inch around, I think. It was about the size of the point of my little finger.

Ques. 17. State, if you please, as to his muscular development? Ans. He was well muscled, heavy.

On cross-examination of the witness, by counsel for plaintiff, he testified as follows:

Ques. 18. Where did you say he resided?

2058 Ans. At Fort Madison, Iowa.

Ques. 19. Have you ever lived anywhere else, but in Fort Madison? Ans. No, sir.

Ques. 20. Have you ever been away from Fort Madison for any length of time? Ans. I have.

Ques. 21. When and how long were you away?

Ans. Last January and February, was away five weeks. I have been away fifteen or twenty times, for two or three weeks at a time.

Ques. 22. What were you away for last January, and where?

Ans. On a visit, in the State of Michigan.

Ques. 23. What were you away for the other times you mentioned? Ans. At work.

Ques. 24. At what work? Ans. Carpentering.

Ques. 25. Name some of the place you were at?

Ans. It was mostly in the country.

Ques. 26. What other places besides in the country?

Ans. Warrens Station was one place, on the Southwestern road. That's all. That's the only place.

Ques. 27. How long have you been a carpenter?

Ans. Eight years this spring.

Ques. 28. What did you do before you became a carpenter?

Ans. Went to school.

Ques. 29. Do anything else?

Ans. No, sir, only work around home.

Ques. 30. During the eight years you have been a carpenter, have you been steadily at work at your trade?

Ans. All but the last two years.

Ques. 31. What have you been doing the last two years?

Ans. Tending bar in a saloon.

2059 Ques. 32. In whose saloon have you been tending bar? Ans. Jacob Mueller's.

Ques. 33. Now, during the six years you were at work, at the carpenter's trade, about how often do you think you saw Adolph Walters?

Ans. I saw him very near every day; we were here in town together.

Ques. 34. Were you running around town while you were steadily engaged working at your trade?

Ans. No, sir, only after supper in the evening.

Ques. 35. Were you in town every night while you were at work in the country and other places?

Ans. Not while I was working in the country.

Ques. 36. Were you and Adolph Walters particularly close and intimate friends? Ans. Yes, sir.

Ques. 37. Did you ever stay with him all night at his house? Ans. No, sir.

Ques. 38. Did he ever stay with you all night at your house? Ans. No, sir.

Ques. 39. Did you ever visit any of his family?

Ans. I have been there often; we only lived half a block apart.

Ques. 40. Did you ever visit any of the members of his family?

Ans. No, sir; no more than I just went there. No, sir; I didn't.

Ques. 41. How do you know whether he has ever returned to Fort Madison or not, since he last went away about two years ago?

Ans. I haven't seen him or heard anything of his being here.

[—] He might have been here and you not have seen him or heard of him, might he not?

Ans. I might not have seen him, but I would have heard of it.

Ques. 42. How do you know you would have heard of it?

Ans. Heard of it from his companions.

Ques. 43. Do you mean to say now that he has not
2060 been here to your knowledge, or can you swear positively that he has not been here at all.

Ans. I can positively swear that he has not been here since he left over two years ago.

Ques. 44. You spoke about his mustache being lighter colored than his hair; isn't it a fact that almost everybody's mustache is lighter than his hair? Ans. I don't know.

Ques. 45. You have not had sufficient observation to be able to tell whether people's mustaches are generally lighter than their hair or not have you? Ans. No, sir.

Ques. 46. It is not a matter that you have made a business of noticing is it?

Ans. I don't think I have to answer that question, I don't think it is anybody's business.

Ques. 47. Since you left the carpenter business and commenced selling whiskey as a bartender, you have had opportunity to notice a great many people in front of the bar have you not?

Ans. Yes, sir, I have had the opportunity if I wanted it.

Ques. 48. Since you have been a bartender have you been in the habit of selling whiskey over the bar?

Ans. Don't know as that is any of your business, I don't intend to answer any more such foolish questions.

Ques. 49. Since you have been a bartender have you been in the habit of selling whiskey over the bar? A. No sir.

Ques. 50. Have you ever sold any whiskey over the bar?

Ans. No, sir.

Ques. 51. Have you ever sold any whiskey in the saloon where you are a bartender since you have been in there as such bartender? Ans. No sir.

Ques. 52. How do you know what Adolph Walters' height was? Ans. I have seen him measured.

2061 Ques. 53. When did you see him measured?

Ans. Four or five years ago.

Ques. 54. Where did you see him measured four or five years ago?

Ans. Here in town at F. D. Ellwanger's cigar shop.

Ques. 55. Who was present at that measuring?

Ans. Don't remember who, now, there were four or five of them.

Ques. 56. State the name of any one of them, if you can?

Ans. Don't believe I can.

Ques. 57. You cannot now recollect the name of any person besides yourself who was present at that measuring can you?

Ans. No, sir.

Ques. 58. Please to state how the measuring was done?

Ans. He stood up against the wall and made a mark at the top of the head and measured it with a rule.

Ques. 59. Who made the mark at the top of the head?

Ans. Don't remember.

Ques. 60. Who did the measuring with the rule?

Ans. I did.

Ques. 61. Whose rule did you measure it with?

Ans. My own.

Ques. 62. Did you make any memorandum in writing of his height at that time?

Ans. No, sir, I didn't; I guess others did.

Ques. 63. How do you know he wore a number nine boot?

Ans. From the appearance of his feet.

Ques. 64. You judge then simply from the appearance of his feet, do you? Ans. Yes, sir.

Ques. 65. When did you see the mole you speak of on his back?

Ans. I couldn't tell the exact day. A year or two before he left.

Ques. 66. Where was he when you saw it?

Ans. At the Turners Societies turn yard.

Ques. 67. How did you happen to see it?

Ans. By his getting on the turning pole; his shirt was open in the back.

2062 Ques. 68. Then you saw it while he was turning did you? Ans. That was the first time I noticed it.

Ques. 69. How long ago do you say that was?

Ans. A year or two before he left.

Ques. 70. Were you a member of the Turners' Society?

Ans. I was.

Ques. 71. Are you still a member?

Ans. No, sir, it has broke up.

Ques. 72. Who first spoke to you about giving your testimony in this case? Ans. Mr. Rourke, I think.

Ques. 73. Who is Mr. Rourke? Ans. Deputy Sheriff.

Ques. 74. Who next spoke to you?

Ans. Mr. Munn, the Sheriff.

Ques. 75. Who next spoke to you about it?

Ans. Mr. Green asked me a few questions.

Ques. 76. Who next spoke to you about it?

Ans. Nobody.

Ques. 77. Did Mr. Timpe come down and ask you to come up here? Ans. No, sir.

Ques. 78. Have you and Mr. Timpe had any conversation on the subject? Ans. No, sir.

Ques. 79. Are the three persons you have mentioned the only ones who have conversed with you about the matter?

Ans. Yes, sir.

Ques. 80. When did you first see this photograph that was shown you by defendant's counsel?

Ans. This is the first time, a few minutes ago when he handed it to me.

Ques. 81. Will you please to state what there is in that photograph that leads you to say it is the photograph of Adolph Walters? Ans. The general appearance of it.

Ques. 82. Is there anything else about it but its general appearance that leads you to so say?

Ans. His nose and his mustache.

Ques. 83. Are the nose and mustache the only
2063 things besides its general appearance that leads you to say it is a photograph of Adolph Walters?

Ans. His chin, that's all.

Ques. 84. What is there about the mustache that you can identify a person by it?

Ans. The mustache is like his was, it grows straight out, it was thin like his was.

Ques. 85. Does the mustache in that photograph look as Walters' mustache always looked when you knew him?

Ans. Yes sir.

Ques. 86. What is there about the chin that gives you any means of identification?

Ans. It was straight, not a very large chin.

Ques. 87. Anything else? Ans. No, sir.

Ques. 88. What is there about the nose that gives you any means of identification? Ans. Long, slightly Roman.

Ques. 89. What do you mean by Roman?

Ans. A little round on top.

Ques. 90. You have seen other noses that were round on top, haven't you? Ans. I have.

Ques. 91. Was his nose crooked sideways on his face?

Ans. No, sir, it may have been a little, but a very little.

Ques. 92. Can you remember whether it was crooked at all sidewise of his face?

Ans. I think it was a little, but I wouldn't say positively that it was.

Ques. 93. Was Adolph Walters a large man?

Ans. He was.

Ques. 94. Did he have broad, strong hands and feet?

Ans. He had big hands, the feet were not very small. He did.

Ques. 95. Was he a very strong man? Ans. He was.

Ques. 96. Pretty raw boned? Ans. Yes, sir.

Ques. 97. With regard to that mole you speak of, can you say positively where it was situated on his back?

Ans. I can say within a few inches of where it was.

2064 Ques. 98. State the nearest point that you can state where it was.

Ans. Right under his left shoulder blade, next to the center of his back.

Ques. 99. About how far from his neck?

Ans. About ten inches.

Ques. 100. Who did you first talk with here, about knowing that mole was on his back?

Ans. I don't remember.

Ques. 101. Who first asked you the question whether there was such a mole on his back or not?

Ans. Nobody, I told it before I was asked.
Ques. 102. Who did you tell it to before you were asked?
Ans. To Charles Johns.
Ques. 103. When did you tell it to Charles Johns?
Ans. Eight or ten days ago.
Ques. 104. Where did you tell it to him?
Ans. At his cigar shop.
Ques. 105. Before you commenced giving your testimony here, had any one stated to you that the corpse of which the picture shown you by the defendant's counsel, appears to be a photograph, had a mole on its back? Ans. No, sir.
Ques. 106. Have you ever received such information from any source whatever? Ans. No, sir.
Ques. 107. Had you ever heard of such a thing?
Ans. No, sir.

CHARLES HOESSIG.

2065 The defendants, and each of them, next offered in evidence the deposition of Charles W. Schott, taken at Ft. Madison, Ia., May 25, 1881, and days following, which is in words and figures as follows, to wit:

Charles W. Schott, a witness of lawful age, being produced by defendant, first being duly sworn, testified as follows:

Ques. 1. State your name, age, occupation and place of residence?
A. C. W. Schott, age twenty-five years, occupation cabinet maker, reside at Fort Madison, Iowa.
Ques. 2. How long have you resided at Fort Madison Iowa?
A. First came here in 1873. During that time I staid here then until 1875, was gone about two years then returned and remained six months. Then went away again and returned the 20th of last August; have been here since then with the exception of two months.
Question 3. State if you were ever acquainted with a person by the name of Frederick Adolph Walters?
A. Yes sir.
Ques. 4. When and where did you make his acquaintance?
A. Fort Madison, Iowa.
Ques. 5. When did you make his acquaintance, about when?
A. During the summer of 1873.
Ques. 6. Where and when did you last see Frederick Adolph Walters; if so please give it.
A. Daniel Walters.
Ques. 7. Where was Frederick Adolph Walters residing at the time you made his acquaintance?
A. With his parents at Fort Madison.

Ques. 8. Where and when did you last see Frederick Adolph Walters?

Ans. Kansas City, Mo., in the spring of 1879.

Ques. 9. Did he leave Kansas City before you did?

A. Yes sir.

Ques. 10. Where did he go to from Kansas City, state if you know.

Ans. He was going to see his brother who resided, I can't just say, out in Kansas somewhere, I believe.

Ques. 11. Look at the picture or photograph now shown you, which has been marked exhibit "A" by Mr. Casey, Notary Public, by J. W. Green, one of the attorneys for the defendant, and state whether or not it is the picture or
2066 photograph of any person whom you have heretofore seen, and if so, please state of whom it is a picture or photograph?

A. I recognize the picture in some few points as a person I have seen. His name was Adolph Walters.

Ques. 12. State the full name, please of the person.

A. Frederick Adolphus Walters.

Ques. 13. Please to give a description of Frederick Adolph Walters as he appeared when you last saw him.

A. He was a large person, very dark complected, dark clothes; his hair was quite long, and light mustache in heft. He looked quite natural from what I had always seen him.

Ques. 14. State if you please more fully in regard to his hair; giving color and the character of it.

A. Very dark hair; it might be called dark brown, inclined to curl when long as it was then when I last seen him.

Ques. 15. Describe if you please more fully, his mustache; giving the color and how it grew.

A. It was somewhat lighter than his hair in color; was of a bristly nature; it was not curly and a little lighter in heft on one side than on the other.

Ques. 16. Give the shape of his nose, if you can.

A. He had quite a large nose; more of what is called a Roman nose.

Ques. 17. Describe his cheek bones if you can.

A. The cheek bones were very high, showed very prominent, as his face was very thin.

Ques. 18. State if you can the character and quality of his teeth.

A. He had very good teeth, strong teeth, and as far as I know there was none missing. His teeth looked as if they might be tobacco stained; they looked as if of that color; they were not nice and white.

Ques. 19. Can you give the shape of his chin, if so, state.

A. No sir.

Ques. 20. Describe, if you can, his hands.

A. Very large hands, his fingers uncommonly long.

2067 Ques. 21. State if you can, in respect to his feet.

A. No sir; I couldn't.

Ques. 22. State, if you know, whether or not he had any marks upon his body.

A. He had a mole on his back is all I know about; two moles rather.

Ques. 26. Please to describe those moles and locate them if you can, and give the size.

A. One of them was quite large, about the size of a pea, more of a warty nature and it was dark; it was discolored; this one was under his left shoulder blade. The other was quite small, situated over his right hip bone; it was not very much discolored; quite small.

The witness on cross-examination, by R. J. Borgholthaus, Atty. for the Plaintiff, testified as follows:

Ques. 24. Mr. Schott how old were you when you first came to Fort Madison? A. Something near 17.

Ques. 25. Where did you come from?

A. I came from Bonaparte, Iowa.

Ques. 26. How long had you lived at Bonaparte?

A. About five months.

Ques. 27. Where did you live previous to that?

A. Burlington, Iowa.

Ques. 28. How long had you lived in Burlington?

A. I think it was about four months.

Ques. 29. Where did you come from when you went to Burlington? A. Pekin, Ill.

Ques. 30. How long had you lived at Pekin?

A. About two months.

Ques. 31. Where did you move from to Pekin?

A. St. Louis.

Ques. 32. How long had you lived at St. Louis before you removed to Pekin? A. About two weeks.

2068 Ques. 33. Where did you move from to St. Louis?

A. From Champaign, Illinois.

Ques. 34. How long had you lived at Champaign?

A. Nearly one year.

Ques. 35. Where did you move from to Champaign?

A. Vedersberg, Indiana.

Ques. 36. How long had you resided at Vedersberg?

A. Something like five months.

Ques. 37. Where did you move from to Vedersburg?

A. Centralia, Illinois.

Ques. 38. How long did you live at Centralia?

A. Can't say exactly; something about 9 or 10 months I guess.

Ques. 39. Where did you move from to Centralia?
A. From Monroe, Wisconsin.
Ques. 40. How long were you in Monroe; how long did you live there? A. Something like a year and a half.
Ques. 41. Where did you move from to Monroe?
A. Cepron, Illinois.
Ques. 42. How long did you live at Capron?
A. I couldn't say exactly, two years and a half I guess.
Ques. 43. Where did you move from to Capron?
A. Argile, Wisconsin.
Ques. 44. How long had you lived at Argyle; about how long?
A. I couldn't say; something as near as I can remember, about four years.
Ques. 45. Where did you move from to Argile?
A. Judy, Wisconsin.
Ques. 46. How long did you live at Judy?
A. I don't know; don't remember at all.
Ques. 47. Where did you move from to Judy?
A. Warren, Illinois.
Ques. 48. State as near as you can remember how long you lived at Warren? A. I do not know.
Ques. 49. Where did you move from to Warren?
A. I do not know.
Ques. 50. Who did you reside with when you resided at Warren? A. My parents.
2069 Ques. 51. How old were you then?
A. I could not say.
Ques. 52. Who did you reside with when you lived at Judy? A. My parents.
Ques. 53. Who did you live with when you resided at Argile? A. My parents.
Ques. 54. What was your father's business?
A. Cabinet maker.
Ques. 55. How old were you at that time?
A. I don't remember.
Q. 56. About how old were you?
A. I haven't any idea.
Ques. 57. Explain why it is that you can remember how long you lived at Argile and when you left there and why you can't remember your age or about your age, at that time?
A. I remember living there; I disremember giving any exact time how long and from there back to childhood I couldn't remember my age.
Ques. 58. Do you mean now to say that you are mistaken as to your having lived at Argile about four years?
A. I said I thought it was about four years; I couldn't say. it might have been three; it might have been five.

Ques. 59. Do you remember when you moved to Capron?
A. No, sir.
Ques. 60. What did your father do at Capron?
A. He followed carpentering for a time; had a store—a grocery store.
Ques. 61. Any other business? A. No, sir.
Ques. 62. Did he sell anything but groceries in the grocery store?
A. Had queensware, wooden and willow ware; that was all that I know.
Ques. 63. Your father is a German is he not?
A. Yes, sir.
Ques. 64. Is your mother a German also?
A. I think not.
Ques. 65. What did your father follow in Monroe, Wisconsin? A. Carpentering.
Ques. 66. Do you remember your age when living in Monroe; state about how old you were at that time?
A. Something like between eleven and twelve.
2070 Ques. 67. Where do your parents reside now Mr. Schott? A. In Fort Madison, Iowa.
Ques. 68. How long have they lived here?
A. Since about the spring of 1873. Since '73 in the spring.
Ques. 69. What has your father been engaged in here, since 1873? A. Furniture business.
Ques. 70. When did you learn your trade as cabinet maker?
A. I served no time, I picked it up in my father's shop at different times.
Ques. 71. Have you any other trade or business?
A. I sometimes follow painting.
Ques. 72. Are you engaged in business with your father?
A. No, sir.
Ques. 73. Have you been since he came to Fort Madison?
A. No, sir, nothing more than working for him.
Ques. 74. How long since you left home to work for yourself?
A. I worked for other parties for a livelihood since about fourteen years of age.
Ques. 75. Did you live with your father's family up to the time you left Bonaparte?
A. I lived with my father off and on during this time since 14 years of age; during the time I was not occupied and employed by other parties.
Ques. 76. Where did your father live when you were at Bonaparte? A. At Bonaparte?
Ques. 77. Did he live at Burlington the time you were there four months? A. No, sir.

Ques. 78. What did you follow while at Burlington?

A. I worked in a sash, door and blind factory.

Ques. 79. All the time?

A. During that four months, yes, sir.

Ques. 80. Where did your folks live while you were at Pekin?

A. My father was at Pekin with me, or I with him.

Ques. 81. How old were you when you first left home to work for yourself?

A. Between thirteen and fourteen.

Ques. 82. Did you leave the town your father was living in at that time for that purpose? A. No, sir.

2071 Ques. 83. You say you met Fred Walters in the summer of 1873, what time was it in the summer?

A. I couldn't answer the exact time, along in April as near as I can remember.

Ques. 84. How long did you stay here at that time, before you left home, after you met Walters?

A. About eight months.

Ques. 85. Then how long were you away before you returned?

A. I was here off and on at different times, to spend Sunday or a holiday at home, but I was gone something like a year and a half.

Ques. 86. Where did Walters live during the year and a half you were gone?

A. At home most of the time, I believe.

Ques. 87. Then you came back after the expiration of about a year and a half, and staid how long?

A. About between two and three months.

Ques. 88. Then you were gone about two years?

A. No, sir; not that I can remember of; I was gone about seven months.

Ques. 89. Well, how long did you stay after coming back after seven months? A. About nine months, I think.

Ques. 90. Then you left and were gone until August 1880, were you? A. Yes, sir.

Ques. 91. Then you did not see Walters from the time mentioned in your last answer, until you met him in Kansas City, as you have stated, did you?

A. I did not see him until during that time.

Ques. 92. What time was it in the spring you were in Kansas City and saw Walters?

A. I couldn't answer exactly; the exact time, as near as I can remember it must have been in the fore part of February.

Ques. 93. How long were you in Kansas City—at that time?

A. I was there from November 1877, to the fore part of 1880

Ques. 94. What were you doing there?
A. Working for a wholesale furniture house.
Ques. 95. What house?
A. At that time G. M. Todd & Co.
Ques. 96. You say at that time, what is the style of the firm now, or has it changed?
2072 A. Since 1880 in April, I have understood that the name of the firm then was Todd & Lowrey; it was changed to that since April, 1880.
Ques. 97. Were you working for them when you met Walters? A. I was working for G. M. Todd & Co.
Ques. 98. What was your foreman or superintendent's name?
A. The shipping clerk acted as foreman. His name is S. R. Parker.
Ques. 99. Was Walters on his way when you met him, to see his brother?
A. He came there in search of a situation and told me when he left, that he did not procure a situation, he was going to his brothers.
Ques. 100. He said his brother lived in Kansas, somewhere?
A. I didn't say so, or don't say so knowingly. I am not personally acquainted with his brother and did not ask him where he was.
Ques. 101. Where did he say he was going?
A. To his brothers.
Ques. 102. Did he state where his brother lived?
A. No, sir.
Ques. 103. Did you go with him to the train when he left?
A. He didn't go by the train.
Ques. 104. How did he go?
A. He walked, he started and told me he thought he would take the railroad track.
Ques. 105. How long was he in Kansas City?
A. From Tuesday morning until Monday morning?
Ques. 106. Where did he stay?
A. He staid with me.
Q. Where did you stay?
A. I was boarding at a restaurant.
Ques. 108. What was the restaurant,—what is the name of it?
A. Farmer's Dining Hall—Farmer's Restaurant and was changed to Farmer's Dining Hall. They called it a restaurant—it went while I know it by the name of Farmer's Dining Hall.
Ques. 109. Where was it located?
A. On Fourth street between Main and Walnut, opposite the Market House.

Ques. 110. What was the proprietor's name?

A. George Sass.

Ques. 111. Did you take Walters there as your guest?

A. Yes, sir.

2073 Ques. 112. Did you enter his name upon the Register of the house?

A. I did not, as they had no register.

Ques. 113. Did you pay his bill while he was there?

A. Yes, sir.

Ques. 114. Did you pay from meal to meal, or did you have an account there, and his went in with yours?

A. I told the proprietor he was a friend of mine and I would be accountable for his meals. I had no account as I paid every week. The proprietor kept account I suppose.

Ques. 115. Did you pay in advance or did you pay by the week as his account accrued against you?

A. I paid by the week at the end of each week, not in advance.

Ques. 116. Did he furnish you a statement of your account on a piece of paper, or a memoranda, of how much you owed him? A. No, sir.

Ques. 117. Didn't you take any receipt to show you had made these payments? A. No, sir.

Ques. 118. Did you during that spring at any time keep any other guest at your expense at that restaurant?

A. Not for any more than a meal probably a friend of mine.

Ques. 119. Do you know what road he left on?

A. As I stated before he was going to take the railroad track and walk, I told him he had better take the wagon road and he would probably have a chance to ride.

Ques. 120. Why didn't he take the railroad?

A. I don't know unless he acted on my suggestion and thought he might get a chance to ride and took the wagon road.

Ques. 121. Do you know which road he took, the railroad or wagon road, and in which direction did he start out on?

A. The wagon road; he started for Independence, Kansas.

Ques. 122. Did you go part of the way with him?

A. No farther than the store door.

Ques. 123. Is there a road leading from Kansas

2074 City, known as the Independence, Kansas road?

A. I don't know as there is really one by that name.

Ques. 124. State if you know, Mr. Schott, why Mr. Walters did not take the cars for Independence, instead of walking?

A. Because he didn't have no way of getting a ticket; he had no money to get a ticket or fare.

Ques. 125. Was he entirely out of money?

A. He had a little small change, it was less than a dollar, I think.

Ques. 126. What kind of a satchel did he have to carry his clothes in?

A. He had a small valise of morocco leather, nickel plated, and the word F. A. Walters, in gilt letters. It was on the outside.

Ques. 127. What was the size of it?

A. Probably 18 in. long, about 10 or 12 in. deep and about some thing like ten in. in thickness.

Ques. 128. Had he more than one suit of clothes?

A. Yes, sir.

Ques. 129. What kind of a suit did he have on when you seen him?

A. The suit he had on when he left was a light summer suit, that is of light goods, of a grayish brown color; the suit was made by his father in the summer of 1877.

Ques. 130. Was his satchel pretty well filled or only partially filled?

A. He had a suit of clothes; had some shirts and underclothing, and papers and letters—a nice little bundle of them. The way he put them in it was quite well filled.

Ques. 131. Did you ever see this picture your attention was called to in your direct examination, or one like it before this morning? A. Yes, sir.

Ques. 132. State when, Mr. Schot, and also who showed it to you?

A. Last Fall sometime; whether that one or one like it I could not say, it was shown to me by Mr. Munn.

Ques. 133. It was either this one or a copy of it?

A. Whether it was that one or a copy I can't say, it was one or the other.

Ques. 134. State now where that transpired?

A. In my father's door in Fort Madison.

Ques. 135. What did Mr. Munn say about the picture when he showed it to you?

A. I was in the store at the time; my attention was called to the picture, and what words were used at the door,
075 I can't say, I disremember, any more than I was asked if it resembled Mr. Walters.

Ques. 136. Who held the picture, did Mr. Munn hold it at the time you were asked the question? A. Yes, sir.

Ques. 137. Mr. Munn asked you the question did he not?

A. Yes, sir.

Ques. 138. Did he point out to you the points of resemblance between Mr. Walters and the picture at the time?

A. No, sir.

Ques. 139. Did he say anything at all?

A. He asked me the points I recognized.

Ques. 140. Did he point out any of the features of resemblance? A. Not to my remembrance.

Ques. 141. Did he state to you at the time who he was representing here, or did you know?

A. He did not, no, sir.

Ques. 142. Did you know who he was representing?

A. I had understood that there was a gentleman in the city that had photographs taken of the supposed Frederick Walters, and Mr. Munn came into the store, I was introduced to him, the pictures were shown to me, and the question asked whether I recognized any of the features.

Ques. 143. Do you mean to say Mr. Munn or Mr. Munn came into the store? A. Both of them.

Ques. 144. Which one of the Munns was it, Mr. Schott?

A. The older gentleman.

Ques. 145. Is he an insurance agent?

Ans. I believe so.

Ques. 146. Did you know at the time or ascertain since in whose interest Mr. Munn was acting?

A. Nothing more than I had understood he was an Insurance man.

Ques. 147. What companies did you understand?

A. No special company.

Ques. 148. Did you learn that those companies had been sued at that time or since on insurance policies?

A. No, sir. I have not known or do not know as yet, whether they have been sued on or not.

Ques. 149. Mr. F. A. Walters was a large man was he not, what is known as a large man? A. Yes, sir.

2076 And what would be ordinarily called a good looking man was he not?

A. He was an ordinary looking man, yes.

Ques. 151. Was he not an ordinarily good looking man in his proportions and in his features?

A. That's a matter of taste; I should call him a fair looking man; pretty well proportioned; he was raw-boned; his features had a very prominent look.

Ques. 152. At the time you last saw him did his mouth gap open and show his teeth as they do in this picture?

A. No, sir.

Ques. 153. Did his moustache look shaggy and hang out straight under his nose like bristles, as it appears in that picture?

A. His mustache was under his nose and would depend on the way it was combed; it didn't stick out like it does here when I saw him last.

Ques. 154. Were his cheeks hollow and sunken, like they are in the picture of that corpse?

A. No, sir.

Ques. 155. Were his eyes sunken and gone as they are in that picture of a corpse?

A. No, sir.

Ques. 156. Was his hair kinked and curled as it is in that picture, Mr. Schott?

A. His hair was kinky and curly when long as it was when I last saw him, but whether just as in this picture I can't say. I saw his hair combed when this in the picture shown here is uncombed.

Ques. 157. Did you ever see his hair as kinky as it is in that picture?

A. I have seen it, yes.

Ques. 158. Then you would say this hair is very curly would you?

A. No, sir.

Ques. 159. Is it not so in that picture?

A. As it looks in the picture it don't look curly to me. It looks more of the kinky order.

Ques. 160. Do you understand, or mean to imply, that curly hair is less straight than kinky hair?

A. Yes, sir.

Ques. 161. State what you mean by kinky hair.

A. Kinky hair is hair inclined to curl, where curly is curled more in ringlets.

Ques. 162. Would you say that F. A. Walters' hair was curly or would you say it was wavy?

2077 A. I should say it was more inclined to curl than to wave.

Ques. 163. Which is it—curly or wavy or kinky?

A. That's a question I am lost to answer myself. It wasn't curly and it wasn't wavy—put it in as kinky.

Ques. 164. When you saw him ordinarily his hair was combed wasn't it?

A. Yes, sir.

Ques. 165. Did you ever see the picture of a corpse before?

A. Yes, sir.

Ques. 166. How many corpses have you seen pictures of?

A. Of several; I couldn't give you the correct number.

Ques. 167. State the names of the persons.

A. I couldn't state no names of persons, because they were merely photographs of persons I had seen, that is photographs of corpses, the persons whom I did not know in life.

Ques. 168. You have had opportunities of observing dead bodies, have you not?

A. I have seen a few, yes.

Ques. 169. State the result of your observation in such cases, with regard to the change in appearance of the person when dead, as compared with them when living.

A. I could give no definite explanation of the difference, because I never observed them much, the difference would depend a great deal on how long a person had been dead.

Ques. 170. Did you ever observe any difference between a person when dead and the same person when alive?

A. There is quite a difference I should think in a person who had been long sick, and had died a natural death, than what there would be in life. As far as any cases I have noticed they generally turn a little whiter after death.

Ques. 171. Then you would imply that so far as your observation has gone, in the matter of observing dead bodies of persons whom you have known in life, that the only change in their appearance in case of death is that they have
2078 turned a little whiter; is this what you mean?

A. That is all I have observed unless they have been dead a few days; when so far as my observation has gone, very often the features are sunken.

Ques. 172. Have you ever examined a corpse of a person whom you knew in life, who had been dead a few days?

A. No, sir.

Ques. 173. Then this would be a matter of judgment?

A. Yes, sir.

Ques. 174. Now to be frank, Mr. Schott do you not know as a matter of fact that anybody is materially changed in features very shortly after vitality has passed out of them, and that they look very different from what they did in their life time?

A. Nothing more in my observation, than I never noticed any more than discoloration or sunken appearance.

Ques. 175. How about the eyes in case of death?

A. Oft times the case that they are sunken; sometimes more and sometimes less, in different cases.

Ques. 176. Look at the picture you testified about this morning and state how they appear to you there.

Ans. It appears sunken somewhat, the eye-ball either broken or the eye gone and a small piece of cotton in its place.

Ques. 177. Then you would say, Mr. Schott, that the eye as it appears in that photograph, bears no resemblance to the eye of Walters when you saw him?

A. No sir, it has no resemblance.

Ques. 178. What color does the hair in that picture appear to you to be?

A. I couldn't answer that. Well, I couldn't answer the color of the hair. I should judge from the photograph to be dark.

Ques. 179. Is it not black as it appears there?

A. No to my view it is brown, sooner than a black.

Ques. 180. You would not be certain in your judgment as to what it would be?

A. No, sir.

Ques. 181. Now, then, Mr. Schott, you have said in your cross examination that in answer to cross question No. 152, that the mouth of Mr. Walters when you last saw him did not gap open and show his teeth, as they do in this picture; you have also stated in answer to cross-question No. 153
2079 that "his mustache did not look shaggy and stick out like it does in the picture," you have also stated in answer to cross question No. 154, that "his cheeks were not sunken like they are in the picture of this corpse." You have also stated in answer to cross question No. 155, that "his eyes were not sunken and gone as they are in that picture," you have also stated in your cross-examination that when you saw him his hair was combed, and did not appear as it does in the picture of the corpse, you have also stated in your cross-examination that you could not say upon examination of the photograph what the color of the hair is as it appears in the photograph, you have also stated in your testimony that dead bodies according to your observation appear whiter and their features more sunken than in life; you have also stated that the eyes as they appear in this photograph appear to you to be gone and a piece of cotton put in their place; now then, after all these statements will you please state what there is left in the appearance of that photograph of that corpse upon which you based your statement when you said, "I recognize the picture in some few points as a person I have seen; his name was Adolph Walters?" Answer fully.

A. I recognized in the features of the photograph prominence of the nose, the kind of the hair, the appearance of the mustache, if combed or straightened, the high cheek-bones, as resembling those I saw of Frederick Adolph Walters.

Ques. 182. Explain what there is about the appearance of the nose in this photograph which leads you to believe it represents Fred Adolph Walters's nose?

A. As shown in the photograph it is as a Roman nose, and also a lump as being higher in the middle rather than straight.

Ques. 183. You have noticed Fred Walters' nose, have you in his life time?

A. I didn't in particular, as it appeared as I always saw it.

Ques. 184. State whether his nose appeared straight as it does in that picture, that is, not warped to either side.
2080 A. Yes sir. His nose was straight; not bent.

Ques. 185. Did you ever see his hair kinked as it is in the picture? Ans. Not exactly.

Ques. 186. State how you can tell, or form an opinion from the way that mustache sticks out or appears in that picture,

that if it was combed or straightened out it would be just like Fred Walters' mustache? A. I don't know as it is just like it.

Ques. 187. Have you not in your observation seen numerous men with high cheek bones as indicated by this photograph? A. Yes sir.

Ques. 188. If you had that alone in this case upon which to base your opinion that this picture represents the body of Fred Walters, would you not have some doubt as to whether you could testify with certainty in the matter?

A. From what I have judged of it I have only judged from the photograph. If I had the cheek bones alone, yes sir, I would have doubts from the cheek bones, alone.

Ques. 189. Why would you have doubts in that case?

A. Because if I had nothing else to judge by I wouldn't be able to judge whether it was human or unhuman, just from a few bones.

Ques. 190. If in looking at this photograph, and making up your opinion as to whether it represented Fred Walters, you had nothing but the cheek bones as they appear there to judge from, would you swear that it represented Fred Walters?

A. No sir.

Ques. 191. If you had nothing but the hair as it appears there, or the nose, could you feel confident in your testimony?

A. No sir.

Ques. 192. Is it not a fact that you rely principally for your opinion that this picture resembles or represents in a few points Fred Walters, on the prominence of this Roman nose alluded to by you?

A. Mostly, especially with the accompanying features.

Ques. 193. What accompanying features do you mean?

A. The cheek bones, kinky hair and light weight mustache, being points that I can recognize this photograph as resembling him as I have seen him.

2081 Ques. 194. Did Walters chew tobacco or smoke?

A. He smoked a great deal, he did not chew very much to my knowledge.

Ques. 195. How do you know his teeth were good?

A. I noticed them as being good strong teeth; have heard him remark what good strong teeth he had; had often seen him cracking nuts with his teeth; never heard him say he had ever had the toothache or had ever had any taken out.

Ques. 196. Do you swear he never had any taken out?

A. Couldn't swear to that, no sir.

Ques. 197. What was the shape of his hand?

A. He had a very long hand, and uncommonly long fingers; also quite a wide hand.

Ques. 198. How about his knuckles, were they prominent?

A. They were not really large, clumsy knuckles; not very much so; that is that I ever observed.

Ques. 199. Were his fingers tapering or were they blunt?

A. Kind of tapering, and turned up a little at the tips.

Ques. 200. Would a ring slip easily over his joints?

A. That I couldn't answer as I never seen him try or heard him say.

Ques. [200.] Did you notice his hands particularly when you saw him last? A. No sir, not particular.

Ques. 201. Did you ever see him wear a ring on any of his fingers?

A. I saw him have a ring on his little finger.

Ques. 202. When was that?

A. Here at Madison in the summer of 1877.

Ques. 203. Did it have a set in it? A. Yes sir.

Ques. 204. The top of the ring was larger than the band was it?

A. Yes sir, accordingly, it was a set ring; had stones in it; the set was raised up above the band.

Ques. 205. The setting was in a separate piece, and set on the band? A. Yes sir. It was not a plain ring.

Ques. 206. How did you come to notice these moles you have spoken about?

A. From sleeping with him at night.

2082 Ques. 207. Did the largest one project like a teat or was it a discoloration, slightly raised above the surface of the skin?

A. It was of a warty nature, discolored, and was a pretty good sized mole. It projected about as a wart does generally, about from an eighth to 3-16 of an inch.

Ques. 208. Do you think it projected as much as 3-16?

A. I couldn't answer to a sixteenth; more or less.

Ques. 209. Did it project enough for you to take hold of it with your fingers and pull it?

A. I couldn't get a hold of it with my fingers but I could with my finger nails or tips of my fingers.

Ques. 210. How far below the shoulder blade was it?

A. I couldn't say exactly how far it was.

Ques. 211. Near his waist?

A. It was nearer the shoulder than it would be where a belt would rest on.

Ques. 212. How far would you say it was from the line of his back or back bone?

A. It might have been an inch and a half or two inches, I can't say exactly.

Ques. 213. When did you last see that mole?

A. It was in the summer of 1877. In June or July some time, I can't say which.

Ques. 214. How can you remember of so small a thing as that, from that time to this, and so as to mention it in your testimony as you did this morning?

A. My attention was attracted to it as I have a small mole on my shoulders.

Ques. 215. Was that the reason you remembered about this so as to specify to it, or did some one refresh your memory about it?

A. I remembered it as it was spoken about either by him or me, as a birth mark or something to that effect, which we both had.

Ques. 216. When was that?

A. At the time of our sleeping together.

Ques. 217. Did you ever come across anybody else who had a mole on their back? A. Not to be spoken of.

Ques. 218. What do you mean by "not to be spoken 2083 of"?

A. It is, my attention was never called to one. It was never spoken of.

Ques. 219. Did you converse with any one about this mole before you gave your testimony?

A. I was asked the question if I know any marks on his person, any scars, I remember no scars but remembered the mole.

Ques. 220. Was that all the conversation at that time, and state who it was with?

A. I think I was asked where the mole was situated and how I came to remember it. My answers were sleeping with him and it being brought about by his reference or mine, to birth mark. The conversation was with Mr. Green, one of the defendant's attorneys.

Ques. 221. How did you come to see this mark on Walters' back as you have indicated?

A. He had his shirt off, all clothes off, as I had likewise.

Ques. 222. What were you doing?

A. We were going to bed.

Ques. 223. It was in the night time?

A. Yes, sir; retiring time.

Ques. 234. Did you have lamps or gas?

A. It was a two lamp chandelier, coal oil.

Ques. 225. Were they both lighted?

A. No, sir, only one.

Ques. 226. Did he point out to you the mole on his hip, or did you discover it?

A. Well, he called my attention to a place on his back where his suspenders had rubbed it, and remarked about it that it was rubbed and the sweat made it sore, and in looking at his back I observed the second mole or slight discoloration;

I didn't know whether it was a bed bug or something else; I put my finger there and found it to be what I would call a small, soft mole, smooth.

Ques. 227. Were you standing close by?

Ans. Quite near, that is I had my hands on it.

Ques. 228. I mean at the time you discovered it were you standing very near?

A. Yes sir; close enough to put my hand on it.

Ques. 229. Did you ever see him naked any other time than that, if you did state when.

2084 A. Yes, sir; several times while bathing.

Ques. 230. Did you ever notice any other marks than those you have mentioned on his arms and legs? A. No, sir.

Ques. 231. Did you ever examine his arms or his legs particularly? A. No, sir.

Ques. 232. Did you ever hear through him or others of his having been bit by a dog on the calf of his leg? A. No, sir.

Re-Examination

By defendant's counsel:

Ques. 233. State if at the time you and young Walters were speaking about your birth marks, he called your attention to any other marks or scars upon his person? A. No, sir.

Ques. 234. State whether or not in recognizing the photographs of any of your intimate friends, living or dead, you do it without reference to the color or shape or feature or whether it is by relation of all the features to each other, and by their expression?

Objected to by plaintiff's counsel as irrelevant, incompetent and immaterial, as leading and suggestive.

2nd. It is immaterial so far as the facts in this case are concerned, what his custom has been or what his practice may be in determining resemblances of his friends by looking at their photographs.

3rd. That the suppositional case put by the counsel bears no similarity or sameness, but is altogther different from the point of identity he is seeking to establish by this photograph in question, in which the eyes are gone, and which represents a body which has been dead for some weeks.

4th. That this is an improper method of eliciting proof and seeks to obtain statements which in no manner bear upon or affect the issues in this case.

Objection overruled. Exception taken.

A. The combined features; the general expression.

CHAS. W. SCHOTT.

2085 Defendant next read in evidence the deposition of Conrad Lesch, taken at Ft. Madison, Ia., June 2d, 1881. It is in words and figures as follows, to-wit:

Conrad Lesch, a witness of lawful age, produced by the defendant, being duly sworn, testified as follows:

Q. State your name, age, occupation and place of residence?

A. Conrad Lesch, deal in boots and shoes and manufacture, live here in Fort Madison, Ia., will be 48 years old in September.

Q. How long have you resided in Fort Madison?

A. Since 1862.

Q. State if at any time you knew and was acquainted with one Frederick Adolph Walters, and, if so, where did you become acquainted with him?

A. Yes, at Fort Madison.

Q. Can you state the name of the father of Fred. Adolph Walters, and if so, please give it? A. Daniel Walters.

Q. State if at any time you ever did any work for Frederick Adolph Walters, and, if so, state what it was, and state about when it was done?

A. I have been living in a couple of doors apart from him when I came to this town, and I always used to do their work, more or less, all of them; I made a pair of boots for him something about five or six years ago to my best knowledge.

Q. State if at that time you took his measure for his boots?

A. Yes, sir.

Q. Give that measure of you please, if you have it.

A. Adolph Walters. That is his bare foot when he sets down, he had his stocking on, 7 in length, cross the ball 9¾, instep 10¾, heel 14.

2086 Q. State, if you please, what you mean by 7 in length?

A. When I take a person's measure I put down what the foot measures and I always make the boots or shoes from a size and a half to two sizes longer. If I would make them just what the foot measures a person couldn't wear them, they would be too short.

Q. What sized boot, then, did Frederick Adolph Walters wear? A. From 8½ to 9, at them times.

Q. State how long a foot is that calls for a boot No. 8½ to 9; that is, in inches?

A. For 8½ it requires eleven inches. For 9 about eleven and ⅝ths.

On cross-examination by R. J. Borgolthaus, Att'y for plff, the witness testified as follows:

Q. You have no recollection of having made more than this one pair of boots for F. A. Walters, have you?

A. [He] always done their work. I have made some shoes for him. I know that.

Q. When did you make the shoes for him ?

A. I couldn't say how long.

Q. Was it before or after you made the boots?

A. That was before. The boots he had made on his own order, the others went on his father's bill.

Q. How long before you made the boots was it that you made the shoes? A. I couldn't say.

Q. State as near as you can.

A. I couldn't say without I would go and look over some of Mr. Walter's accounts, if I could find them.

Q. About how old was Fred Walters when you made the shoes? A. I couldn't say.

Q. Was he grown or not? A. He wasn't grown.

2087 Q. Do you do your own measuring in your shop?

A. Yes, sir.

Q. The answer you have given to question 7, which is as follows: "Adolph Walters. That is his bare foot when he sits down he had his stocking on, 7 in length, across the ball 9¾, instep 10¾, heel 14" is all, with the exception of "that is his bare foot, when he sets down he had his stocking on," was read by you from a book in which you keep your measurements of orders for boots, and was given by you to the Notary, as your answer to that question, word for word, just as it is written in that book, was it not? A. Yes, sir.

Q. Is it your writing that you read from the book?

A. Yes.

Q. Did anybody else make entries of your measurements in that book but yourself? A. No.

Q. Is there any date appearing there on that book, when that measurement was taken?

A. No, did not put dates in my order book when I take measures.

Q. How then can you tell when the measure was taken?

A. I looked up some boots that were charged just about the same time when that measure was taken.

Q. Who were the boots charged to?

A. One man, lives over the river named Walker.

Q. How can you tell in that way, when you measured for this pair of boots for Walters?

A. Because the measures are not far apart.

Q. Did you do Walker's work?

A. He has not been getting work done lately, but at them times I used to do his work.

Q. Did you do work for more than Walker himself?

A. Yes, I done work for the old man Walker and his boys.

2088 Q. Was it all charged to the old man? A. No.

Q. Who was this pair charged to, that you looked at to find the date when you measured Walters?

A. Johnnie Walters, the young man.

Q. How old was Walters at the time you measured his foot?

A. I couldn't say for sure, he was a young fellow, who had grown up pretty high, he may have been 19 or 20 I can't say for sure, he might be younger or older than that, at that time. I am almost satisfied in my mind that he was not older than that.

Q. What was the style of boot worn by him at that time?

A. Well he wore a round toed boot, that's what I think we made him at that time, he wanted them tight.

Q. Did he want them short?

A. There was nothing said about that.

Q. You made him a fashionable boot did you?

A. Yes.

Q. What was the fashion at that time Mr. Lesch?

A. They were mostly made then to protect the upper leather, with projecting soles.

Q. Did he have what you would call a very broad foot?

A. I call it a pretty good size.

Q. Did he have corns on his feet?

A. I couldn't say.

Q. He made no complaint to you about corns did he?

A. No.

Q. Did you make the boots tight as he requested you?

A. I had a shoemaker, he lasted his boots very tight at that time.

Q. Did Walters put these boots on in your presence?

A. Well, I could say that he tried them on, everybody tried them on, if they don't fit they leave them on my hands.

Q. State Mr. Lesch, whether he ever made any com-
2089 plaint to you about the fit of these boots?

A. Not what I could recollect.

Q. I will ask you if he had knots on the joints of his big toes? A. He kind of had.

Q. Were they larger than common, or like you generally see them on men's feet you measure?

A. They was, he was young at that time yet, he looked as if he would have a pretty good show to have some pretty big lumps, because I know that much about his feet yet.

Q. That is quite a common thing for you to notice that on men's feet when measuring them?

A. If I take a measure I will always look for that, will ask them if that hurts them, always fix something on the last for it. Or I ask people if they run boots or shoes over, which way.

Q. Did you find in your experience in a good many cases, where those knots were on their toes? A. I do.

Q. You didn't change your last any did you, in making Walters boots? In that particular?

A. I think not, it is not marked down.

Q. In taking a measure of a customers foot you do not measure carefully so as to know just what the size of the foot is in inches, do you?

A. I hardly ever look at it in that way, sometimes when a fellow wants to know, I will. I take it in shoemakers' sizes, not in inches.

Q. Then you could not tell in measuring for your purpose what the size of the foot is in length or breadth or in any other way in inches, from that measurement alone? Could you?

A. Yes I could.

2090 Q. How?

A. If I turn the measure over then you can see how many inches.

Q. Then you use another rule to ascertain that?

A. I don't understand.

Q. Why then, if you can tell the size of the foot in inches from the measurement you take for your purpose, was it that you had to go for your rule, before you could tell the length in inches it took to fit Walters' foot, why could you not tell this length in inches by the measurement you had before you, without your rule?

A. Well, I never look at the inches part in length.

Q. Do you ever look at the inches part in breadth?

A. I never measure across the bottom of the foot alone.

Q. You measure do you not the circumference around the ball of the foot only? A. Yes sir.

Q. And from that measurement you could not tell the width across the foot in inches could you?

A. For our practice we would call it about 3¼ across the bottom of the ball of his foot.

Q. How do you get at that?

A. When we trim soles we allow so much broadness on a person's measure according how broad his foot is.

Q. Look at the measure in your book and tell me from that measure without using the rule, how many inches long and how many inches wide across the bottom Fred Walters' foot was when you measured it if you can?

A. Well I couldn't that time but I could now, having looked at the rule.

Q. You could not have told then without looking at the rule, could you?

A. I could tell now without looking at the rule, but
2091 I couldn't then any time before.

Q. State if you please Mr. Lesch, how you got at the sized boot it took to fit Walters' measure when you were asked that in the examination by the defendant.

A. I had to look at my measure book.

Q. Did you have to look at anything else? A. No.

Q. Didn't you have to go for your rule? A. No.

Q. Did you not leave the witness stand and go down to your shop and get your rule, and bring it back before you could answer that question?

A. I wouldn't have to do that. I just got that thing to see about the inches.

Q. Then you can tell the size of the boot can you a customer will take by simply looking at your measurement in your book without the use of your rule, can you? A. Yes.

Q. Look at the measurement in your book next under the measurement taken of Walters, and state what it is, and then state in the same connection the sized boot it would take to fit that foot.

A. Length 8½, this is a bad foot, ball 11¼, instep 11, ankle 9¾, it was for a pair of shoes. A person who had such a big ball I make them 10½ in length, that is what the last would measure.

Q. How many inches long would that man's foot be?

A. Something about 11¾.

Q. Can you tell exactly?

A. That's as good as I could tell without the rule.
2092 On re-examination by defendant's counsel, the witness testified as follows:

Q. State when you speak of the length of a person's foot, and in taking the measurement of it, you take it in shoemaker's size or do you take it in its length in inches?

A. I take it in shoemaker's size.

Q. Now in measuring around the ball of the foot and the instep and the heel, what measurement do you get there?

A. That strop measures inches that I measure with.

Defendant here asks permission to ask the witness a question that should have been asked in direct examination.

Q. State the length in inches of a foot which measures in length No. 7 shoe-maker's size if you can?

A. I believe 11½.

Q. Please look at the rule and state exactly the number of inches in length a foot is, that measures No. 7 shoemaker's size?

A. I was mistaken, it measures 10½ inches, after examining the rule.

Q. State what sort of a rule it is you referred to and looked
?
[—]It is a standard shoemaker's rule, like they always use.

C. LESCH.

93 The defendant next read in evidence the deposition of Alvina D. Kasten taken at Ft. Madison, Ia., in June, 81, which is in words and figures as follows, to wit:

Miss Alvina D. Kasten, a witness of lawful age, produced defendant, being duly sworn, testified as follows:

Q. 1. State your name, age and place of residence?
A. Alvina D. Kasten. My age is twenty-one; reside at Fort adison, Iowa.
Q. 2. How long have you resided in Fort Madison?
A. I was born and raised right in this place.
Q. 3. State if at any time you were acquainted with one rederick Adolph Walters, and if so, please state where he as residing at the time of that acquaintance?
A. Well, as long as I knew him he had been living on cond street where they now live in Fort Madison, Iowa.
Q. 4. When did you last see Frederick Adolph Walters?
A. It was on the 24th of March, 1878, at Fort Madison at e Kasten House.
Q. 5. You may state whether or not he has been residing Fort Madison since? A. He has not.
Q. State whether or not he left Fort Madison about that ne? A. To my knowledge he did.
Q. 7. State if you please if at any time after he left Fort adison you heard from him, and if so, in what manner?
A. I received a letter two weeks after he was gone.
Q. Did you receive other letters from him, and if so, please ıte.
A. I have; I have received letters most every two weeks, nerally every two weeks, or a week and a half.
Q. 9. How long did this correspondence between you and : Walters last?
A. I received letters until the 3d of March, 1879, was the t one I received.
Q. 10. State whether or not you know the handwriting of Frederick Adolph Walters?
94 A. Well, I think I would.
Q. 11. Look at the letter now shown you by J. W. een and state if you know in whose handwriting the body the letter is in, and whose signature is affixed thereto?
A. The handwriting is that of F. A. Walters; I recognize letter as one I have given to Mr. Tillinghast. The signa-

ture is in the handwriting of F. A. Walters. It is his signature.

Q. 12. State whether or not you ever saw this letter before, and if so, please state about when you first saw it?

A. When I first saw it was on the 3d of March, Monday evening in 1879.

Q. 13. Where did you first see it?

2095 A. The letter was handed to me at the postoffice.

Q. 14. State whether or not by a person connected with the postoffice?

A. The letter was handed to me personally by the postmaster.

Q. 15. How many letters, if any, did you receive from F. A. Walters after this letter shown you? A. Not any.

Q. 16. Had your correspondence with F. A. Walters been regular from the time that he left Fort Madison up to the receipt of this last letter, if so, please state?

A. Yes, sir, it had.

Q. 17. Will you please state to the notary what appears on the face of the envelope written and printed?

Counsel for the plaintiff objects to the question and asks the Court to limit the force of the testimony as indicated by the Supreme Court.

A. Miss Alvina Kasten, Fort Madison, Iowa, Lee County, postmarked, Wichita, March 2nd.

Q. 18. State if you know in whose handwriting is the address on the letter? A. F. A. Walters.

Q. 19. State to whom that letter was addressed if you know? A. To myself, of course.

Q. 20. You may state if this is the letter that you referred to as being the last letter received by you from Frederick Adolph Walters, and as having been received about March 3rd, 1879? A. Yes, sir.

The defendants and each of them offer in evidence the letter referred to by the witness, and the envelope containing the same.

By Mr. Hutchings, Counsel for the Plaintiff: We object to the introduction of the letter because it is incompetent, irrelevant and immaterial, no sufficient foundation has been laid for its introduction, and in any event it is not evidence for the purpose of proving the truth of any statement made in the letter, but merely as evidence in connection with the fact of Walter's statement he was going somewhere.

By the Court: That is the limitation prescribed by the Supreme Court.

By Mr. Hutchings: That is the limitation prescribed by the Supreme Court of the United States in the previous decision, and we ask the Court to limit it when it goes to the jury, that its force may be understood from the beginning and before the examination of other witnesses upon this subject.

By the Court: The letter referred to, gentlemen of the jury, will be read to you and should be considered by you not as a narrative of facts communicated to the writer of the letter by others, nor yet as proof that the writer of the letter—I take it to be Walters—

2096 By Mr. Green: Yes, the letter has been identified.

By the Court: — actually went away from Wichita, but as evidence that shortly before the time when other evidence tended to show that he went away, he had the intention of going and of going with Hillmon. In order to apply the letter as I have directed, you should find from the evidence that it was written by Walters. If it is not found from the evidence to have been written by Walters, then you give no attention to it whatever, but if you find that it is a genuine letter written by Walters then you give it such effect as evidence as I have described to you—not as a narrative of facts communicated to the writer by others nor yet as proof that the writer went away from Wichita, but as evidence that shortly before the time when other evidence tended to show that he went away he had the intention of going and of going with Hillmon, and that the Hillmon mentioned in the letter is the Hillmon in this case.

To the action of the Court in thus limiting the effect of the letter, the defendants and each of them then and there duly excepted.

And thereupon said letter was read in evidence to the court and jury, and is in words and figures as follows, to wit:

2097 EXHIBIT C.

Sabert M. Casey,
Notary Public.

Wichita, Kas., Mar. 1st, '79.

Dearest Alvina:

Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia so I did not have time to answer it at Emporia. I will stay here until the fore part of next week & then will leave here to see part of the Country that I never expected to see when I left home as I am going with a man by the name of Hillmon who intends to start a sheep range and as he promised me more wages than I could make at anything else I Concluded to take it for

a while at least until I strike something better. There is so many folks in this country that have got the Leadville Feaver, & and if I would not of got the situation that I have got now I would have went there myself but as it is at present I will get to see the best portion of Kansas Indian Territory Colorado & Mexico the route that we intend to take would Cost a man to travel from $150 to $200. but it will not cost me a cent Besides I get good Wages. I will drop you a letter occasionally until I get settled down then I want you to answer it. (You bet Honey.) Don't it? So you can see that I will not get home for a few months yet, but cannot tell how soon I will get back, I am about as Anxious to see you as you are to see me. But I do not want to get back there without a sent of money for that is not what I left for (you know). When I get back you will get to see me in about the way we parted (You bet)!? If any one asks you what I am doing tell them that you were not Informed for it is none of their Business and an other thing don't ask me to write long letters for I would without being told if I could find the Words when I write as I am generaly Busy when I receive a letter from my (Old Woman) Sweet Little Girl. But you know how that is without being told so I will not have to waist any more paper on that cubject (at present). I will have to come to a close before long or I will have to do as that Other Fellow write 2 Sheets & swindle the P. Master out of 3 cents and you know that I don't like to do that. (Pet) Please give compliments to enquiring Friends and all the love that you can embrace for yourself & no body else. I will close for this time Love, to let you hear from me soon again.

Yours as ever,

F. A. WALTER.

P. S. Much obliged for that Poetry & I done as you said (thought of you when I read it.)

2098 Q. 21. Look at the picture now shown you by J. W. Green, one of the defendants' counsel and examine it closely and state whether or not you recognize it as the photograph of any person whom you have heretofore seen, and if so, state of whom it is a photograph.

A. Judging from the picture I recognize it as F. A. Walters.

Q. 22. Please state the name of the F. A. Walter whom you refer to, commonly went by among his companions.

A. Adolph.

Q. 23. Can you describe the personal appearance of Frederick Adolph Walters, if so, please state?

A. Do you mean as I last seen him? His appearance when I last seen him good?

Q. 24. I refer to his size and complexion, color of his hair and other features.

A. Well, I could not tell his exact size, but I think it was from five feet ten inches to six feet. His hair was dark, very dark, and wavy, dark brown eyes. His teeth as far as I knew were perfect. His nose to my judgment I would generally call a Roman nose, it had a bulge on top of the nose. He had high cheek bones and his lower lip was a little larger than his upper lip. He always wore a mustache, as long as I knew him, which was not very heavy. His chin was short and round. He had a long slim hand. I think his knuckles were larger. His fingers were pretty long and slim. He was dark complexioned.

Q. 25. State if you know whether or not he wore a ring and, if so, on which finger?

A. He wore a heavy ring on the little finger of his left hand.

On cross examination by plffs. counsel, the witness testified as follows:

Q. 1. When did you first become acquainted with Fred Walters? A. I have known him from childhood.

Q. 2. What age in childhood did you first form his 2099 acquaintance; state both your ages?

A. I couldn't say the exact age; I was quite little at (the) time.

Q. 3. About how old was he at the time; state as near as you can?

A. Well, I couldn't tell his age as I was very young myself and didn't put it in my memory; we were quite young.

Q. 4. How many years older is he than you?

A. Lacking five days of being four years older. He is 25.

Q. 5. His last birthday was in January? A. Yes sir.

Q. 6. Had he been absent from Fort Madison any portion of the time of your acquaintance prior to the time you have specified in your deposition, if so, specify the times he was gone, how long at each time and where he was?

A. He had been gone several times and as it was none of my business and I was not interested in his welfare at that time, I didn't take notice where he went, and how long he was gone.

Q. 7. State the last time he was absent, when it was, how long gone, and where he was preceding the time stated in your deposition?

A. I don't know of him going away before this last.

Q. 8. How far did you live from where he lived during the last several years? A. It is two blocks.

Q. 9. How long had you lived within that distance of each other? A. I think always.

Q. 10. Were you in the habit of seeing him frequently during this always?

A. I have, yes sir; we often met as friends.

Q. 11. Now, then, if you have lived within two blocks of him always and was in the habit of seeing him frequently during all that time, why can't you state whether he had been absent from home prior to the time mentioned in your testimony today, and when such absence occurred?

A. Well, it was then we met as friends, and I of course did not think it concerned me, or make it my business whether he was gone or not.

Q. 12. Up to what date or about to what date, were you in the habit of meeting him as friends during the years of your acquaintance you have referred to?

A. As we met as friends, and I began to feel an interest in him in the latter part of February, 1877.

Q. 13. Had you known of his being absent any time within a couple of years prior to the February, 1877?

A. That is a question I cannot answer.

Q. 14. When did he first leave home after February, 1877?

A. March the 26th, 1878.

Q. 15. And you did not see him for two days prior to the time he left?

2100 A. He left on the early train Tuesday morning, and I did not see him on Monday.

Q. 16. Did you not state in your testimony the last time you saw him was on March 24th? A. Yes sir.

Q. 17. What time on March 24th?

A. On Sunday evening.

Q. 18. Where? A. At the Kasten House.

Q. 19. How long was he there?

A. Well he staid until ten o'clock.

Q. 20. How many hours did he stay then?

A. He came at half-past seven.

Q. 21. What did he go away from Fort Madison for at that time?

A. To seek his fortune as he claimed.

Q. 22. How long after he had been away before you got the first letter?

A. It wasn't quite two weeks, or was two weeks; I am not quite certain. I think it was about two weeks.

Q. 23. How often was he to write to you in accordance with the understanding between you, if there was any understanding?

A. A week and a half or two weeks.

Q. 24. Where was he going when he left you?

A. Well that he wasn't certain of himself.

Q. 25. What direction was he to start when he left here?

A. He went from here to Council Bluffs, Pottawatomie County. It was from there I received the first letter.

Q. 26. Where did you receive the next letter from?

A. Well I couldn't tell you that. I couldn't remember.

Q. 27. When did you receive the next letter?

A. Well I couldn't tell you that, they were mostly two weeks apart.

Q. 28. State as nearly as you can when you received the next letter, how long after the first?

A. Well I am not certain; I think about two weeks. Mr. Tillinghast has all the dates I received letters.

Q. 29. How long after that before you received the third one, and where was it written from?

A. 29. I cannot tell where the next letter was from. I know of different places where he had been and I had received letters from him.

Q. 30. State the different places where you received letters from?

A. I received some from Alladin, Kansas. I received one from Kansas City. I don't remember whether it was one or two from Holden, Missouri. I received some from Paola, Kansas. Most of them were I think from Emporia, Kansas, and the rest from Wichita.

2101 Q. 31. When did you receive the Alladin, Kansas, letter?

A. I couldn't tell the date there.

Q. 32. How long after he had been gone?

A. I cannot answer that either.

Q. 33. How many were there of them?

A. I think I have between 24 and 26.

Q. 34. I mean the Alladin, Kansas, letters.

A. I don't remember whether it was two or three or more; I ain't certain.

Q. 35. Were there as many as three?

A. I am not satisfied in my mind on that question; I am not certain.

Q. 36. What is your best recollection?

A. I do not recollect, and cannot say no more on the subject than what I have.

Q. 37. About how long had he been gone before you received the Kansas City letter?

A. Well I couldn't tell the exact time, but I can find out.

Q. 38. Was it a year?

A. I am not certain.

Q. 40. How can you find out?

A. Well not to state names. I heard of another party who was with him at the same time.

Q. 41. How did you hear that?

A. To make a long story short, I know he met a young friend of his out there by the name of Schott, C. W. Schott, and of course as friends, he put in a few words to me in the same letter.

Q. 42. You mean that Schott put in a few words?

A. As a friend he put in a few words, he of course knows the time he was out to Kansas City.

Q. 43. Where is the letter now; what did you do with the letter? A. I destroyed it.

Q. 44. When did you destroy this letter?

A. I destroyed these with the rest of them except the last; well I destroyed them shortly after Mr. Tillinghast was here. I was sick at the time and did not expect to get over my sickness and destroyed all my letters.

Q. 45. When was that?

A. In 1880, in the spring.

Q. 46. When was Tillinghast here to see you?

A. January the 28th, 1880. I made a mistake. The letters I destroyed in 1881 in the spring.

Q. 47. You were sick this last spring? A. Yes sir.

Q. 48. Then you have no recollection as to when you
2102 received the Kansas City letter, nor how long it was before you received the Wichita letter, have you?

A. I cannot make mention of that.

Q. 49. You were dangerously sick were you?

A. I suppose I was.

Q. 50. Do you think that that sickness has affected your memory with regard to these matters? A. No sir.

Q. 51. Were you engaged in marriage to F. A. Walters?

A. Well that concerns no one but him and me, but we had exchanged rings.

Q. 52. Do you decline to answer my question?

A. Well there was an understanding between us both, nobody else knew anything about it, we didn't think it was anybody else's business—

Q. 53. How long had you been engaged before he left here if you were engaged?

A. Well I received a ring from him on Christmas eve in 1877.

Q. 54. When did you receive the letter next preceding the Wichita letter, and where from?

A. Well, I received that from Emporia.

Q. 55. How long was that after you received the Kansas City letter?

A. I received the Kansas City letter before he went to Holden, Mo.

Q. 56. Did you get any other letters between the Kansas City and Emporia letter besides the Holden letter?

A. Well I can't exactly state, but it seems to me I received the Alladin letters after he left Holden, then I am not certain whether I received the Paola letters or Emporia.

Q. 57. Then as a matter of fact your recollection with regard to the letters and the whereabouts of Mr. Walters during the period of his absence down to your last letter, has made very little impression on your mind and you have a very vague recollection of the same?

A. I cannot really answer that as I ought to. If I were in better mind I might answer more questions. I am bothered about my sister who is sick; if I was not bothered I might think of a good many things in explaining.

2103 The witness here explains her last answer as follows: "My sister was dangerously ill and I had no nights rest for the past two weeks and of course the letters made quite an impression on my mind but I could not recall the exact date."

Q. 58. You showed Mr. Tillinghast all the letters you had at the time and talked over very fully with him all these points as to Walter's whereabouts and his personal appearance and gave him all the information you could when he was here Jan. the 28th 1880, did you not? A. Yes sir.

Q. 59. Who was he representing at the time?

A. He was representing the New York Life Insurance Company.

Q. 60. You knew then at the time did you not that his only object in coming here and interviewing you with regard to Mr. Walter was in behalf of the insurance Company and not in behalf of yourself or Mr. Walter's family?

A. Well he was brought up there by Mr. Daniel Walter himself and by Mr. Spreen. Was introduced to that gentleman to whom I was to give all information I knew concerning F. A. Walters.

Q. 61. Did you have more than one interview with him on the subject while he was here, if so, how many.

A. Well I had an interview with him in the morning of the 28th and in the evening he called for the letter.

Q. 62. Are those the only interviews you had with him?

A. Yes sir, I meant to say it was shortly after dinner that I had the first interview with him. Mr. Walter and Mr. Spreen were present.

Q. 63. Were these other gentlemen present with Mr. Tillinghast during this first interview or did they retire?

A. They was there part of the time.

Q. 64. Did you produce these letters you have referred to, to Mr. Tillinghast at this first interview and while these other two gentlemen were present?

A. Yes sir, we all looked over them.

Q. 65. Did they read all these letters?

A. They did not read the full letters, they only looked at them to find out the places he had been.

Q. 66. Did they not have to read the letters for that purpose? A. Not the full letters.

Q. 67. How much of them did they read, state to what extent about they read these letters?

A. 67. They read enough of the letters just to find out where he had been.

Q. 68. What did Mr. Tillinghast say he wanted to get this information for?

A. For the New York Life Insurance Company.

Q. 69. Did he show you this picture that you examined yesterday?

A. He did not show me this one, but I saw one of the same kind. He showed it to me.

Q. 70. When did he show it to you?

2104 A. He showed it to me the day he called; the first interview.

Q. 71. Had he examined the letters before he produced the photograph, or did he produce the photograph first, and did he show you one or two photographs at the time?

A. He showed me two, and he produced the photographs before I got the letters out.

Q. 72. What did he say when he produced the photographs to you; give his exact language as near as you can?

A. He asked me whether I recognized it as the photograph of any one I knew.

Q. Was that his language?

A. Well, it was not just as he spoke at the present, he might have spoken some different.

Q. 74. Did you take both photographs in your hand?

A. Yes, sir.

Q. 75. Had you heard that Mr. Tillinghast and these pictures were in town before he called to see you?

A. I have never heard of Mr. Tillinghast before, but I had seen the pictures; Mr. Walter had them—

Q. 76. Then you had made up your mind about these pictures before Mr. Tillinghast brought them to your house, had you not? A. Judging from the picture, I did.

Q. 77. And your judgment was the same as you stated in your deposition yesterday, was it?

A. Well, I only looked at one of the pictures yesterday here.

Q. 78. One of these pictures you did not recognize, am I correct; but you recognized the side view picture?

A. I could not recognize the one only the teeth which I thought were his. That was the front view.

Q. 79. How long before Mr. Tillinghast came here was it that you had seen these pictures at Mr. Walter's?

A. The 6th of January the same year.

Q. 80. You have stated that you knew F. A. Walter ever since his childhood; were you in the habit during your childhood of meeting him frequently in common with your childhood associates and as a childhood associate?

A. Well, I have met him frequently, but I had no childhood companion in him, but I met him frequently and we spoke.

Q. 82. Have you been in the habit of visiting the family of Mr. Daniel Walters during this period of your acquaintance with him?

A. I called on the girls at the age of fourteen or fifteen when I started to go down there.

Q. 82. Were you in the habit of seeing F. A. Walter about the house on the occasion of those calls, particularly the early calls? A. Some times.

2105 Q. 83. Do you know whether he was ever bitten by a dog?

A. His mother was telling me he was is all I know about it.

Q. 84. Do you remember the time he was bitten or about the time. A. I do not recollect that.

Q. 85. In the description you have given of F. A. Walter in this deposition upon your direct examination you held the picture in your hand at the time, did you not, and described his features by looking at the picture, did you not?

A. I held the picture in my hand, but I described the features as I remembered him—

Q. 86. In describing his nose did you not inspect the photograph at the same time?

A. I inspected the photograph, of course, and judging from that, I thought it resembled his.

Q. 87. Did you not inspect the photograph when you described his cheek bones?

A. I had the photograph lying face down in my lap; the cheek bones are naturally high.

Q. 88. You are positive about having the photograph face down when you described his cheek bones?

A. At that time, yes, sir; but I had looked at them before. I had its face down when I described his features.

Q. 89. Now, if you can remember with such precision a small circumstance like that, and can also state the day and hour and the person of whom you received the letter alluded to as being the last letter you received from Fred Walter and can state the day of the month and the time of the day when Mr. Tillinghast came to see you, why is it you have no recollection

as to dates or locations of the whereabouts of F. A. Walter, a person between whom and yourself intimate relations existed, during the time of his absence since March 26th, 1878?

A. As I did not expect that he should meet his death, and keep in memory the dates and location of his whereabouts. The last letter as having such an impression on my mind as it was the last, from him.

Q. 90. You do not know whether he went to Colorado or not, do you?

A. I know no more than the letter states, that's the last place I heard from him.

Q. 91. You don't know whether that is the last letter he wrote you or not, do you?

A. Yes, sir; that is the last I have heard of him.

Q. 92. Might he not have written you and you not receive the letter?

A. Not to my knowledge, as my mail is personally and no one can get it but myself.

Q. 93. Do you not think it possible that a letter
2106 would miscarry so you would never receive it?

A. Such might be the case, but it never happened before and I do not think it would have at that time.

Q. 94. Why do you think it would not have happened at that time?

A. As I can not complain of missing letters and if I had his parents would certainly have heard from him.

Q. 95. May it not have been possible that he had made up his mind not to write to either of you?

A. I think his affection for his parents would not allow him to keep silent and not allow them to hear from him.

Q. 96. Did you read the letters that came with these photographs to Mr. Walters? A. No, sir.

Q. 97. Did you hear them read? A. No, sir.

Q. 98. Did you ever read any newspapers bearing an account of a coroner's inquest held at Lawrence about two years ago? A. No, sir.

Q. 99. Did you hear any one talking about it?

A. No one but the family.

Q. 100. Was Fred Walter's nose blunt at the end or sharp?

A. Blunt.

[A.] Was the end of his nose large and round.

A. I cannot give a correct answer to that.

Q. 102. Did you ever see him when his hair was not combed, and was all mixed up like it is in this picture?

A. His hair was always combed when I saw him.

Q. 103. Did you ever see him with his cheeks sunken and hollow, like they are in this picture?

A. No, sir; they were never sunken that much.

Q. 104. Did you ever see him with his mouth spread open like it is in that picture? A. No, sir.

Q. 105. Did you ever see him with his mustache sticking straight out from under his lips like bristles like they do in that picture?

A. I have never seen him this way; they were bristly; he always kept them down as nice as he could.

Q. 106. Did he not part his mustache in the middle and train it back on either side of the lip?

A. Well, I know that he had them parted in the middle, but they were bristly like, and he couldn't keep them back, I suppose.

Q. 107. You have noticed in this picture that the
2107 eyes are entirely gone, have you not?

A. You can't tell much about the eyes. They look so to me.

Q. 108. You have said, have you not, that Fred Walter, as you knew him had a short chin?

A. As I thought, a short, round chin.

Q. 109. Now, look at the picture again and state whether or not you consider that a short, round chin represented there?

A. Judging from the picture I think the chin resembles his.

Q. 110. Look at the picture and state whether the chin, as represented here, without regard to the other features, is a short, round chin.

A. I should not call it much otherwise. Well, I can't see no difference in it here, according to my mind, but that it is him. I might have said medium, although it is not the shortest that I meant. That's what I have always called it to be.

Q. 111. You have stated that you never saw Fred Walter's cheeks look sunken and hollow as they do in this picture; that you never saw his mouth as it is in this picture, and that the eyes are gone from this picture; that you never saw his hair excepting when it was combed; that you have never seen his mustache this way as in the picture. Now, then if all these features and marks of identity are different from what you have ever seen upon him, what is there left upon which you can swear that that picture represents Fred Walters?

A. I cannot exactly state what it is, but it is the general expression and features of the head that I recognize and think to be F. A. Walters—

Q. 112. What features of his head do you rely upon?

A. I cannot state that exactly, but it is the impression that is upon my mind from knowing him while he was here as one of my acquaintances.

Q. [—] Did you ever see two persons who resembled each other?

A. I have never seen but have heard of folks who resembled one another.

Q. 114. Did you never make the remark concerning some person that they look like some person else you had seen?

A. I have in brothers and sisters, but not among strangers.

Q. 114. Did you never make a similar remark about other persons?

A. I disremember of ever making such remarks.

Q. 115. You have seen other men with high cheek bones have you? A. I suppose I have.

Q. 116. And you have seen other men with dark brown eyes, have you? A. Yes, sir.

Q. 117. And you have seen other men with dark brown hair, nearly black, inclined to curl, have you?

A. I presume I have.

Q. 118. And you have seen other men with short, round chins, have you?

2108 A. Such may have been the case.

Q. 119. And you have seen other men with the Roman nose have you not?

A. I think I have; my brother wears one, I suppose, which I call it any way.

Q. 120. What kind of ears did F. A. Walters have; did they lay up close to his head?

A. I can't give you the size of his ears, but they stood out from his head.

Q. 121. Did his nose stand up straight as it does in that picture?

A. Well I have never taken that particular notice of it whether it did or not.

Q. 122. Was his nose straight or twisted to one side?

A. As much as I know of his nose it was straight.

Q. 123. He had been gone nearly two years had he not before you saw the picture or a copy of the same?

A. I think it was one year and between nine and ten months before I first saw that picture.

Q. 124. Now don't you think it is rather an uncertain thing for a person to undertake to swear that they recognize a person who they have not seen for nearly two years from the photograph of a corpse buried several days then taken up out of the ground and exposed to the air and carried across the country about ninety miles by stage and over 200 miles by railroad in warm weather and then laid about an undertakers establishment, exposed to the atmosphere for two or three more days and then buried again, then taken up again and exposed to the air and embracing in all a period of nearly three weeks from the time it was killed such photograph having been taken at the last time it was taken up, and

after all this had transpired don't you consider that it is very uncertain whether one can make a recognition from a photograph of such a corpse taken under such circumstances after all the decay that must have followed and the change that must have naturally taken place in a body under such circumstances, of a person whom they had not seen for nearly two years?

A. That is rather an uncertain thing but still the countenance and general expression of the corpse I cannot help as recognizing as being of Mr. Walters.

Q. 125. Would you say there is no possibility of its being a photograph of the corpse of some other person resembling Fred Walters?

A. It may be possible, but judging from the photograph, I cannot help but think it is that of Mr. Walter.

Q. [136.] Miss Kasten, you may state if you please, how do you know, if you do know, that Walter had no unsound teeth?

A. He told me so himself and I know he never complained of the toothache.

Q. 127. Do you know that he never had a tooth extracted?

A. I know no more than what he said, that his teeth were sound. I noticed in speaking that his front teeth were perfect.

Q. 128. How could you tell they were perfect; by looking at them?

A. Well, as we got into conversation, I had my teeth fixed at the time, it was through that he showed me his teeth, and I didn't see any decay about them.

Q. 129. How did he show them to you?

A. Well, by opening his mouth.

Q. 130. How did he open his mouth?

A. He drawed his lip back with his fingers and showed his upper teeth.

Q. 131. You didn't see the inside of his teeth at any time do you? A. No, sir; I took his word for that.

Q. 132. Did you ever notice the skin on his neck under the jaw and cheek as to whether it was smooth or wrinkled?

A. I am not certain but I think it was smooth.

Q. 133. And the skin on his face was smooth, was it not?

A. As much as I can remember, yes.

Q. 134. He was a young man in good health and had a ruddy complexion and round face, had he not?

A. He was in good health as much as I know of him. His complexion was dark. I cannot exactly state about his face; I believe it was longer than round.

Q. 136. Did he have a well filled face or was it hollow cheeked? A. I disremember; I can't really say.

Q. 137. Did he use tobacco, if so, in what form?

A. I have often seen him smoke cigars but never saw him chew.

Q 138. Do you know whether he chewed or not?

A. No, sir.

Q. 139. Did you write to him at any time after the letter received from Wichita?

A. No, sir, I never wrote to him after that as he told me not to write again until I heard from him.

Q. 140. Have you anything in your possession showing the signature and handwriting of F. A. Walters, if so, state what it is?

A. I have nothing but a copy which was lithographed of the letter which the insurance company now holds.

Q. 141. What letter is that, Miss Kasten?

A. The letter from Wichita.

Q. 142. Have you no autograph or other album in which he has written or no card upon which he has writen or none of his writing about your house?

A. I have an autograph album, but did not have
2110 it at that time, no writing whatever I may have; he wrote his name in some books of mine.

Q. 143. State, Miss Kasten, how you found out the height of Mr. Walters?

A. Through conversation between he and I. He told me.

Q. 144. That is the only way you know about it?

A. Yes, sir.

Q. 145. When you last saw him he was in a good condition of health and his appearance, as you have expressed it, "was good" and the impressions you bear to-day upon your mind and your recollection of him are the same as when you last saw him; this is the fact, is it not?

A. His health and appearance at that time was good as far as I know. My impression is still the same.

Q. 146. He didn't then at that time resemble this picture very closely, did he?

A. There is an expression about the picture I must say that resembles him. He didn't look that bad.

Q. 147. Do you or do you not then say that his appearance when you last saw him closely resembled that picture?

A. Well, I can't say no more about that picture than I have; I gave my opinion about the picture and can say no more.

Q. 148. Do you then say that you cannot answer that question?

[—] The expression about the picture that I seem to recognize, resembled him at the time, but he was not as poor as he was in that picture.

Q. 149. What do you mean about the expression about the picture; what do you mean by expression?

A. I mean there is a look about it, I cannot tell what it is, that gives me that idea.

Q. 150. You know, do you not, that after life has left the body that it changes very rapidly and very much in appearance from what it looked in life, do you not?

A. I presume so.

Q. 151. And that this change grows more marked in proportion as time advances?

A. Yes, I should think so any way.

Q. 152. Was his hand a slender hand or a wide hand?

A. I don't remember; I know it was a medium long hand.

Q. 153. What was the shape of his fingers?

A. I cannot give the shape of his fingers though I know they were rather long.

Q. 154. What kind of a ring was this you said he wore?

A. He wore a set ring for a short time and a plain ring after that; heavy ring.

Q. 155. When did you last see that ring?

2111 A. When I last seen him.

Q. 156. You haven't seen it since? A. No, sir.

Q. 157. Have you talked over the subject of your testimony in this case with any one before you commenced testifying here yesterday?

A. No, sir, as I hadn't the opportunity as I just come from my sister.

Q. 158. Have you seen Mr. Schott and talked with him since he testified here? A. I saw him last evening.

Q. 159. Did he state to you about what questions you would have to answer in this examination? A. No, sir.

Q. 160. Was there nothing said about it?

A. He didn't have much time to speak about that; the remark was only made that I was up here, and that I was getting along pretty well.

MISS ALVINA D. KASTEN.

2112 Defendant next offered in evidence the testimony of Gustav Buckholz, taken at Ft. Madison, Ia., in June, 1881, which testimony was in words and figures as follows:

Ques. 1. State your name, age, occupation and place of residence?

Ans. Gustav Buckholz, my age is 32 this October, barber, reside on Pine street, Fort Madison, Iowa.

Ques. 2. State how long you have resided in Fort Madison, Iowa? Ans. Since 1855, November.

Ques. 3. State if you ever knew a person by the name of Frederick Adolph Walters; if so please state where it was you knew him?

Ans. I knew him from childhood up at Fort Madison, Iowa.

Ques. 4. Do you know the name of his father, if so please state? Ans. I do not.

Ques. 5. Where does his father reside?

Ans. Between Market and Pine streets, Fort Madison.

Ques. 6. About when was it that you last saw Frederick Adolph Walters? Ans. Three years ago this spring.

Ques. 7. Where was it? Ans. At Fort Madison.

Ques. 8. State if you have resided in Fort Madison continuously the last three years? Ans. Yes, sir, I have.

Ques. 9. State if you know whether this Frederick Adolph Walters has been in Fort Madison since he left that place, as you state, about three years ago this spring?

Ans. He has not.

Ques. 10. Look at the picture or photograph now shown you by J. W. Green, one of defendant's attorneys, and which has been marked on the back Exhibit "A" by Mr.
2113 Casey, the notary public taking these depositions, examine it closely and state whether or not it is a photograph of the dead body of any person whom you knew in life, and if so state whom that person was?

Ans. The expression shows for itself that it is Adolph Walters.

Ques. 11. Describe if you can this person whom you speak of as Adolph Walters, stating first his general physical appearance and then if you can his different features.

Ans. First place his hair is what I would call half curly. Next, his forehead is somewhat long, his nose was long and it had a bump, and his mustache was light and straight, and it had light brown and dark brown together. And his teeth was the only teeth I ever saw in my life that looked anything like the front view of this photograph. His chin was long and full, and his face was long, his cheeks was flat, had a high cheek bone. His eyebrows they was what I would call dark brown. And his skin was smooth when it was shaved with a smooth razor and when it was with a rough-edged razor it would leave his face rough. And he had a long neck. And his hair is what I would call dark brown. I have shaved him for five years and nobody else for that time and I know that photograph is nobody else but Adolph Walters. And he had very good teeth. His teeth was long and broad and good condition, and he used to take good care of them while I was doing his shaving with the cigar ashes. And he used to say that he wished he had my mustache because it was laying down in place of sticking out. I used to say to him, I wish I had his teeth in place of my mustache. And his complexion was not spotted. And his ear didn't stand out very much.

He used to wear his hair very long because it was curly,
2114 and he knew that curly hair looked the best on him. And his height was five feet and between ten and twelve inches and his arm was tolerably long, and his fingers was tolerable long. And he was sort of a laughing sort of a person. He couldn't laugh without showing his upper teeth. And his hair was kind a coarse. But they looked black to people that didn't understand human nature or black or brown. it used to take a pretty short hair cut to make his neck and hair look smooth. And when he left here he said to me, "Gus" you are the first barber that ever shaved me and as far as I know this shave you are giving me now may last a long time. And Adolph said to me—

Ques. 12. State if you can as to the character of the beard he had other than a mustache?

Ans. His beard was very heavy below the top of his chin bone, and it was very heavy long the neck, and it looked like his beard was black at the neck, and there was black and brown hair together.

Ques. 13. State the character of the hair of his mustache if you know.

Ans. His mustache when it made its first appearance when it come out, it was trying to be curly but through shaving couple years to bring it out it made it so stiff that it growed out straight, and his mustache was very long for the thickness of it. And there was a few curly hair on each end of the mustache. And if he got ten years older his mustache would have been the same.

Ques. 14. State if you know whether or not his hair was inclined to curl more on one part of his head than another?

Ans. His hair was more curly from the ears than it was on top of the head, because—and his neck it, the hair,
2115 was a good deal like the hair around his ear, because his hair was finer along the edges of his hair, that's what made it more curly around the edges of his head, and his hair looked darker around the edges than it did towards the front, because I find pretty near all the hair that's curly to be that way. The hair was decidedly darker than the mustache in appearance.

On cross-examination of the witness by R. I. Borgholtham, plaintiff's attorney, he testified as follows:

Ques. 1. Did you ever see, Mr. Buckholz, Mr. Adolph Walters with his clothing off? A. I never did.

Ques. 2. Do you remember him when he was a child ten or twelve years old? A. I do.

Ques. 3. Did you see him frequently along about that time? Ans. I did.

Ques. 4. Were you a boy at the same time with him?
Ans. I was.
Ques. 5. What was the difference in your ages?
A. Between 5 and 7 years. I was older than he.
Ques. 6. Do you remember the time he was bit by the dog?
Ans. I remember.
Ques. 7. Was you with him at the time? A. I was not.
Ques. 8. Did you see the wound? A. I did not.
Ques. 9. Was it wrapped up when you saw the place?
Ans. I heard of it being wrapped up. I didn't have a chance to go to see him because I was under the care of my uncle in the saloon business at that time.
2116. Ques. 10 Was he laid up at home with the sore?
Ans. I heard some of my comrades say that he was.
Ques. 11. Before this happened were you in the habit of seeing him every day?
Ans. I was.
Ques. 12. How long was the time after this happened before you saw him again; state about the time?
Ans. About three or four weeks.
Ques. 13. He was kept at home then about that length of time, was he?
Ans. He was.
Ques. 14. Did you live with your parents here, Mr. Buckholz?
Ans. I haven't lived with my parents since 1867.
Ques. 15. Did they move away from here at that time or did you go off for yourself at that time?
Ans. My uncle got my father to consent to help my uncle to go to his home with him because my uncle was in need of a boy at that time, and my father he could spare me and that's the way I got away from home.
Ques. 16. How long did you stay with your uncle?
Ans. I stayed with him three years.
Ques. 17. Assisting him with his saloon?
Ans. Yes, sir.
Ques. 18. When you left him did you go into the barber business?
Ans. I did.
Ques. 19. Have you been in that business ever since in this town?
Ans. I have.
Ques. 20. You stated in your examination by Mr. Green when you looked at the photograph that the expression shows for itself that it is Adolph Walters. Will you please explain what you mean by the term "expression."
2117 Ans. I have been in all my days to my recollection been a inquisitive person on expressions and features and I

equal myself with expressions and features generally, and I think I know more about features and expressions than two-thirds of the people, and when that photograph come here a year ago this spring I heard of it being down at Mr. Tewksbury's and I went down there to take a fair look at it, and Mr. Tewksbury asked me who that was. I said to him if any person couldn't see who that person was by the picture he must be next thing to blind. Expression is this much, that when I have a person in front of my face and I know him a long time and don't see him again until I see a picture of him, dead and gone, and its my place to know something about expressions when I know a person's hair as well as I do and his forehead and his ears and his nose and his mustache and his drawed up lip and his teeth and his chin, and his flat cheek and tolerable high cheek bones, I think it be mighty funny if a barber like me didn't understand expressions and features as well as I do, and I can prove by the people here in Fort Madison and strangers that I understand more about expressions and features generally.

Ques. 21. Mr. Buckholz suppose that you were acquainted with a person as well as you are acquainted with Walter and that he had left and you hadn't seen him for nearly two years, that this person had died or been killed and had been buried and after about a week the body had been taken up and exposed to the air, and then hauled in a wagon across the country for about ninety miles and then had been carried still farther on the railroad a distance of about 200 miles, and then was detained in a undertaker's establishment two or three
2118 days, and then was buried again and was then after two or three more days taken up again and exposed to the air, this all in warm weather and his photograph was taken at this last time when it was taken up, do you think that you coul look at that photograph after all this had happened and then state with confidence as to who the photograph represented? Ans. I could.

Ques. 22. You think you would have no doubt about it do you?

Ans. I would not.

Ques. 23. Did you ever see a man, or have you not seen men before who had hair that was dark brown and what you would call half curly?

Ans. I have but real different from this hair.

Ques. 24. Explain what the difference is, Mr. Buckholz.

Ans. The difference is that his hair from the ear and the edges of the hair was thicker than any other man's hair I ever cut or combed in my experience of my trade. I have cut a good many heads of hair in my trade and I found lots of heads of hair that was curly around the ear, but not much, some a

good deal more than others. Walters, he had more around the edges than any man's hair I ever cut in my days.

Ques. 26. How about the forehead?

Ans. The hair was what I would call coarse around the forehead. It had a good deal of life in the hair for as coarse as it was.

Ques. 27. Have you not seen other men that had foreheads somewhat long?

Ans. I have.

Ques. 28. With regard to the nose, have you not seen other men who had a long nose and a bump on it?

Ans. I have.

Ques. 29. And take the mustache, have you not seen other men with a mustache similar to Walters?

Ans. Not exactly.

2119 Ques. 30. Explain the difference then.

Ans. Well the difference is he had a very narrow lip.

Ques. 31. Any other difference?

Ans. I know enough about mustaches to know that I never seen a mustache that had any resemblance like this one, in all my trade.

Ques. 32. Now look at the mustache in that picture and state whether it looks like Walters' mustache generally looked.

Ans. It does very much from the side view. It looked heavier from the front view; all these mustache look thinner by side views than they do from front views.

Ques. 33. Did his mustache ever part in the middle and turn to either side or did it stand out straight as shown in that picture?

Ans. Well it did part in the middle. I never knew a mustache as lighe as his was that didn't part in the middle.

Ques. 34. Is that one parted in the middle in that picture?

Ans. It is a side view and it don't show much of a part.

Ques. 35. Does it not seem to stand out straight under the nose in that picture. Ans. It does not.

Ques. 36. Was his nose straight or was it twisted over to one side?

Ans. It wasn't as straight as some noses I have seen.

Ques. 37. Was it slightly bent to one side or the other?

Ans. It was not

Ques. 38. What do you mean by saying that his cheeks were flat?

2120 Ans. I shaved him often enough to know what his cheeks looked like. Well, he wasn't very fleshy in his cheeks, if he had they wouldn't look as flat as they did.

Ques. 39. Did his cheeks look very much like they do in the picture of this corpse? Ans. They do.

Ques. 40. His skin, what color was that, on his face?

Ans. It was what I might call tolerable light, for the complexion of the hair and the beard.

Ques. 41. Did he use tobacco?

Ans. To my recollection I don't believe he did, only in smoking.

Ques. 42. Was he a great smoker?

Ans. He was not half as bad as the average cigar makers. He smoked what I would call moderately. What I call moderately would be three a day.

Ques. 43. Did his lips ordinarily when you knew him stand apart as they do in this picture? Ans. They did.

Ques. 44. Do you consider that a good picture of Fred Walters?

Here witness was shown Exhibit "B."

Ans. Yes sir, I do.

Ques. [—] You don't find the lips standing apart in that picture like the other do you?

Ans. You don't find any man to hold his lips apart when he tries to get a good picture of himself, and Walters when I met him any time I found his lips generally closed, but if I make any funny remarks he would draw his lip up so. I could see the whole length of his teeth.

Ques. 46. You have stated in your direct examination that no one else but yourself had shaved Walters for five years. How do you know that nobody else shaved him in that time?

2121 Ans. Well he come to the shop and he used to wait his turn to get into my chair and I haven't made the statement that I was the only barber that had shaved him in Fort Madison. Once in a great while he would take my brother's chair when he seen he had to wait too long to get into my chair.

Ques. 47. Had he not been away from Fort Madison at any time within this five years you speak of?

Ans. He has not.

Ques. 48. How do you know he took care of his teeth with the cigar ashes?

Ans. He has made that statement to me often enough that I ought to remember all about it.

Ques. 49. That is the only way you know is it?

Ans. Yes sir.

Ques. 50. How did you find out that his height was what you said it was?

Ans. I have heard him and his friends who used to shave in the shop that were Turners, and they have often spoke together about their heights.

Ques. 51. That is the only way you know about that is it?
Ans. Yes sir.
Ques. 52. Were you a Turner at that time?
Ans. No, sir.
Ques. 53. Do you belong to a Turner's society now?
A. No, sir.
Ques. 54. Was his shoulders square or round?
Ans. I have seen squarer shoulders.
Ques. 55. Were they straight out from the neck on top or did they slant off from the neck?
Ans. They didn't slant very much.
Ques. 56. Were his shoulders broad or narrow across the back?
2122 Ans. They were more narrow than they were broad, across the back. I would call it average.
Ques. 57. How about his chest. Did he have a full chest or a flat chest?
Ans. I never seen enough of his chest to know very much about it.
Ques. 58. Was he what you call a large, healthy, well developed man?
Ans. I wouldn't call him very well developed.
Ques. 59. Was his hand a slim hand or a broad hand?
Ans. I would call it not very broad.
Ques. 60. Was it a bony hand and somewhat knotty about the knuckles?
Ans. It wasn't a very fleshy hand, and the fingers had a rough appearance.
Ques. 61. Do you mean with regard to the skin or the bones, or both? Ans. They looked coarse.
Ques. 62. He had then rather a bony, rough looking hand, did he? Ans. Yes sir.
Ques. 63. Did his chin recede or retreat from his mouth by slanting in or was it a projecting chin, projecting out, or was it a straight chin, entirely straight?
Ans. It was curved a little.
Ques. 64. Which way?
Ans. About an inch below the edge of the lip it started to curve. The chin was what we would call straight.
Ques. 65. Do you remember when he was vaccinated or the fact of his having been vaccinated when you were boys?
Ans. I do not.

GUSTAV BUCKHOLZ.

2123 The defendants and each of them next offered and read in evidence in succession, the depositions of:
H. C. Spreen,
C. W. Schott,
F. Holzburger,

C. H. Walters,
F. D. Ellwanger,
F. H. Ochs,
J. G. Rourke,
George Anthes,
William H. Kasten,
E. H. Stempel,
A. H. Stempel,
H. F. Stempel,
D. W. Henry,
T. Ernst,
H. J. Windmayer.

Taken before Sabert M. Casey, a Notary Public at Fort Madison, Iowa, in October, 1881, which said depositions are, respectively, in words and figures as follows, to wit:

2124 H. C. Spreen, a witness of lawful age, being produced and sworn on the part of the defendant, testified as follows.

Ques. 1. State your name, age and place of residence.

Ans. 1. Henry C. Spreen, 38 years of age, reside in Fort Madison, Iowa.

Ques. 2. How long have you resided in Fort Madison?

Ans. 2. Since the 23rd day of January, 1875.

Q. 3. State if you were ever acquainted with a person by the name of Frederick Adolph Walters.

Ans. I was.

Q. 4. State where was living at the time of such acquaintance, and how long it was that you knew him.

Ans. 4. I knew him since the 17th day of March, 1875; that was when I got acquainted with him at Fort Madison.

Q. 5. State when it was that you last saw him.

Ans. 5. It was about the 25th day of March, 1878.

Q. 6. Have you resided in Fort Madison continuously since that time? Ans. 6. Yes sir.

Q. 7. Were you in the habit of seeing him often prior to the date you have given?

Ans. 7. Yes sir, being a neighbor of mine I saw him nearly every day.

Q. 8. With whom did he reside?

Ans. 8. With his parents?

Q. 9. Do you reside in the same place and does his parents reside in the same place they did at that time?

Ans. 9. Yes.

Q. 10. Will you please describe the appearance and features of Frederick Adolph Walters?

Ans. 10. Well I think he must have been about five feet ten or eleven inches in height, don't think he was quite six feet. He had kind of curly hair a kind of dark brown, kind

of curly especially around his ears. He had rather a high forehead and cheek bones stood out prominently. I think he had a high nose over the bridge, sort of a Roman nose. He
2125 had a mustache when he left here it was kind of curly not very heavy. I think his mustache was lighter than his hair, lighter in color and lighter in heft. He had very nice white teeth. He had long slim fingers. His arms were very long I think reached down longer than usual. He was a pretty good turner his [mustache] well developed. Don't remember about his feet. I think he had a mole on his back but I can't tell where it was. We went swimming several times together.

Q. 11. Look at the picture or photograph now shown you by J. W. Green, one of the defendant's Counsel and which said counsel requests Sabert M. Casey, the Notary, to mark Exhibit A to these depositions and attach the same thereto. Examine it closely and state whether or not you recognize it as the photograph of any person whom you knew in life, and if so state the name of that person.

Ans. 11. It looks a good deal like Frederick Adolph Walters, I think it looks a great deal like the features of Adolph Walters.

Q. 12. State if you please whether or not Frederick Walters was a member of any secret society of which society you was a member?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and imaterial.

The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

Ans. He was.

Q. 13. What society was that?

Counsel for the plaintiff objects to the question as incompetent, irrelevant and immaterial.

The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

Ans. Concordia Lodge No. 133 of Odd Fellows, Fort Madison, Iowa.

Q. 14. What official position if any did you hold in said lodge?

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial.

The Court overruled the objection, to which action and ruling of the Court the plaintiff at the time duly excepted.

Ans. 14. I was N. G. Noble Grand about the time that he left.

Q. 15. State whether or not the death of Frederick A. Walters was ever suggested to the Lodge of which he was a member; if so please state under what circumstances and what action was taken by the Lodge, please state fully.

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial.

The Court sustained the objection, to which action and ruling of the Court the defendant and each of them at the time duly excepted.

2126 Ans. On account of Adolph Walters being always very punctual in paying his dues after he left here and also, and also having his traveling card renewed, and after we had not heard from him for some time, his traveling card running out some time, and as a great many members of the Lodge had seen the photograph one of them like the one shown me now and another view of the same body the members of the lodge came to the conclusion that it was the picture of Brother Adolph Walters and a motion was made to pay to the family of Adolph Walters the $50 in case of death of any member as provided for by our constitution and By Laws of said Lodge.

Int. 16. State if after Frederick Adolph Walters left Fort Madison at the date you have mentioned you had any correspondence with him and if so, state at what place you received the last communication and about when that was.

Ans. 16. I had a correspondence with him and received the last letter from him from Wichita. I received it about the 6th or 7th of March as near as I can recollect.

Int. 17. State if you have that letter in your possession?

Ans. 17. I have not.

Int. 18. State what has become of the letter if you know.

Ans. 18. I think I have thrown it in the waste basket and it has gone to waste.

Int. 19. State if you have looked for it diligently where you would be apt to keep it if preserved.

Ans. 19. I have, and can't find it.

Int. 20. State the contents of that letter as nearly as you can.

Counsel for the plaintiff objects to the question because the same is incompetent, irrelevant and immaterial.

The Court overruled the objection to which action and ruling of the Court the plaintiff at the time duly excepted.

Ans. 20. He told me he was going cattle—he didn't say cattle herding he said herding, he said he was going to leave on the 7th of March, and he had already left when I got the

letter. He asked me how he stood in the lodge, that he was going herding, and that I should see that he was not dropped on account of dues. HENRY SPREEN.

2127 William Schott, a witness of lawful age, produced by defendant and sworn, testified as follows:

Int. 1. State your name, age and place of residence and occupation.

Ans. 1. William Schott, age 53 years, occupation that of furniture dealer and cabinet maker, residence, Fort Madison, Iowa.

Int. 2. How long have you resided in Fort Madison, Iowa.

Ans. 2. Eight years.

Int. 3. State if you have known a person by the name of Frederick Adolph Walters and if so please state where it was that you knew him.

Ans. 3. Yes, I had known him intimately well at Fort Madison, Iowa.

Int. 4. State if you please when you last saw Frederick Adolph Walters and where.

Ans. 4. I have seen Adolph Walters at my place near Fort Madison where he bid me good bye, on or about March, 1878, when he told me he was going out West, also asking me if my son Charlie was at Kansas City yet, which I answered in the affirmative.

Int. 5. Have you resided in Fort Madison ever since?

Ans. 5. Yes.

Int. 6. Describe the person and features of this Frederick Adolph Walters.

Ans. 6. He was a young man of about 24 years of age, he was about five feet ten or eleven inches high, broad shouldered, strong and healthy. He has to my best of knowledge, his hair had a bluish black color, curly; He had what I should call a Roman nose. He had high cheek bones, large mouth and splendid teeth. He had a high forehead. He had somewhat of a dark brown mustache light in heft not heavy. He had a large, long slim hand.

Int. 7. Look at the photograph now shown you by J. W. Green, one of the attorneys for deft which has been marked Exhibit "A" by Sabert M. Casey, the Notary Public taking these depositions, examine it closely and state if you recognize it as the photograph of any person whom you have heretofore known and if so state of whom it is a photograph.

Ans. 7. I recognize it as that of Adolph Walters. I recognize it on his hair, nose and mustache, high cheek bones and of the teeth and by the features in general.

Int. 8. State whether or not you have in your business been accustomed to see persons after death.

Ans. I have, as I am undertaker myself, and seen many cases. WILLIAM SCHOTT.

2128 Frederick Holtzberger, a witness of lawful age produced by defendant being sworn, testified as follows:

Int. 1. State your name, age, occupation and place of residence.

Ans. 1. My name is Frederick Holtzberger, my age is 55 years, my occupation is blacksmith and carriage maker, residence, Fort Madison, Lee County, Iowa.

Int. 2. How long have you resided in Fort Madison?

Ans. I have resided in Fort Madison since the 5th of May, 1849.

Int. 3. State if you ever knew a person of the name of Frederick Adolph Walters, and if yes, please state where he resided at the time of such acquaintance?

Ans. 3. He resided in the city of Ft. Madison, Lee County, Iowa.

Int. 4. How long did that acquaintance continue?

Ans. 4. I knew him from childhood up.

Int. 5. Where did you last see this Frederick Adolph Walters?

Ans. 5. I think it was three years ago last spring. I think he left in March sometime, he left in the spring, don't know exactly what month.

Int. 6. With whom did he reside when living in Fort Madison?

Ans. 6. He resided with his father Daniel Walters, he was a cigar maker by trade.

Int. 7. Where does his father reside as to your place of business?

Ans. 7. Right opposite my place of business on Second street between Pine and Market, Pine and Market.

Int. 8. Please describe the person and features of this Frederick Adolph Walters.

Ans. 8. He was about five feet nine inches tall. He was a broad-shouldered man and had a good lengthy arm and heavy shoulders, broad shoulders. He was well muscled. His hair was kind of brownish black on the curly order. He had high cheek bones and he had a Roman nose. His mustache was kind of light a little lighter than his hair and was not
2129 heavy, it growed kind of straight out and wasn't curly. He had a medium sized mouth, his teeth were white, good teeth and the two front teeth were broader than the other, when he spoke his lip went up and showed his front teeth. He had a pointed chin, a medium chin. He had a kind of long hand, medium size and very long fingers. He had a good foot on the long order, he had corns on his toes.

Int. 9. Look at the picture or photograph now shown you by J. W. Green attorney for defendant, which has been marked

Exhibit "A" by the notary, and state whether or not you recognize it as the picture of any one whom you have heretofore known, and if so, please give the name of that person?

Ans. 9. I recognize the photograph as being Adolph Walter.

Int. 10. State how you recognize that picture or from what you recognize it as being that of Frederick Adolph Walter?

Ans. 10. I recognize him by his cheek bones, his Roman nose, his two front teeth, his mustache and his hair and also his chin and by features in general.

FREDERICK HOLZBERGER.

F. D. Ellwanger, a witness of lawful age produced by defendant, being duly sworn, testified as follows:

Int. 1. State your name, age and occupation and place of residence?

Ans. 1. Age, 28 the 17th of this month, name, F. D. Ellwanger, occupation, cigar maker and cigar manufacturer, reside at Fort Madison, Iowa.

Int. 2. How long have you resided at Fort Madison?

Ans. 2. About ten years, with a few short absences.

Int. 3. State if you ever knew a person by the name of Frederick Adolph Walters and if so where he resided during that acquaintance.

Ans. 3. I did, he resided in Fort Madison at the time I got acquainted with him.

Int. 4. How intimately were you acquainted with him?

Ans. 4. I was an associate with him, he worked in the factory for me.

Int. 5. What was his business or trade?

Ans. 4. His trade was a cigar maker.

Int. 6. When did you last see this Frederick Adolph Walters?

Ans. 6. The last I saw him was before he left Fort Madison, I believe in the spring of 1878.

Int. 7. Have you resided in Fort Madison ever since that?

Ans. 7. Yes, sir, I have resided here ever since that.

Int. 8. Please give a description of the person and features of Frederick Adolph Walters as you now remem-
2130 ber him.

Ans. 8. He was between five feet ten and a half to eleven inches probably higher, he was very raw boned. He had square shoulders, tolerably broad shoulders. He was not very fleshy, his muscles were well developed. His arms were very long. His hands were pretty large, slim hand long fingers. One of his little fingers was a little crooked. He had a pretty large size foot, a slim foot; he had corns on his feet. I have heard him complain of corns. He had a kind of brown

hair, a dark brown. The hair was curly when long and wavy in front. He had a very high and prominent forehead. His cheek bones were ordinarily high. He had a kind of Roman like nose. It was a nice shaped nose. He had a mustache the last I saw him, a very small, thin mustache, it was a little lighter than the color of his hair, it kind of growed out straight. He had an ordinary sized mouth. He had very pretty sound front teeth, he showed them very prominent when he laughed and when he talked he showed them. He had a broad chin. Could not remember his weight.

Int. 9. Look at the picture now shown you by J. W. Green one of the attorneys for defendant which has been marked Exhibit "A" by Sabert M. Casey, the notary public, and after examination state whether you recognize it as the photograph of any person you have heretofore known and if so give the name of that person?

Ans. 9. I think I recognize it, and the features of this picture look a good deal like Frederick Adolph Walter.

F. D. ELLWANGER.

Charles W. Walters, a witness of lawful age, produced by defendant being duly sworn testified as follows:

Int. 1. State your name, age and occupation and place of residence?

Ans. 1. Charles H. Walters, age 29; occupation, cabipet maker; residence, Fort Madison.

Int. 2. How long have you resided in Fort Madison?

Ans. 2. Not quite 27 years.

Int. 3. State if you have known a person by the name of Frederick Adolph Walter, and if so please state where he resided at the time you knew him?

Ans. 3. I knew him, he resided at Fort Madison.

Int. 4. About how long did that acquaintance exist, and how intimately were you acquainted with him?

Ans. 4. Ever since we were little boys going to school together.

Int. 5. When did you last see Frederick Adolph Walters?

Ans. 5. It must have been in 1878, it was in the
2131 spring I saw him the last night before he left Ft. Madison.

Int. 6. Please describe the personal appearance and features of Frederick Adolph Walters as you now remember them.

Ans. 6. He was about five feet between ten and eleven inches high I would judge. He was wide across the chest, square shouldered; he was a muscular man and weighed between 180 and 190 in the winter time and in the summer time he would come down to 168 to 170. His arms were long, his

hands were long, his fingers long. He had a pretty large foot, he wore nines I think. He generally wore his hair long. It was a dark brown color and wavy. He had a medium high forehead. He had high cheek bones. He had a large nose shaped like Roman nose. His mustache was a shade lighter than his hair rather thin and grew out straight from the lip. He had nice shaped, sound white teeth. He took a good deal of pains with his teeth. He showed them when he talked or laughed. He had a kind of wide shaped heavy chin.

Int. 7. Look at the photograph now shown you by J. W. Green attorney for defendant which has been marked Exhibit "A" by Mr. Casey, the notary public, and after examination state whether you recognize it as the photograph of any person you have heretofore known and if so give the name of that person?

Ans. 7. I recognize the photograph as that of Adolph Walter.

Int. 8. State how you recognize it as his photograph?

Ans. By the nose, teeth, chin, his high cheek bones, the mustache and the features taken together.

CHAS. H. WALTER.

F. H. Ochs, a witness of lawful age produced by defendant being duly sworn testified as follows:

Int. 1. What is your name, age, occupation and place of residence?

Ans. 1. F. H. Ochs, age 20, occupation barber, reside at Fort Madison.

Int. 2. How long have you resided at Fort Madison?

Ans. 2. I was born here and I have always made this my home.

Int. 3. State if you have ever known a person by the name of Frederick Adolph Walters, and if so state where you formed his acquaintance?

Ans. 3. I knew him at Fort Madison and made his acquaintance there.

Int. 4. When did you last see Frederick Adolph Walters?

Ans. 4. I last saw him about three years ago before he went away.

Int. 5. Describe the personal appearance and the features of Frederick Adolph Walters as you now remember them?

2132 Ans. 5. He had long hair, never very short, it was in small curls and wavy, it grew down on his forehead in front and the temples were bare. His cheek bones stood out pretty well, his cheeks were thin and fallen in below the cheek bones. He had a peaked nose, Roman nose, thin as

to the nostrils. His mustache was lighter than his hair, the color of his hair was dark brown and his mustache grew out long and thin, pretty hard to make it lay. His teeth showed when he laughed he had a good set of teeth, large teeth, his chin was kind of a pointed heavy chin. He had long fingers, pretty small but his hands were long. He was pretty muscled for a thin built fellow.

Int. 6. Look at the photograph now shown you by J. W. Green, attorney for defendant and which has been marked Exhibit "A" by the Notary Public, and after examination state whether you recognize it as the photograph of any person you have heretofore known, and if so give the name of that person?

Ans. 6. I recognize it as the picture of Adolph Walter.

Int. 7. State how you recognize it?

Ans. 7. By his hair, lips, mustache, nose, cheek bones and chin and the long face and the general shape of it.

FRED H. OCHS.

John G. Rourke, a witness of lawful age being produced by defendant and duly sworn testified as follows.

Int. 1. State your name, age, occupation and place of residence?

Ans. 1. John G. Rourke; age 45; occupation, Deputy Sheriff of Lee County, Iowa; place of residence, Fort Madison.

Int. 2. How long have you resided in Fort Madison?

Ans. 2. Ever since 1864.

Int. 3. Have you ever known a person by the name of Frederick Adolph Walter and if so, where was he residing at the time of such acquaintance?

Ans. 3. I have known him ever since 1864, he has resided in Fort Madison.

2133 Int. 4. About how long since you last saw him?

Ans. 4. Not since 1877 or 1878. I don't remember which year, the time he left to go on this trip, from which he never returned to my knowledge.

Int. 5. Have you been residing in Ft. Madison continuously for the last four years? Ans. 5. Yes, sir.

Int. 6. How large a place is Fort Madison?

Ans. 6. Between five and six thousand inhabitants.

Int. 7. How intimately were you acquainted with this Frederick Adolph Walters?

Ans. 7. Well from 1864 up to 1870 I think I saw him nearly daily, after that, probably more than twice a week. I was absent from Ft. Madison from October, 1873, until January, 1875.

Int. 8. Describe the personal appearance and the features of Frederick A. Walter as you last saw him and as you now remember them.

Ans. 8. Well I think his height was somewhere near six feet as near as I can judge. I would think his weight to be somewhere from 160 to 175 pounds. He was a man that didn't carry much flesh but was a square built man square shoulders and very muscular. He had long arms and very strong fingers and long hands and fingers. His hair was dark and curly. He had a high forehead. He had a Roman nose. He had rather high cheek bones. His upper lip was shorter than the lower and his teeth would show. He didn't have a very heavy mustache, it was dark but not quite as dark as his hair, couldn't say whether it curled or not. He had good teeth in front but they were very long. I couldn't describe his chin.

Int. 9. Look at the photograph now shown you by J. W. Green, attorney for defendant which has been marked Exhibit "A" by Mr. Casey, the Notary Public, and state whether you recognize it as the photograph of any person you have heretofore known, and if so give the name of that person?

Ans. 9. I recognize it as the photograph of Adolph Walters and did recognize the photograph the first time I saw it without knowing it had been taken from Adolph Walters after he had been dead.

Int. 10. State how you recognize that photograph as being that of Frederic Adolph Walters?

Ans. 10. Well from the general appearance of the countenance in the picture.

JOHN G. ROURKE.

George Arthers, a witness of lawful age being produced and duly sworn testified as follows:

Int. 1. State your name, age, occupation and place of residence?

Ans. 1. George Arthers; age, 42 years; hotel keeper; reside in Ft. Madison.

Int. 2. How long have you resided in Fort Madison?

2134 Ans. 2. About twenty years.

Int. 3. Look at the photograph now shown you by J. W. Green, attorney for defendant, which has been marked Exhibit "A" by the Notary Public, and after examination state if you recognize it as the photograph of any person you have heretofore known and if so state the name of that person?

Ans. 3. From the photograph I should take it to be Mr. Walter's son.

Ans. 4. Where did you know the person of whom this is a photograph? Ans. 4. Here in Fort Madison.

Int. 5. State whether or not he resided here in Fort Madison when you knew him? A. Ans. 5. Yes, sir.

GEORGE ARTHERS.

Wm. H. Kasten, a witness of lawful age produced by defendant being duly sworn testified as follows:

Int. 1. State your name, age and occupation and place of residence?

Ans. 1. Wm. H. Kasten; age, 28 years; occupation, salesman in lumber yard; residence, Fort Madison.

Int. 2. How long have you resided in Fort Madison?

Ans. 2. My life time. I was born here.

Int. 3. State whether you have ever been acquainted with a person by the name of Frederick Adolp Walter, and if yes, state where he resided at the time of such acquaintanc?

Ans. 3. In Fort Madison.

Int. 4. How long did that acquaintance exist?

Ans. 4. From childhood up as long as I can remember.

Int. 5. When did you last see Frederick Adolph Walters?

Ans. 5. In 1878, in the Spring.

Int. 6. Please give a description of the personal appearance and features of Frederick Adolph Walters.

Ans. 6. I think he was rather tall, I judge about between five feet eight and twelve inches. He was rather square shouldered. He had tolerable long arms. His hands were pretty long from the wrists down, his fingers were long but somewhat clumsy. He had a foot rather flat, long and good sized, he wore somewheres near an eight or nine. His hair was of a dark brown and was kinky, that is somewhat curly. His forehead was rather high. He had pretty large cheek bones, they extended somewhat. He had a Roman nose. He had a very light mustache when I last saw him, it was dark in color. He had very large front teeth. They were nice white teeth, they would show sometimes while laughing. His chin was rather sharp-like and small, it was broad, yet somewhat thin.

2135 Int. 7. Look at the photograph now shown you which has been marked Exhibit "A" by Mr. Casey, the Notary Public, and after examination state whether you recognize it as the photograph of any person you have heretofore known, and if so please state the name of that person.

Ans. 7. I should state that I would take that to be the picture of a party that I have known. I would take that to be a picture of Adolph Walters, a likeness of him.

Int. 8. How do you recognize that to be a likeness of Frederick Adolph Walters?

Ans. 8. By the form of his face by the shape of his nose, the style of his hair, the cheek bones, his teeth and also by the mustache.

WM. H. KASTEN.

Eugene H. Stemple, a witness of lawful age, being produced by defendant, and duly sworn testified as follows:

Int. 1. State your name, age, occupation and place of residence?

Ans. 1. E. H. Stempel; age, 27 years; Guard at Iowa State Penitentiary; reside at Fort Madison.

Int. 2. How long have you resided at Fort Madison?

Ans. 2. All my life; this has always been my home.

Int. 3. State if you were ever acquainted with a person by the name of Frederick Adolph Walters and if so state where he resided at the time of such acquaintance?

Ans. 3. I was acquainted with Frederick Adolph Walters. He was an intimate friend of mine and resided in Fort Madison.

Int. 4. How long did that acquaintance continue?

Ans. 4. From childhood up.

Int. 5. When did you last see Frederick Adolph Walters?

Ans. 5. Early in the spring of 1878.

Int. 6. State if you ever heard from Frederick A. Walters since the spring of 1878 and if so, where was he the time you last heard from him?

Ans. 6. We corresponded regularly, and the last letter I received from him was written by him in Paola, Kansas.

Int. 7. Did you hear from him directly after you received this letter from Lawrence?

Ans. 7. I did; Miss. Kaston told me she had received a letter from him from Wichita, that was the last I heard of his whereabouts.

Counsel for the plaintiff moves to strike out the last answer of the witness as not responsive to the question and hearsay.

2136 The Court sustained the objection, to which ruling of the Court the defendants and each of them at the time duly excepted.

Int. 8. Please to describe the personal appearance and features of this Frederick Adolph Walters the last time you saw him as you remember them?

Ans. 8. He was a man five feet eleven inches high. I should judge he weighed about 170 pounds. He was a well built man. He had pretty broad shoulders. He had a pretty long arm, a very long arm; he had a large bony hand and long straight fingers. He had been troubled a great deal with corn, which made his feet sore; he wore a number 8 or 9 fine boot, if I am not mistaken. He had dark brown hair, wavy. His forehead was medium in height. He had heavy cheek bones, high cheek bones. He had a pretty large nose, it was pretty high between

and below the eyes. He had a light mustache, that is light in heft; I should call it a kind of ash color; the hair of it was straight; there was no lay to it. He had a very good set of teeth, his front teeth white and large.

Int. 9. Look at the photograph now shown you by J. W. Green, attorney for defendant, which has been marked Exhibit "A" by Mr. Casey, the Notary Public, and after examination state whether you recognize it as a photograph of any person whom you have heretofore known and if so give the name of that person?

Ans. 9. I think I recognize that picture as that of F. Adolph Walters. There is no doubt in my mind of that being his picture.

EUGENE H. STEMPEL.

Arthur H. Stempel, a witness of lawful age, being produced by defendant and duly sworn, testified as follows:

Int. 1. State your name, age, occupation and place of residence?

Ans. 1. Arthur H. Stempel; age, 23; occupation, druggist; reside in Fort Madison.

Int. 2. How long have you resided in Fort Madison?

Ans. 2. Twenty-three years and over; was born here.

Int. 3. State if you were ever acquainted with a person of the name of Frederick Adolph Walters, and if so where did he reside at the time of such acquaintance?

Ans. 3. At Fort Madison.

Int. 4. State how long that acquaintance continued and how long had you known him?

Ans. 4. As far back as I can remember.

Int. 5. When did you last see Frederick Adolph Walters?

[Int. 5.] In the spring of 1878.

Int. 6. Please to describe Frederick Adolph Walters; that is, his personal appearance and features as you last saw
2137 him?

Ans. 6. His height was very near six feet, square shoulders; he weighed about 175 pounds; he was muscular; had long arms, long fingers and large hands. He had a large foot, but slim; he complained of corns. His hair was wavy, curly; heavy and dark brown; it seems to me it was fine, I may be mistaken on that point. It seems to me he had a high forehead, cheek bones, heavy. He had a pretty large nose; it had a hump, a small one in the middle. His mouth was not very large and when he laughed he showed his teeth. He had heavy, nice set of teeth. His mustache was light, that is it was lighter than his hair. It grew straight. He had a large chin.

Int. 7. Look at the photograph now shown you by J. W. Green, attorney for defendant, which has been marked Exhibit "A' by Mr. Casey, the Notary Public, and after examination state whether you recognize it as the photograph of any person you have heretofore known and if so give the name of that person.

Ans. 7. I think I do, of Frederick Adolph Walter. His hair, cheek bone, mustache and chin is that of Frederick Adolph Walters and teeth.

A. H. STEMPEL.

H. F. Stempel, a witness of lawful age, being produced by defendant and sworn, testified as follows:

Int. 1. State your name, age, occupation and place of residence?

Ans. 1. My name is H. F. Stempel, my profession is physician; I am 57 years of age; reside in Fort Madison.

Int. 2. State if you were ever acquainted with a person by the name of Frederick Adolph Walters, and if so state when and where you knew him.

Ans. 2. I have been acquainted with him intimately. He was very often in my house visiting my sons. I liked him just like our own boys. I knew him at Fort Madison.

Int. 3. Describe the personal appearance and features of Frederick Adolph Walters, as you last saw him?

Ans. 3. He must have been about five feet and ten inches or so; I don't know exactly, nine or ten inches, maybe ten or eleven inches in height. He was a heavy built boy; bony, not very fleshy, but muscular. He had pretty large arms and pretty long hand. His legs were long in proportion to his body. His hands were large and his fingers were long, and the veins showed themselves on his hands. He had a pretty high forhead, a good sized nose, a kind of Roman nose, and pretty large nostrils. His lower jaw and his upper jaw, the teeth of the lower and upper jaws covered, they fit together. He had very fine teeth, pretty large, too. He had somewhat curly, dark brown hair. He had a great mass of hair on
2138 his head. His cheek bones were elevated or high. He had a medium chin. He was of dark complexion.

Int. 4. Look at the photograph now shown you by J. W. Green, attorney for defendant, which has been marked Exhibit A by Mr. Casey, the Notary Public, and after examination state if you recognize it as the photograph of any person you have heretofore known and if so state his name?

Ans. 4. To the best of my belief I think it is the picture of Frederick Adolph Walter. It is the same hair and laying on the temple just as it did in life. It is the same forehead. The nose is a little changed, but it comes from death. The same

cheek bones and mouth, and his mustache. The same chin as he had in life, and from the general cast of the features I would say it was Walters.

H. F. STEMPEL.

D. W. Henry, a witness of lawful age, being produced and sworn, testified as follows:

Int. 1. State your name, age, occupation and place of residence?

Ans. 1. D. W. Henry; age, 58; residence, Fort Madison, Lee County, Iowa; I deal in stocks.

Int. 2. How long have you resided in Fort Madison?

Ans. 2. Twenty-seven years last April.

Int. 3. State if you ever knew a person by the name of Frederick Adolph Walter, and if so, where he resided at the time of your acquaintance?

Ans. 3. I knew him from his boyhood; he lived in the town of Fort Madison.

Int. 4. Please to give a description of the personal appearance and the features of this Frederick Adoph Walters?

Ans. 4. His general appearance was good. My opinion is he would be a man from five feet ten inches high to eleven inches. His legs were longer in proportion to the balance of his body to form an evenly proportioned man. His arms were long, equally long in proportion to his legs. He was
2139 square-shouldered, rather heavy shouldered, the point of his shoulder was higher if anything than where it joined his neck. He had rather high cheek bones and his face was wide through the upper part of his cheek bones. The nose was a little on the Roman order, and the nostrils were wide at the base. He had what I call nice teeth, a little broad, and his upper lip being short showed his teeth when he talked. My recollection is that his teeth set square together. He had a fine head of hair and my recollection is that it curled a little, it was dark brown.

Int. 5. Look at the protograph now shown you by J. W. Green, attorney for defendant, which has been marked Exhibit "A," by S. M. Casey, the Notary Public, and after examination state whether you recognize it as the photograph of any person you have known heretofore and if so give the name of that person?

Ans. 5. Yes, sir; I do, and that is poor Frederick Adolph Walters; I can't be mistaken.

Int. 6. State how you recognize that as the photograph of Frederick Adolph Walters?

Ans. 6. Well, I recognize it by the general features of the man, there is something I cannot explain about it, but it is the general features of the man. There is the high cheek bone, a

little of the Roman nose and the nostrils wide at the base, and a fine set of teeth and the upper lip a little short; and his fine head of hair. It looks as natural as a corpse could look.

D. W. HENRY.

Theodore Ernst, a witness of lawful age, being produced and sworn, testified as follows:

Int. 1. State your name, age, occupation and place of residence?

Ans. 1. Theodore Ernst; Fort Madison, Iowa; jeweler; age, 48 years.

Int. 2. How long have you resided in Fort Madison?

Ans. 2. Over 20 years.

Int. 3. State if you ever knew a person by the name of Frederick Adolph Walter and if so state where he lived when you were acquainted with him?

Ans. 3. I knew from a little boy at Fort Madison.

Int. 4. Please describe the personal appearance and the features of this Frederick Adolph Walters?

Ans. 4. He was a good sized man, very heavy boned and muscular. He had wide shoulders and a face which was a kind of Indian cut, with high cheek bones, a good nose, large, a little Roman nose in shape, high and wide forehead, nose was kind of Roman. The hair dark brown and curled or very near black. He had teeth, full, large teeth, and a mouth full of them. He was very strong, heavy boned and muscled. He wasn't fleshy; it seemed he was just muscle and bone,
2140 his mustache grew thin and straight.

Int. 5. Look at the picture now shown you by J. W. Green, attorney for the defendant, which has been marked Exhibit "A" by Sabert M. Casey, the Notary Public, and after examination state if you recognize it as the photograph of any person you have known in life and if so give the name of that person?

Ans. 5. I recognize it as the picture of the person I have been describing.

Int. 6. How do you recognize it as the picture of Walters?

Ans. 6. From the full appearance and by the outside lines of the features. When I look at it it appears as if I had him right before me.

THEO. ERNST.

Alex. J. Windmayer, a witness of lawful age being produced and sworn, testified as follows:

Int. 1. State your name, age occupation and place of residence?

Ans. 1. A. J. Windmayer; age 25 last April; residence, Fort Madison.

Int. 2. How long have you resided in Fort Madison?
Ans. 2. I was born here.
Int. 3. State if you ever knew a person by the [—] of Frederick Adolph Walter and if so where did you know him?
Ans. 3. Yes sir; he resided here, we were schoolmates and very good friends.
Int. 4. Please to give a description of the personal appearance and the features of Frederick Adolph Walters as you last saw him?
Ans. 4. I should judge he was about five ten or eleven inches high, wide shouldered, very square build, he had high cheek bones and a pretty large nose, it was slightly Roman, very dark brown curly hair, more black than brown. He had beautiful teeth, a very close set and regular, of equal length. His hands were slim and very long fingers. His mustache was not very heavy; when I saw him last it was straight. It was lighter in color than his hair. He had a middling high forehead, slightly retreating. His arms were long. He had long legs; in proportion to his body his legs were a little too long, slightly bow legged. He had a pretty large foot. I think he wore an eight or 9 boot.
Int. 5. Look at the photograph now shown you by J. W. Green, attorney for the defendant, and marked Exhibit 'A' by the Notary Public and after examination state if you recognize it as the photograph of any person you have known and if so give the name of that person?
Ans. 5. I would say it was Frederick Adolph Walters. I should judge it to be a picture of him, Frederick Adolph Walters.

A. J. WINDMAYER.

2141 Impeaching Questions of Hezekiah Covey.

By Mr. Barker: We now offer in evidence certain questions on pages 29 and 30 of the transcript of the trial of 1885, on the cross examination of Hezekiah Covey, the witness who testified in regard to a mole on the back or John W. Hillmon. His attention was called to these questions.

The plaintiff objects to the reading of the questions in evidence as incompetent, irrelevant and immaterial, because no proper foundation has been laid, and because the method sought to be employed is not a proper method to impeach a witness. Objection overruled, the plaintiff excepts.

Mr. Barker thereupon read to the jury the following questions and answers from said testimony of Hezekiah Covey:
"No, you identified those remains, did you?
A. Well, in my own mind I did, yes sir.

Q. Did they look natural, well preserved and in good order? A. They looked natural to me.

Q. Perfectly natural? A. Not perfectly natural.

Q. Now, by what particular feature, if any, did you recognize the remains as being Hillmon's?

A. Nothing no more than I would you.

Q. Didn't recognize him by any particular feature or mark?

A. No sir.

Q. Was there any peculiarity about Hillmon by which you could recognize him?

A. Not particularly, no marks that I knowed of.

Q. Don't remember of any marks? A. No sir."

By Mr. Hutchings: We now offer to read in evidence, the entire testimony of the witness Covey given upon said trial of 1896.

No objection. Said testimony is in words and figures as follows, to wit:

2142 H. Covey, called and after being duly sworn, testified as follows:

Questions by Mr. Hutchings:

Q. What is your first name? A. H. Covey.

Q. Mr. Covey, where do you reside? A. In Lawrence.

Q. How long have you resided in Lawrence?

A. Since 1865.

Q. What is your occupation?

A. Well, generally it had been driving a team.

Q. State if you were acquainted with John W. Hillmon in his life time? A. Yes sir.

Q. About what time did you become acquainted with him?

A. I can't state exactly. I think it was in 1872 or 1873.

Q. How frequently had you met him up to the time of his death?

A. I could not say. He was in the country frequently. I used to see him frequently in town. I seen him several times at Mr. Eldridge's stable, and I have seen him with Mr. Baldwin several times.

Q. About when did you last see him alive?

A. It was in 1879 sometime; I see him and Mr. Baldwin sitting on the bridge the last time I saw them—right at the end of the bridge. I was coming over with a team. They were sitting there talking. I spoke to them.

Q. The bridge at Lawrence? A. Yes sir.

Q. In what condition did you next see them?

A. I saw the remains of him there at Bailey & Smith's, the undertakers.

Q. About how long after that?

A. I could not say exactly how long it was after.
Q. Can you tell about what time of the year it was?
A. It was in 1879 some time, but I could not tell the exact time.
Q. Tell whether it was in the spring or fall.
A. It was in March or April along there somewhere in the spring, I think.
Q. Who was present when you saw the dead body
A. Well, there was a good many. I could not name them all. I was not looking to see who was present. I just walked in to see the corpse. Ed Monroe was present. He was the only one I have any recollection of knowing who was in there.
Q. Do you remember with regard to Hillmon's height?
A. Well, I don't; no sir.
Q. About what was his height, if you can tell, compared with yours?
A. I should judge he was about the height of me—might be a little taller; I could not say. He was as tall as I am any way, I think.
Q. What is your height? A. I am five feet eleven inches.
Q. Where were you at the time of the former trial of this case three years ago? A. Three years ago I was in Atchison.

Cross Examination.

Questions by Mr. Barker:
Q. I understand you to say that you do not remember in regard to his height—nothing special about his height?
A. I do not think I said anything of the kind.
2143 Q. You do remember now, then?
A. I said he was tall as I am.
Q. That is a mere matter of judgment, opinion, is it not?
A. Yes sir.
Q. He is a man that you have not seen since 1879?
A. Yes sir.
Q. And you call to mind now that that is your impression?
A. Yes, I have seen him frequently—been with the gentleman.
Q. Who were you working for in the spring of 1879?
A. Tom Anderson.
Q. Were you driving a team for Tom Anderson?
A. Yes sir.
Q. In Lawrence? A. Yes sir.
Q. You are working for him now in Atchison, are you not?
A. No sir; I am driving for the city of Lawrence now.
Q. What were you doing prior to 1879?

A. I drove some for Mr. Anderson in Atchison since. I have also drove a couple of years before for the city of Lawrence.

Q. You know Levi Baldwin, don't you? A. Yes sir, I do.

Q. Know him well? A. Yes sir.

Q. You used to live out there in that neighborhood, didn't you? A. Yes, within five miles of him.

Q. Do you remember seeing Levi Baldwin there at Lawrence at the same time the remains were there?

A. No sir, I don't.

Q. Didn't you see him around there?

A. No sir; I just happened in with a load of nails. I saw them take the remains in. I jumped off to see the remains. That is how I came to be there. Ed Monroe was in there, and we came out together.

Q. You and Ed Monroe came out together? A. Yes sir.

Q. Did you see Bailey & Smith there?

A. I do not have no recollection of it, no sir.

Q. Now, you identified those remains, did you not?

A. Well, in my own mind I did, yes sir.

Q. Who was the first person you told in regard to it?

A. Ed Monroe.

Q. Did those remains look natural?

A. They looked to me like Hillmon.

Q. Did they look natural—well preserved—in good order?

A. They looked natural to me.

Q. Perfectly natural? A. Not perfectly natural.

Q. The remains were sufficiently well preserved so that you had no trouble in recognizing Hillmon?

A. I got it down in my head that that was Hillmon.

Q. And this is the first time you ever told of it in public, is it not? A. Yes sir; I have tried to keep out of it.

Q. Now by what particular features, if any, did you recognize the remains as being Hillmon's?

A. Nothing no more than I would you.

Q. Didn't recognize him by any particular feature or mark?

A. No sir.

Q. It was just you had an impression that those were
2144 the remains of Hillmon, was it not?

A. Yes; I had seen him a good many times.

Q. It was talked over that those were the remains of John W. Hillmon?

A. Some said it was and some said it was not.

Q. Did you hear anything in regard to it in there?

A. No sir.

Q. So you remember Hillmon well, do you? A. Yes sir.

Q. Remember his features well, do you? A. Yes sir.

Q. Do you remember the color of his hair and eyes?

A. Yes sir.
Q. What was the color of his eyes?
A. He had dark eyes and dark hair.
Q. Did you examine the hair of the dead body?
A. I looked at it, yes.
Q. Was his head covered or uncovered?
A. It was not covered when I was in.
Q. How long were you in there?
A. About ten or fifteen minutes.
Q. You stayed in there ten or fifteen minutes, did you?
A. I did.
Q. This room in which the remains were kept was a small room, was it not? A. Yes sir.
Q. And there could not more than six or eight persons get in at the time?
A. There were more than that in there at that time.
Q. Was Mr. Eldridge in there all the time you were in there? A. I did not see Mr. Eldridge.
Q. I mean Ed Monroe?
A. I could not tell you. He came out with me. I think Mr. Monroe went in with me.
Q. What is his name? A. Edwin.
Q. You think he went in with you, do you? A. Yes sir.
Q. Where is he? A. In Lawrence.
Q. Was there any peculiarity about Hillmon by which you could recognize him?
A. Not particularly; no marks that I knowed of.
Q. Don't remember of any marks? A. No sir.
Q. Now, I understand you to say that you had seen Hillmon and Baldwin together some time before that?
A. Yes sir. I think the last time I saw Mr. Hillmon he was sitting on the bridge.
Q. He was sitting on the Lawrence bridge? A. Yes sir.
Q. Whereabouts?
A. At the end of the bridge right where the railroad goes under the bridge.
Q. When would you say that was—what month?
A. I could not say; it was along in the spring some time.
Q. They were sitting there talking? A. Yes sir.
Q. And you say that was the last time you ever saw Hillmon?
A. I think that was the last time. I would not say positive, but I think that was the last.
Q. When before that had you seen him?
A. I had seen him in town frequently.
Q. You saw him in March or February 1879; when had you seen him before that?

A. I could not say positive, only that I had seen him passing. He lived at Lawrence and I lived there. After I would get off of my team, sometimes I would go up town and pass the gentleman.

2145 Q. Was he there in Lawrence along during the winter of 1879—did you see him there frequently say during December 1878 and January and February 1879?

A. I do not think he was there in 1879.

Q. You don't think you saw him in 1879? A. Yes, sir.

Q. Did you see him in those months in 1879—in the months of January and February 1879, and in the month of December, 1878?

A. I seen him in 1878, frequently, just as I saw him in 1879.

Q. Did you see him frequently in 1879?

A. Not very frequently.

Q. How often do you suppose you saw him in 1879?

A. About once or twice. That was in 1879 that I saw him on the bridge; I think it was.

Q. Did you see him at any time prior to that time in 1879?

A. I could not say positively. I used to see him every few days.

Q. When you first knew him, where were you living?

A. Well, we came out to where father was living on Robinson's place. He came there for a few cattle, I think.

Q. Do you know who he was working for then?

A. I do not.

Q. Did you ever know a man by the name of Keeler?

A. I do, yes sir.

Q. Do you remember of his working for Keeler?

A. Mr. Keeler had some cattle there, yes.

Q. Do you remember of Mr. Hillmon's working for Keeler?

A. I do not remember whether he was there for Keeler or not. He used to come there for cattle frequently.

Q. Do you remember of his herding cattle for Mr. Keeler anywhere over that country? A. I don't think I do.

Q. What year was that when you first saw him?

A. I could not say positively what year.

Q. State as near as you can.

A. I don't know as I could.

Q. You know of his going west, don't you?

A. I don't, no, sir. I didn't know it until I heard this talk of his getting killed.

Q. Didn't you know of his going to Colorado or New Mexico.

A. No, sir, I never knew anything of it until I went in to see him there.

Q. I understand, then, that during the time you lived there at Lawrence, you never knew the fact that he had been to Colorado or New Mexico? A. No, sir.

Q. Never heard of it? A. No, sir.
Q. Didn't miss him while he was gone?
A. I didn't pay any particular attention.
Q. I asked you if you missed him while he was gone there?
A. No, sir, I have no recollection of his going.

Witness dismissed.

* * * * *

2146 J. W. Green, recalled on behalf of the defendants.

Direct examination

By Mr. Barker:

Q. At the time of the coroner's inquest at Lawrence over this body state whether or not there was a stenographer present? A. There was a stenographer present.

Q. Do you remember his name? A. George Baldridge.

Q. Did he take stenographic notes of the testimony of the witnesses? A. He did, I presume.

Q. Do you know what became of those stenographic notes; you may state when and where if ever you last saw them?

A. The last time I remember of seeing them was at the first trial of this case. That is to say, the stenographic notes extended; those stenographic notes were never signed by the witnesses.

Q. You may state what was done with them or what became of them if you know?

A. We placed Mr. Baldridge on the stand to testify and objection was raised to the notes that the notes were secondary evidence; then the further objection was made that—Objection.

By the Court: What became of the notes, Mr. Green?

A. That I don't know; they were deemed to be worthless.
Q. Were they used in evidence at that time?
A. They were not permitted to be used in evidence at that time.
Q. Have you seen those notes since that time?
A. No, sir, not to my recollection.
Q. Where was George Baldridge living at that time; I mean at the time of the trial of this case first in Leavenworth?
A. In St. Louis.
Q. Do you know what position he held, whether he was in any other business at that time or not?
A. I don't remember what he was doing. I know he was living in St. Louis.
Q. Do you know whether he is living or dead now?
A. My information was that he was dead before the second trial of this case.

2147 Q. I will ask you if you have those notes in your possession or under your control or know where they are?
A. I don't think I ever had them in my possession; I don't recollect that I did. I think Mr. Baldridge kept them in his possession.

Cross-Examination

By Mr. Atwood:

Q. Were they at any more than one trial, those extended notes? A. No.
Q. You are positive upon that point?
A. Quite positive of that.
Q. Who employed Mr. Baldridge to take those stenographic notes and extend them?
A. I don't know that I recollect who employed him to take them.
Q. Who paid him?
A. Some of the insurance companies paid him.
Q. When were the notes extended with reference to the inquest? How long subsquently to the inquest?
A. I don't recollect that.
Q. Well, it must have been prior to the first trial?
A. Yes.
Q. How does your recollection serve you, was it within a short time, a few weeks or months after the inquest?
A. That I don't remember.
Q. Did you or Mr. Barker to your knowledge give directions for their extension?
A. I think I gave directions for the extension.
Q. Who was the custodian of those notes after they were extended? A. Mr. Baldridge, I think.
Q. When were they paid for? A. I don't remember that.
Q. You know within six months or a year, don't you? This all transpired in the spring of 1879?
A. I don't remember when they were extended.
Q. What would be your best recollection as to whether they were extended within a month or two months after the inquest? A. I have no recollection on that point.
Q. Who was the custodian of those notes after they were extended? A. Mr. Baldridge, I think.
2148 Q. You never had them in your possession?
A. I don't remember ever having them in my possession.
Q. You say you don't know which of the insurance companies paid for them. Who distributed the money that went to Mr. Baldridge to pay for that work of taking those notes and extending them?
A. I don't know; I haven't thought of that matter.

Q. Is it not a fact that you were the person who did the most of the disbursing for the companies relative to that matter there. That is for the purpose of refreshing your recollection.

By Mr. Barker: I object to the question as not proper cross-examination. The only point was to show that the notes were lost.

By Mr. Atwood: We think it is proper to find out about them. If they were, as we understand, private property made by one of their servants, in the custody of one of their servants, then their loss is due to the insurance companies.

By Mr. Barker: That does not show that they are not lost.

By Mr. Atwood: But it shows who lost them along with the tin type and other things.

The defendants and each of them except to the remark of counsel.

Q. You say you never have been the custodian of those notes, extended or otherwise? A. Not to my recollection.

Q. Did you ever see them in the possession of the insurance people except with Baldridge?

A. I have had them in my hands.

Q. Did you ever see them in the possession of anybody besides Mr. Baldridge and yourself? A. I don't recollect.

Q. Did you have them in your possession outside of the court room at the time they were presented at the first trial?

A. I don't recollect that I did.

Q. Do you rememeber of seeing them at that trial?

A. Yes, sir.

Q. But you have no recollection of seeing them since that time? A. No, sir.

Q. But the insurance companies paid for them?

A. I presume they did.

Excused.

2149 George J. Barker, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. Mr. Barker, you may state if you were present at the coroner's [question] held over this dead body in the spring of 1879? A. I was.

Q. Do you remember whether or not there was a stenographer there? A. There was.

Q. What was his name? A. George Baldridge.

Q. Do you know as to the fact as to whether he ever extended those notes, the notes taken there at that time?

A. He extended notes of some of the witnesses; I don't know whether he did of all or not.

Q. When and where did you see those notes as extended?

A. I saw them in this city, I think in 1881, at the time this case was being tried before Judge Foster.

Q. You may state whether or not Baldridge was a witness on that occasion? A. He was.

Q. Called by whom? A. By the defendants.

Q. You may state whether he was asked to testify as to his recollection of what took place or rather as to the evidence given at the coroner's inquest?

The plaintiff objects to the question as incompetent and immaterial. Objection overruled, the plaintiff duly excepting.

A. He was.

Q. You may state if at that time objection was made as to his testimony and what that objection was.

The plaintiff objects to the question as incompetent, irrelevant and immaterial. The Court sustained the objection, to which action of the Court each of the defendants at the time duly excepted.

2150 By Mr. Green: I desire to show this, and I think I can by this witness, that Mr. Baldridge was asked certain questions; that upon a preliminary question, Mr. Baldridge said that he had no recollection of the evidence which was given at that coroner's inquest except as shown by his notes; he testified that he took the evidence down correctly, that he transcribed it correctly, but that he had no independent recollection, and thereupon, upon the ruling of Judge Foster he was not permitted to testify, he being only allowed to use those notes for the purpose of refreshing his recollection. I think that is proper and we should be allowed to show that. Our motives have been constantly drawn in question by insinuations of counsel.

By the Court: I know, Mr. Green, but I have told the jury and I have no doubt they will endeavor to do so, to pay no attention to insinuations from either side; we cannot stop to clear up insinuations or to try insinuations. Whether Judge Foster was right or wrong, cuts no figure in this case; the utmost that could be said if he were wrong was that that was the reason why the notes were lost, but that cannot be urged because counsel say they think Judge Foster was wrong in making the ruling; they do not say the notes were lost because of Judge Foster's ruling, so I do not see how that throws any light on this subject at all.

To which ruling and opinion of the court, the defendants and each of them at the time duly excepted.

Q. Mr. Barker, where was Baldridge living at the time he was summoned here as a witness? A. Living at St. Louis.
Q. By whom was he brought here?
A. Brought here by the defendants.
Q. What was his business there, if you know?
A. I don't know whether he was still in the service of the telegraph company or not.
Q. What was his business in Lawrence?
A. He was a telegraph operator and stenographer.
Q. Do you know whether he is living or dead?
A. He is dead.
2151 Q. When did he die?
A. I can't tell you; I can't fix the date.
Q. Do you remember whether it was before the second trial? A. I think it was.
Q. Do you know where those extended notes are?
A. I never saw them—
Q. Have you got them in your possession?
A. I haven't got them in my possession or under my control; I have no knowledge as to where they are; I never saw them after that trial to my knowledge.

And in answer to cross interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Now, you think it was in 1882 the trial was, wasn't it?
A. Yes.
Q. Baldridge was here and testified as a witness?
A. Yes, he was put upon the stand, and we attempted to have him testify.
Q. You say that he said at that time he had taken this testimony in shorthand, but that he did not remember what Mrs. Hillmon or the other witnesses had testified to?
A. I don't remember of his using the words, Mrs. Hillmon, but he said he had no independent recollection of what the witnesses testified to.
Q. And he was present and heard all the testimony?
A. Well, I wouldn't say that.
Q. Well, wasn't he?
A. I could not say as to whether he heard all of the testimony; the testimony of the more important witnesses.
Q. I understood you to say upon direct examination that you were there present? A. I was present.
Q. You were examining witnesses, were you not?
A. I examined some witnesses.

Q. Is it not a fact that Mr. Baldridge was at Topeka when the case was tried there?

A. That is not my recollection; no, I am quite clear he never was at Topeka. I mean when I say never at To-
2152 peka, at the instance of the defendants upon these trials; I have no knowledge of having seen him at Topeka or of having seen him after this trial in 1882.

Q. You say that Mr. Baldridge testified that he had no independent recollection, but that the notes he had made were correct, and he knew they were correct when he made them?

A. That is what he testified to, that he had no independent recollection of what the witnesses testified to, but it was correctly taken down, and such of it as was transcribed was correctly transcribed, or extended, I mean.

Q. And you had at that time those notes which the stenographer had correctly taken down and correctly transcribed?

A. I wouldn't say that we had his notes, his original shorthand notes.

Q. The transcript?

A. But we had some transcript or extension of some of these notes.

Q. Now, Mr. Barker, didn't you have that transcript when this case was tried before Judge Thomas in 1895?

A. We did not.

Q. Didn't you have a copy of those notes that Baldridge had made? A. Did not; never saw them.

Q. You are sure of that? I mean at that trial.

A. Quite clear in regard to that, sir.

Q. Mr. Barker, Baldridge was a son-in-law of Colonel Walker, was he not? A. Yes sir.

Q. You say he is dead now?

A. Yes, both he and his wife.

By Mr. Green:

Q. Did Mr. Baldridge give any evidence as to the evidence given or testified to by witnesses at the coroner's inquest, on the first trial?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

2153 A. It is my recollection he did not.

By the Court: I think the law of this state requires the evidence before a coroner's inquest to be reduced to writing, signed and filed with the county clerk.

By Mr. Atwood: It does.

By Mr. Barker: Before the notes were written out, I think Mr. Baldridge had gone away and the witness did not sign their testimony.

Further cross-interrogatories by Mr. Atwood:

Q. How long afterwards did Mr. Baldridge leave the city of Lawrence?

A. I could not saw soon after the coroner's inquest he left Lawrence.

Q. Is it not a fact that he left there a year or more after that? A. I should not; I tried to get him—

Q. No matter about that; I simply want to know in relation to his residence, if you know?

A. I could not state definitely about it.

Q. Wouldn't you fix it as much as six months?

A. Possibly, but I would not think it was as much as that; still my recollection in regard to that is not very definite.

Q. It would be some time; some weeks or some months?

A. Yes, I should think as long as that.

Witness excused.

2154 Charles R. Walters, a witness produced by the defendants, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, testified as follows, to wit:

Q. Mr. Walters, you may state your name, place of residence?

A. Charles Robert Walters, Rich Hill, Missouri.

Q. What is your business?

A. I am engaged in the publication of a newspaper.

Q. How long have you resided in Rich Hill, Missouri?

A. I have resided there since 1880.

Q. Did you at any time reside at Fort Madison, Iowa?

A. Yes, sir.

Q. From what time to what time did you reside in that place?

A. I was both in St. Louis, Missouri, and my father removed to Fort Madison when I was quite small.

By Mr. Hutchings: Never mind about that; the question was how long you had resided there?

A. Well, I don't know exactly; I resided there from infancy until about 17 years of age.

Q. What was the name of your father?

A. Daniel Walters.

Q. Is he now living or dead? A. Yes, sir, living.

Q. What was your mother's name?

A. Elizabeth Walters.

Q. Is she still living? A. No, sir.

Q. What country was your father a native of, do you know?

The plaintiff objects to the question as immaterial. Objection overruled, the plaintiff [fully] excepts.

A. He was a native of the French part of Switzerland.
Q. And your mother, what nationality was she?
A. I think my mother was a native of Germany.
Q. Have you any brothers and sisters? A. Yes, sir.
Q. Will you please state their names?
A. I have three sisters living, Mrs. Elizabeth Rieffenach, Miss Fannie Walters and Miss Anna Hansman.
2155 Q. Did you have any brothers? A. Yes, sir.
Q. What were their names?
A. I had one brother named Frederick Adolph Walters.
By the Court: Is the name Walters or Walter?
A. Sometimes written Walter and sometimes Walters; we usually drop the S; I always have.
Q. Where do your sisters reside?
A. At Fort Madison, Iowa.
Q. Are they still residing at Fort Madison, Iowa?
A. Yes, sir.
Q. You say you had a brother Frederick Adolph Walters?
A. Yes, sir.
Q. When did you last see him?
A. I last saw him at Holden, Missouri.
Q. At what time? A. In the month of July, 1878.
Q. Where were you residing at that time?
A. I was either residing then at Warrensburgh or Holden; I resided a portion of the time in one town and a portion of the time in the other.
Q. How did it come that you resided a portion of the time in one town and a part of the time in the other?
A. I was engaged in business in both towns; both towns are in the same county.
Q. Of those brothers and sisters, which was the oldest?
A. I was the oldest child in the family; my brother was next oldest, my sister Elizabeth next, Fannie was next in age and Anna was the younger.
Q. Since you saw this brother Frederick Adolph Walters as you stated at Holden, Missouri, have you heard from him?
A. Yes, sir.
Q. Now, from what place did you last hear from him?
A. I am not certain in my recollection of the last point, but it was either Emporia or Wichita, Kansas.
Q. Did you hear from him before you say you heard from him from Emporia or Wichita, Kansas, from any other place after he left you at Holden, Missouri? A. Yes, sir.
Q. Can you state what places you heard from him?

A. I can remember some of the points; the first point after he left me was Paola, Kansas, and after that I heard
2156 from him at Lawrence and Emporia and perhaps Topeka; I am not certain about that now, however, and the last letter, his last letter came to me either from Emporia or Wichita.

Q. Now, when was that letter written or dated?

A. It occurs to me—

The plaintiff objects to the contents of the letter as secondary evidence.

By the Court: Is it lost?

By Mr. Green: It is lost. Do you know where the letter is that you last received from him? A. No, sir, I don't.

Q. Have you searched for that letter? A. Yes, sir.

Q. Have you searched in all the places you would expect to find it, where you would usually keep it? A. Yes, sir.

Q. And so far as you know, the letter is lost?

A. Yes, sir.

Q. Now, you may state if you please, the date of that letter?

A. To the best of my recollection that letter was received in the month of February following the time that I last saw my brother.

Q. That would be February— A. 1879.

Q. Do you know when your brother Frederick Adolph Walters left Fort Madison, if he did leave Fort Madison?

A. I do not know the exact time.

Q. How long had it been since you left Fort Madison up to the time that you saw him as you say in 1879?

A. Well, sir, I don't remember definitely but I saw him in 1876, during the Centennial year; I saw him in the fall of 1876 at Fort Madison.

Q. You don't understand my question. When did you leave Fort Madison originally?

A. I left Fort Madison in 1871.

Q. Now, have you heard from this brother Frederick Adolph Walters since the time you spoke of receiving a letter from him written from Emporia or Wichita? A. No, sir.

Q. Have you seen him since? A. No, sir.

Q. Has he returned to his home in Fort Madison since that time to your knowledge? A. No, sir.

2157. Q. Now, about how often had you been hearing from him from the time he left you at Holden in 1878, up to the time that you received this last letter?

A. Well, I judge about twice a month.

Q. Now, what business arrangement, if any, did you have or contemplate with your brother Frederick Adolph Walters?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled; the plaintiff duly excepts.

My brother and I had an understanding at the time he left me at Holden to go up to Leadville, Colorado, together as soon as I could dispose of my property and make my business arrangements at those points, Warrensburg and Holden.

Q. Now, will you please state the contents of that letter which you last received from him, as near as you can remember.

The plaintiff objects to the same as incompetent, irrelevant and immaterial, hearsay and because no proper foundation has been laid.

By the Court: That is the letter you stated was lost?
By Mr. Green: Yes, sir.

The court overruled the objection, the plaintiff duly excepting.

A. My brother stated in this letter that he had engaged with a party by the name of Hillmon to make a cattle drive back from their into eastern Colorado; he said he believed [the] would be a benefit to his health, that it would enable him to see a large portion of the country which he was desirous of seeing and that it would bring him back to a point favorable for he and I to meet for the purpose of making this trip to Leadville, at a season when the climate and conditions would be more favorable than they were at the time he wrote me.

Q. What had been the condition of his health, if you know, from the time that he left you until you last heard from him?

The plaintiff objects to the question as calling for the contents of letters, secondary evidence and hearsay. Objection overruled, the plaintiff duly excepts.

2158 By the Court: If you know.

A. I only know from his letters; I have no personal knowledge of the matter.

Mr. Green withdraws the question.

Mr. Hutchings moves to strike out the statement of the witness about the proposed trip to Leadville. The Court overruled the motion, to which ruling, the plaintiff at the time duly excepted and still excepts.

Q. What, if anything, did he say in that letter in regard to your joining him at Leadville?

The plaintiff objects to the question as leading, and calling for the conclusion of the witness. Objection overruled, the plaintiff duly excepting.

A. I don' think there was anything said about my joining him at Leadville; I was to join him at a point before we reached Leadville and we were expecting to go up there together.

Q. What did the letter say if anything about your joining him.

The plaintiff objects to the question as leading and calling for hearsay. Objection overruled, the plaintiff duly excepts.

A. I don't remember anything further than that there was some comment on the condition of the climate, some newspaper clippings, and the letter referred to those same conditions, that when he returned, when he made his return to northern Colorado, I was to join him, at some point which we might agree upon.

Q. Now, will you describe the personal appearance of your brother Frederick Adolph Walters. Well, sir, he was rather a large man, nearly six feet tall, square shouldered, long of limb and arm, large chested, had regular features, rather a high square forehead, Roman nose, brown eyes and dark brown hair. His hands were specially noticeable; he had a long, strong hand with long bony fingers; had rather large feet.

Q. Now, as to his teeth, do you remember the character of his teeth?

A. He had large white teeth, rather prominent; very prominent.

2159 Q. Did he show his teeth when he was talking or laughing?

A. Yes, sir. In conversation his teeth was very noticeable.

Q. You may state whether he had any marks on his body or scars.

A. Yes, he had a scar just somewhere above the heel on the back part of one of his legs caused from a dog bite when a small boy.

Q. When did you last see that scar, if you remember; how large was he or how old?

A. Well, sir I don't remember; I haven't seen it since he was a boy, a young boy, he may have been eight or ten years old or he may have been twelve or fourteen when I last saw it; I could not say as to that; could not say positively as to the time I last saw it.

Q. Did he have any other marks on his body that you know of?

A. Yes, he had a brown mole on his back near the spinal column just a little under the shoulder blade.

Q. When did you last see that mole?

A. I last saw that at Warrensburg, Missouri, just a few days prior to the last time I saw him at Holden, Missouri.

Q. Under what circumstances did you see it?

A. He was taking a bath or had taken a bath, and had requested me to wipe his back with a towel, and it was then that I discovered it, or that I noticed it particularly.

Q. Now as to his teeth; you may state whether or not he had any fillings in his teeth?

A. Well, sir, I could not say as to whether he did or whether he did not.

Q. Do you know from what point he came when he made that visit to you there at Holden?

A. No, sir, I do not; I don't remember at this time; I may have known it at that time.

Q. Now, as to the condition of his feet, what do you say as to them? A. His teeth?

Q. Not his teeth, his feet.

A. One of his feet at the time I saw him last had a slight enlargement just back of the great toe, something in the nature of a bunion, and he had corns on one of his feet, perhaps both; I could not say as to that.

2160. Q. Do you know whether or not he had been walking before he visited you there at Holden?

A. Yes, he had been walking and had been at work in the harvest field; so he told me.

The plaintiff moves to strike out the answer of the witness as hearsay. Motion sustained, the defendants and each of them at the time duly excepting.

Q. Now, you may state, Mr. Walters if you know which member of the family resembles him particularly?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

A. Yes, sir.

Q. Which member of the family.

A. In the profile of his face he resembled my sister Fanny more markedly than any of the rest of us.

Q. How as to his teeth; does he resemble—

A. Very much in that respect.

Q. Resembled whom?

A. My sister Fanny; his teeth were even larger than hers; he was of larger mould in all respects.

Q. Now, as to the shape of his nose?

A. His nose resembled hers more than it did any of the rest of the family.

Q. You spoke about his feet being large; do you know about the size of the foot?

A. No sir, I do not; the last time he—

Objection.

A. His feet were larger than mine.

Q. How were they shaped as to yours?

A. He had a larger instep than I have, and his feet were broader than mine.

Q. You spoke of his height; what means do you have of stating his height more than a comparison?

A. Well, sir, during the Centennial year, when we met together, we had not met for some time and we measured.

Q. Where was that? A. At Fort Madison, Iowa.

Q. Do you remember of his height at that time that you measured?

A. No, sir, not accurately; his weight was five feet, eleven inches and a fraction.

2161 Q. What trade did he have, if any?

A. He had acquitted the trade of a cigar maker and had manufactured cigars on his own account for a time before entering upon this trip.

Q. Can you state how old he was when he visited you at Holden in 1878?

A. I could not off-hand; he was between two and three years younger than I; I could give his age by figuring out my own at that time. He must have been 23 at that time, 23 or 24.

Q. Will you look at the letter which has been marked, in the deposition taken by Sabert M. Casey, as Exhibit C, and state in whose handwriting that letter is?

A. That is in my brother's handwriting.

Q. Your brother Frederick Adolph? A. Yes, sir.

Q. Will you look at the portion of envelope shown you, and which was also marked Exhibit C, by Sabert M. Casey, and state in whose writing the address of that letter is?

A. That is in his handwriting.

Q. Will you look at the picture which is marked Exhibit V and state of whom that is a picture, if you know?

A. Yes, that is a picture of my brother Frederick Adolph.

Q. Do you know how old he was when it was taken.

A. No, sir, I should judge, though, that was taken at about the age of 21.

Recess to 2 o'clock p. m.

Afternoon session. Charles R. Walters on the stand. Direct interrogatories continued by Mr. Green.

Q. Referring now, once more, Mr. Walters, to the condition of your brother's teeth; you may state whether you know of your own knowledge that he ever had any dentistry done?

A. No.

Q. Now, the last time that you saw him in Holden in 1878, state whether or not he had a mustache?

A. Yes, he had a light sandy brown mustache; mustache not as deep color as his hair.

Q. What was that as to texture; as to heft? A. Sir?

Q. What was the character of that as to heft, the
2162 weight of the mustache? A. It was rather light.

Q. How did it grow?

A. Well, I don't know that I can describe it definitely; it grew something as mine does though his mustache was not as heavy as mine, not nearly so heavy.

Q. Will you look at the pictures now shown you which have been marked Exhibits Nos. 29 and 30, and state if you recognize them as the pictures of any one you have heretofore known, and if so, state to the jury who it was?

A. I would take these pictures to be pictures of this brother.

By a Juror: What did you say?

A. I pronounce them pictures of my brother.

Q. Where did you first see these pictures or pictures identical to them, if you remember?

A. I don't remember the exact date but it was sometime in the winter or early spring following his disappearance, or following the time when I last heard from him.

Q. Where did you see them?

A. I received them at St. Louis, Missouri; I received them by mail.

Q. From whom did you receive those?

A. They were sent me by my father from Fort Madison.

And in answer to cross-interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. Mr. Walters when did you leave Fort Madison originally? A. In 1871.

Q. At that time you left Fort Madison permanently, did you not? A. Yes, sir.

Q. Where did you go?

A. I went first into Nebraska, came down through Kansas, and located at Holden, Missouri, for a period of a year and a half or such a matter.

2163 Q. Then, where did you go?

A. I went from there to Houston, Missouri, in Texas county in that state.

Q. Where else did you go?

A. Went from there to St. Louis, and from St. Louis back to Iowa, and back again to St. Louis.

Q. You went back to Iowa; what part of Iowa?

A. I went back to Fort Madison.
Q. How long did you stay in Fort Madison?
A. I don't remember, sir; but a very short time at that period.
Q. Was it days or weeks?
A. It might have been a period of two weeks or four weeks; to the best of my recollection it was about four weeks.
Q. What year was that? A. That was in 1876.
Q. Did you see your brother on that occasion?
A. Yes, sir.
Q. You had not seen him between 1871 and 1876, had you?
A. Yes, sir.
[A.] You had seen him? A. Yes, sir.
Q. Where? A. At St. Louis.
Q. When?
A. I don't remember the exact year, but it was either in 1873 or 1874,to the best of my recollection.
Q. Then was that the only time between 1871 and 1876 that you saw him? A. I think it was.
Q. How old was he when you left home?
A. I should judge he was about 14 in his 15th year probably.
Q. When you left there in 1871? A. Yes, sir.
Q. You saw him only once between 1871 and 1876?
A. Yes, sir.
Q. Then you saw him at Fort Madison when you returned there temporarily in 1876? A. Yes, sir.
Q. Then where did you go to?
A. I went back to—I was at that time located in southern Missouri, I went back to southern Missouri in Texas county.
Q. How long did you remain there?
A. I remained there until, well, I believe I left there in the winter of 1876.
Q. Where did you go to then?
A. I went to Fredericktown in Madison county, Mis-
2164 souri, and remained there a time, and then back to St. Louis and up to Warrensburgh where I located.
Q. That is where you were living in 1878? A. Yes, sir.
Q. Did you see your brother between 1876, when you saw him in Fort Madison, and the time when you saw him in Warrensburgh or Holden in 1878? A. I think not.
Q. Then, from the time your brother was 14 years old, up to the time you say he disappeared, you had seen him but three times?
A. Now, I had seen him a number of different times at three different periods. Now, he was located at St. Louis a portion of this time, during the same time at which I was there when I saw him there in 1873.

Q. How long a period?

A. Well, I should judge we were together there perhaps a month or two.

Q. In St. Louis? A. Yes, sir.

Q. And during that time you saw him frequently?

A. Yes, sir.

Q. Do you know when your brother left Fort Madison on his western trip? A. No, sir, I do not know the exact date.

Q. Do you know approximately when he left there?

A. Only from hearsay.

Q. Were you in correspondence with him before he left Fort Madison did he write to you? A. Yes, sir.

Q. Do you know when he left Fort Madison by the correspondence you had with him? A. No, sir.

Q. When did you first learn that he had left Fort Madison and gone west? A. I don't remember.

Q. What is your best recollection; what is your present impression with reference to that matter?

A. I have no recollection on that point; my impression is that I was notified either by him or by one of the family of his departure.

Q. At the time that he left?

A. At the time he left but I don't remember when that was.

Q. You have no distinct recollection about that?

A. No, sir.

2165 Q. Well, after he left, where did you first hear from him? A. I don't remember that, sir.

Q. Haven't you any recollection at all upon the subject?

A. No, sir.

Q. Have you any recollection that you did hear from him after he left Fort Madison?

A. No, sir; no definite recollection upon that point.

Q. It may [he been] then several months afterwards before you received any letter from him?

A. No, I think I received letters from him about twice a month at all times from the time he left there until he met me at Warrensburgh, and after he left Warrensburgh.

Q. And yet you cannot remember of any place from which you received a letter?

A. It occurs to me that I did receive a letter from him from Council Bluffs and one from Kansas City prior to his coming to see me, but I have no recollection of those dates.

Q. Have you any sort of recollection that you received a letter from him from Kansas City?

A. No, sir; it seems to me I received a letter from him from Kansas City, but I don't know.

Q. You can't say that you have any recollection of it?

A. No, sir.

Q. You can't say that you have any recollection of receiving a letter from him from Council Bluffs?

A. I have no distinct recollection of receiving letters from those places.

Q. Now, then, coming right down to the spring of 1878, you have no recollection of receiving a letter from him from Wichita? A. 1878? No, sir.

Q. Or 1879?

A. I would say no, sir; I received a letter from him—

Q. Just answer the question if you have any recollection of receiving a letter from him from Wichita?

A. I recollect that I received a letter from Wichita—

Q. That does not answer my question; I am asking for your present recollection; if you recollect, can you say that your mind is in that condition at the present time, that you remember that you received a letter from him at Wichita?

2166 A. No, sir.

Q. The last letter that you received, you don't know where it was dated; you don't remember?

A. I don't remember positively, no, sir.

Q. Have you no recollection on the subject?

A. I remember receiving letters from Emporia.

Q. From Emporia?

A. Yes, I have a distinct recollection as to that.

Q. That is what I want to get at. You have a distinct recollection of receiving more than one letter from him at Emporia? A. Yes, sir.

Q. How many letters do you think you got from him at Emporia? A. I could not say as to that.

Q. You got more than once?

A. I don't know as to that. I remember of receiving letters from Paola, from Lawrence—

Q. That is not the question; I want to stick to this Emporia. We will come to the other points. I understood you to state voluntarily that you did remember of receiving letters from Emporia, and that that amounted to a recollection?

A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Now, as contradistinguished from what you said about getting a letter from Council Bluffs and Kansas City and Wichita, you have a better recollection, you do distinctly recollect of receiving a letter from Emporia?

A. Yes, sir; I distinctly recollect of receiving letters from Paola—

Q. I didn't ask you anything about Paola; I am going to come to that. You have stated, as I understand it, that you have no recollection of receiving a letter from Council Bluffs,

Kansas City or Wichita, but you do remember of receiving a letter from him at Emporia? A. Yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. Now, then, do you remember of receiving more
2167 one letter from him from Emporia? A. No, sir.

Q. What is your impression about that, that you received one letter from him from Emporia or more?

A. My impression is that I received one letter from Emporia; I may have received more.

Q. You may have received more? A. Yes, sir.

Q. Is is not your recollection now that he was in Emporia for some weeks and that he wrote you several times from Emporia?

A. No, sir; I remember at this time whether he did or not.

Q. The last letter, as I understand it, that you received must have been from Emporia?

A. From Emporia or Wichita.

Q. But you have no recollection of Wichita?

A. No, sir; but my impression is, my best impression is that it was from Wichita, for the reason that it was received when I was at St. Louis.

Q. I am not asking for the reason; I want, Mr. Walters, to get your recollection. You understand, don't you, that a man may have a recollection of a matter or not. Now, does that amount of memory or recollection that you received any letter from Wichita?

A. According to my best recollection, I did.

Q. Well, now, then, is it your recollection that you received a letter from Emporia? A. Yes, sir.

Q. Then it is your recollection that you received a letter both from Emporia and from Wichita? A. Yes, sir; that is.

Q. That is clear in your mind?

A. Yes, that is according to my best recollection; yes, sir.

Q. You have a recollection upon the subject? A. Yes, sir.

Q. Now, in your direct examination, you have stated the contents of a letter which you received from your brother?

A. Yes, sir.

Q. I would like, if you are willing, to get you to just write on this paper, your best recollection of that letter?

A. Well, I don't know that I can do that.

The defendants object to the question as improper.

By the Court: I do not see, Mr. Hutchings, that so far as aught appears at present, it is necessary.

2168 Q. Where was that letter dated?

A. I don't know to a certainty as to whether it was dated at Emporia or Wichita.

Q. Was it dated at all? A. I should judge it was.

Q. Do you remember that it was?
A. No, sir; I don't remember that it was dated at all.
Q. You don't remember then when it was?
A. I think the inference is that it was.
Q. But you have no recollection about it? A. No, sir.
Q. That is just simply a guess that you make; it was dated because letters are ordinarily dated? A. Yes, sir.
Q. You have no recollection as to whether it was dated or not? A. No, sir.
Q. You don't remember whether the word February or March, or what appeared at the top of the page? A. No, sir.
Q. Do you remember when you received the letter?
A. To the best of my recollection I received it in the month of February.
Q. In the month of February?
A. In the latter part of February, yes, sir.
Q. Do you remember where it was postmarked?
A. No, sir.
Q. How did that letter address you?
A. His letters usually addressed me as Dear Brother.
Q. Have you any recollection as to how this letter read?
A. No, sir; I have not.
Q. What, according to your recollection was the first line of that letter; how did it start out?
A. Well, I could not—. If I could give you the first line, I could probably give you more; I could not state that.
Q. How many sheets of paper did it cover?
A. I can't say as to that.
Q. Was it a long letter or a short letter?
A. Well, I would call it just a medium letter.
Q. How was it signed? A. It was signed F. A. Walters.
Q. F. A. Walters? A. Yes, sir.
2169 Q. That was his name, was it?
A. Yes, he spelled his name Walters sometimes.
Q. How did he in that letter? A. I don't remember.
Q. You always write your name that way, don't you?
A. Yes, sir.
Q. You say the family way is Walters?
A. Some of the family write it with the s; some without the s.
Q. You don't remember how he signed his name?
A. Sometimes he signed it without the s and sometimes with.
Q. He did? A. I think, yes, sir.
Q. He had been to school, hadn't he? A. Yes, sir.
Q. Had some education? A. Yes, sir.
Q. You say that in signing his name he sometimes signed Walters and some times Walter? A. I think he did.

Q. Which way did he employ mostly?
A. I think he left off the s most of the time.
Q. Most of the time? A. Yes, sir.
Q. You have been talking with counsel about that since the adjournment haven't you? A. No, sir.
Q. Have you looked at this letter which was introduced in evidence signed F. A. Walter?
A. I looked at that this morning.
Q. You noticed that the s was left off?
A. I think not; I didn't notice.
Q. But you testified this morning that the name was Walters, and that that was the way in which your family spelled it? A. I don't think I gave any such testimony.
Q. Don't you remember of his Honor asking you this morning whether the name was Walters or Walter?
A. I think I explained to his Honor that some would spell it one way and some the other.
Q. Didn't you say that your family called it Walters and didn't you say that you called it Walters?
A. Some of our family do, yes; some of my father's family do not.
Q. Going back to this letter again: You say it is lost?
A. Yes, sir, I presume it is.
2170 Q. Do you remember when you saw it last?
A. No, sir.
Q. Did you give that letter to the insurance companies?
A. Not to my knowledge.
Q. Didn't you give to Mr. Munn or Mr. Tillinghast, and these insurance companies, all these letters?
A. Not to my knowledge.
Q. Did you give any papers to the insurance companies, any letters you had from your brother?
A. I don't remember; I don't remember that I ever did.
Q. Your recollection is not very goods, is it?
A. No, sir, not in some things; in some, it is.
Q. Now, you have been shown some pictures here, those pictures that are marked Exhibits No. 29 and No. 30; they are pictures of a dead body, one of them is a side view and the other a front view. I will get you to tell the jury when it was you first saw those pictures, or pictures similar to those?
A. To the best of my recollection it was in the winter or early spring following the last letter I received from my brother, which must have been 1880.
Q. It was as early as January 1880, was it not?
A. I think likely it was.
Q. You saw these pictures at that time?
A. Yes, or pictures like these.
Q. Or similar pictures? A. Yes, sir.

Q. And at that time you say you thought you recognized these pictures as pictures of your brother? A. Yes, sir.
Q. You had no doubt that they were? A. No, sir.
Q. You had no doubt he was dead? A. No, sir.
Q. You had no doubt that these pictures represented him dead? A. No, sir.
Q. You say no, sir; you mean you had no doubt?
A. I mean I had no doubt.
Q. That was in January, 1880?
A. I think it was in January, 1880 yes, sir.
Q. Before you received these pictures, you received
2171 a letter from your brother in which he said, in substance, among other things that he had been hired by a man by the name of Hillmon? A. Yes, sir.
Q. And the service that he was to perform for Mr. Hillmon was to go with him through Kansas, Texas and Colorado in herding sheep?
A. I don't remember any mention of sheep in the letter.
Q. Well, what was said on that subject?
A. It was a cattle drive.
Q. A cattle drive? A. Yes, sir.
Q. And in that letter he reminded you of some understanding he and you had that you would go to Colorado, did he? A. He made allusion to that in the letter, yes, sir.
Q. He said in that letter on his way back he would go to a convenient point to meet you; that is right, is it not?
A. Oh, I can't give the point to meet him; we were to meet at a common meeting point.
Q. Your understanding was that you would go to a point where he was to be? A. Yes, sir.
Q. And he would be partially on his way toward Leadville?
A. Yes, sir.
Q. That was the last letter that you received from your brother? A. Yes, sir.
Q. Which is lost? A. Yes, sir.
Q. You had fully made up your mind to meet and go to Leadville; is that right?
A. Well, we had an understanding to that effect.
Q. Well, had you in your mind determined that you would go?
A. Yes, sir, provided I could dispose of my business; could make satisfactory arrangements.
Q. Now, of course, that understanding was had in July, 1878? A. Yes, sir.
Q. The last time you saw him? A. Yes, sir.
Q. You were expecting all the time to make arrangements to meet him as he stated?
A. I was up to the time of this writing, yes, sir.

2172 Q. You didn't change your mind after receiving this letter, did you? A. Yes, sir.

Q. You changed your mind? A. Yes, sir.

Q. Then you determined what?

A. Well, sometime afterwards I had given up the idea; sometime afterwards, I gave up the idea.

Q. Sometime after what?

A. Sometime after I had made this arrangement, and after he had written this letter I had given up the idea of going to Leadville, whether he had returned and had been ready to go or not.

Q. Or not? A. Yes, sir.

Q. After he was down there with you in July, he went away saying that he was going to Kansas City? A. No, sir.

Q. Where? A. He was going to Paola.

Q. You then received letters from him from Paola?

A. Yes, sir.

Q. He left there some time in August?

A. I don't remember when he left Paola.

Q. I mean left Holden to go to Paola?

A. I think it was in July.

Q. July 1878? A. Yes, sir.

Q. He went away on foot did he, or did he take the train?

A. Well, sir, I don't know about that now; it occurs to me through that he took the train there.

Q. Your recollection would be that he went from Holden to Paola by train? A. By train, yes, sir.

Q. And you got a letter from him after he got to Paola?

A. Yes, sir.

Q. How many letters did you get from him from Paola?

A. It occurs to me that I received two letters from Paola.

Q. Now, where did you next hear from him?

A. I am not certain as to where the next letter came from, but subsequent to his departure from Paola, I received letters from Lawrence.

Q. From Lawrence, Kansas? A. Yes, sir.

Q. What would be your recollection as to the time you got a letter from Lawrence, Kansas?

A. I have never charged my memory with them.

2173 Q. I want to refresh your recollection: Will you say that you ever received a letter from him or that he ever was in Lawrence before the spring of 1879?

A. I can't say at this time.

Q. Well, did you get letters from him anywhere else except Paola and Lawrence?

A. Yes sir. I received letters from him continually up to the time I received this last letter I have mentioned.

Q. But from what places; you have already stated you got letters from him about twice a month?

A. I don't remember the different places.
Q. Did you ever get a letter from him at Leavenworth?
A. Not that I remember now.
Q. Do you know that he worked here in Leavenworth at any time? A. I don't remember.
Q. Did you hear that he worked here for Simmons & Staiger? A. I don't remember that I ever did.
Q. Did you get a letter from him at Topeka?
A. It occurs to me I did.
Q. Now, then, your brother had a scar on his leg?
A. Yes sir.
Q. You saw him in 1878 naked? A. Yes sir.
Q. Taking a bath? A. Yes sir.
Q. And you particularly remember that you noticed a mole on his back? A. Yes sir.
Q. That you remember more definitely than you do these letters? A. Yes sir.
Q. That made an impression upon your mind at that time?
A. Yes sir.
Q. And remained in your mind? A. Yes sir.
Q. And at that same time you noticed that one of his feet was larger than the other, did you not?
A. Yes, sir, there was somewhat of an enlargement on one of his feet than on the other.
Q. He had an enlargement of his toe joint that was very noticeable was it not?
A. Well, I don't know whether it was an enlargement of the toe joint or not; it was similar to a bunion, a large
2174 bunion or inflamed condition of the toe there that was very perceptible at that time.
Q. It was very perceptible and made one foot look larger than the other? A. Yes sir.
Q. You were shown a picture here that was marked U. I will show you another picture which will be marked No. 35. Do you recognize that? A. Yes, sir.
Q. That is the same as the one you have seen; the same picture? A. Yes sir.
Q. The same negative but a different picture? A. Yes sir.
Q. Now, I will show you another picture which will be marked No. 36. I will get you to state whether you recognize that? A. Yes sir.
Q. When did you have that picture in your possession?
A. I don't know that I ever had it only at the trials of this case; I don't remember that I ever had it in my possession.
Q. You say that is a picture of your brother?
A. Yes sir.
Q. Do you know H. S. Clarke who used to be sheriff of Douglas county? A. I have met him.

Q. Did you send that picture to him?
A. I don't remember.
Q. Did you send him a picture? A. I don't remember.
Q. Which of these two pictures, No. 35 or No. 36, is the best picture?
A. I presume they were both good pictures at the time they were taken; they were taken at different times, different periods of his age of boyhood.
Q. I exhibit to you here another picture which is marked No. 33, that has already been introduced in evidence, and ask you to state if you recognize that? A. Yes sir.
Q. Who is that? A. That is a picture—
Q. Of your brother, Frederick Adolph Walters?
A. Yes sir, I do not consider it as clear a picture though, as the other.
Q. But it is a picture that you recognize? A. Yes sir.
Q. You don't remember of sending the one from
2175 which that was copied to Mr. Clarke? A. No sir.
Q. You recognize 33 as being a copy of 36, do you not? A. It looks like it, yes sir.
Q. I will exhibit to you a paper to be marked No. 37, and I will get you to state in whose handwriting it is, if you know.
A. That is in my handwriting.
Q. Did you write that? A. Yes sir.
Q. Did you write it about the date that it bears date?
A. I presume I did.
Q. Did you mail it to H. S. Clarke, to whom it is addressed?
A. I presume I did.
Q. Now, prior to that time had you received letters from H. S. Clarke? A. I presume I did, yes sir.
Q. Don't you know you did? A. Yes sir, I do.
Q. Those letters are lost, are they not?
A. I don't know whether they are or not.
Q. Mr. Walters, I will ask you if you don't remember that at the trial of this case in 1895, when you testified in this case before Judge Thomas, that you said that these letters of Mr. Clarke—that you had not been able to find them, but you would go home and look for them, and if they could be found, you would express them to the clerk of the court? Do you remember that?
A. I remember testifying in regard to some letters.
Q. You remember of promising to go home and make a search?
A. I don't remember of testifying in regard to the Clarke letters.
Q. Don't you know that it was the Clarke letters that you testified about and that you promised the court that you would

go home and search for those letters, and if they could be found, would send them back?

A. I remember of testifying in regard to some letters and I remember about promising to go home and search for them and I went home and searched for them.

2176 Q. Did you search for them? A. Yes sir.

Q. You could not find them? A. No sir.

Q. Either of the letters? A. Yes sir.

Q. I will ask you this general question: Whether those letters from H. S. Clarke were written prior to this letter; were they not letters inquiring of you for a description of your brother, Frederick Adolph Walters, and what information that you had about him? A. I presume they were.

Q. They asked you as to where he was employed last, and his whereabouts, to give any marks of identity, and to give the sheriff all the information that you could, did they not?

A. I don't remember just about the details.

Q. That is the substance of them?

A. Yes, that would be the presumption.

By Mr. Hutchings: I ask leave to read the letter in evidence as a part of the cross examination of the witness.

Counsel reads as follows:

2177 EX. 32. C. H. N.

Exhibit 37. Nov. 99. W. C. H.

224 Walnut St., St. Louis, Mo., Apr. 25th, 1880.

H. S. Clarke, Esq., Lawrence, Kansas:

My dear sir: Your favor of a few days since at h'd. In reply will say.

I had a brother who has been missing for more than a year, and who, from circumstances and description, we believed to be the unfortunate person you mention in your letter as being shot near Lawrence, Kansas, year ago this spring.

My brother was entering his 25th year, I believe, tho' at time mentioned must have looked slightly older, owing to severe illness and hardships through which he had passed during winter; he was nearly 6 ft. tall; good chest and rather nicely proportioned tho' long limbed and perhaps spare or raw boned; had dark eyes and deep brown hair, counted by many for black; large full white set of teeth; long bony fingers though powerful hands, wore about an eight or nine shoe—high in instep and had a scar just above heel of one foot; but don't know which foot; must have weighed at that time about 165 pounds. Don't know of any other marks. Usually wore a light (not of dense growth) mustache, which was of lighter shade than the hair—a more sandy brown and his face was perhaps swarthy from exposure.

My brother was a cigar maker by trade but had not worked at his trade for some time previous to that date; had wintered at or near Topeka, I believe and was on his way to Colorado; don't know for whom he worked last, or at what occupation—but don't think he had over $25 in money about his person; had with him a large black leather valise with name "F. A. Walters" in gilt letters on outside and containing about two suits of clothing, shirts and underwear a collection of coins, numerous small articles of brick-a-brack, papers, &c.; had an open face silver watch attached to a hair guard with gold slides usually worn over neck a small gold locket and a
2178 heavy gold ring (valued at $10 or $12) was an Odd Fellow and had papers with him to that effect.

Above are about all particulars I can give you. Have sent for picture and on receipt will forward to you; have none of his handwriting but if you possess any that you consider from his hand and will forward same, I will cheerfully identify if his. have not his last letter, but think I can obtain same as it was written to me in Iowa where, with other articles, I left it. In meantime if you will please send me paper containing account you refer to of last February, and any additional particulars in your possession, I may be able to assist you further.

Very truly yours, C. R. WALTERS.

2179 Q. Now, the date of this letter is April 25th, 1880. At the time you wrote this, didn't you know of any other marks; it was subsequent to the time you say you particularly noticed this mole, was it not? A. Well, I might—

Q. Was it or not?

A. There might have been other things that I might have omitted in that description right at that time that might not have occurred to me.

Q. That does not answer the question. That was after the time you had seen that mole, and particularly remembered it? A. Yes sir.

Q. Now, then, when you wrote this, "I don't know for whom he worked last or at what occupation," you say that you had in your possession a letter from him in which he told you he had hired out to a man by the name of Hillmon and had gone off on a cattle drive?

A. He hadn't worked for Hillmon at that time.

Q. At this date?

A. At the date he wrote the letter.

Q. This letter is dated April 25th, 1880; when you wrote that, you say you had a letter from him and that you did know from that letter who he had hired out to, whom he was with last; that is true, is it not; when you wrote this letter you knew he had hired out to Hillmon?

A. Yes sir, I did undoubtedly.

Q. Now, then, I will exhibit to you another letter here, which is dated St. Louis, May 5th, 1880, and get you to state in whose handwriting that is. It is to be marked No. 38. You wrote that? A. Yes.

Q. Wrote it to this same Mr. Clarke? A. Yes sir.

Q. I will exhibit to you another letter dated St. Louis, May 9th, 1880, which will be marked No. 39. I will get you to state who wrote that? A. I wrote it.

Q. I will exhibit to you another letter dated May 22nd, 1880, and get you to state who wrote that.

A. I think I wrote that also.

Q. I will exhibit to you another letter dated August 9th, 1880, and get you to state who wrote that.

A. I wrote that also, I think.

2180 Q. I will exhibit to you another letter dated February 20, 1881, and get you to state who wrote that letter.

A. I wrote it.

Q. Now, each one of these letters was written by you to this man H. S. Clarke, sheriff of Douglas county, who was making inquiries concerning your brother? A. Yes sir.

Q. Now, who did you first tell or inform that you had received a letter from your brother in which he mentioned the name Hillmon?

A. I think I first informed my relatives in Iowa.

Q. When did you do that?

A. Along about the time of its receipt I should judge.

Q. Didn't you first inform Mr. Munn of that fact?

A. I don't remember.

Q. Did you ever tell anybody of that fact except Mr. Munn at the first trial of this case?

A. Of the fact of receiving the letter?

Q. Yes, in which the name Hillmon was mentioned?

A. Yes sir, I don't remember it now.

Q. You don't remember of ever mentioning that circumstance to anybody until the first trial of this case, do you, except Mr. Munn?

A. My best recollection would be that I first spoke to my relatives about it.

Q. Well, now, that don't answer the question. The question is whether you remember of ever stating that circumstance to any person until you stated it upon the witness stand here when this case was tried in 1882?

A. No sir, I don't remember of stating it to—I don't remember of stating it to Mr. Munn or to any one else; I have stated it to a number of persons but I don't remember when nor where.

Q. You knew H. B. Munn? A. Yes sir.

Q. When did you first see him?

A. I don't remember that.

Q. Was it before or after you first saw these photographs of the corpse? A. I don't remember.

Q. You can't remember: You did see Wiseman?

A. I think I met Major Wiseman in this town at the first trial of the case.

2181 Q. You saw Mr. Tillinghast?

[—] I don't think I ever did.

Q. Well, these parties were up there at Fort Madison, were they not, Munn? A. Yes, sir.

Q. Did you give any papers or letters that you had received from your brother to Munn or Tillinghast or Wiseman?

A. I don't remember.

Q. Well, now, the fact is, Mr. Walters, that notwithstanding your brother wrote you twice a month, you haven't got the scratch of a pen that he ever wrote to you?

A. Not that I know of at the present time.

Q. And you don't know what you did with those letters?

A. Well, as a rule, I destroyed them as I do all ordinary correspondence; I usually preserve letters until I have replied to them and then I destroy them.

Q. Well, now, returning to these letters of Mr. Clark?

Exhibit No. 38. Nov. '99, W. C. H.

"St. Louis, Mo., May 5th, 1880.

H. S. Clarke, Esq.,
Lawrence, Kansas;

My Dear Sir: As per previous promise, I write you this p. m. Since I wrote you before I had written to Iowa and have received reply to effect that a picture of my brother was sent you, &c. Should it not have reached you, I could now send you another. I have none of his handwriting, and can give you no other information asked because I do not possess it."

[—] You remember of writing that, do you, in May, 1880?

A. I don't remember of writing it but I presume I wrote it."

(Reading again.) "I do not know that he ever worked in Lawrence and do not at present know where he did work last."

Q. You wrote that, didn't you? A. I think so.

The defendants object to the evidence as not the best evidence.

By the Court: It is proper to call upon him for explanation, if he has any.

2181 To the ruling of the Court, the defendants and each of them at the time duly excepted.

(Reading.) "I have none of his handwriting and can give you no other information asked because I do not possess it. I do not know that he ever worked in Lawrence, and do not at present know where he did work last."

[—] At the time you wrote that, you had received a letter from him that he had hired to a man by the name of Hillmon and gone out on a cattle drive; you had that information when you wrote this letter?

A. Well, at the time I received that letter—

Q. Just answer the question?

A. He hand't gone on this drive; he had engaged to go with Mr. Hillmon on this drive, but he hadn't gone, though.

Q. But you knew when you wrote this letter that the last thing you ever heard from him was that he had hired out to go with Hillmon? A. Yes, sir.

(Reading.) "Years ago he worked in this city and in Quincy, Ill., also in Burlington, Iowa. He was in Kansas City awhile but don't think he worked there. Was on his way to Colorado by way of Atchison, Topeka & Santa Fe Route."

Q. Now, at the time you wrote that he was on his way—that the last you heard he was on his way to Colorado by the Atchison, Topeka & Santa Fe Route, you had a letter from him that he on his way with Hillmon or was going with Hillmon on a cattle drive, didn't you. That is what you claim, at the very time when you wrote this; you knew the last you heard from him that he was going with Hillmon and wasn't going on the Atchison, Topeka & Santa Fe Route at all?

A. That is your construction of the matter, yes, sir.

"I think when I last heard of him—He was in Kansas City awhile but don't think he worked there; was on his way to Colorado by way of Atchison, Topeka & Santa Fe Route, I think, when I last heard of him."

Q. When you wrote that the last you heard from
2183 him he was on the railroad, you had a letter in your possession that he had hired to Hillmon?

"But was looking for work in Kansas towns on that route on account of weather being too severe to make Colorado a pleasant climate at that season and may have worked in Lawrence; may have signed a fictituous name to hotel register, as you suggest, as young men frequently do such things without apparent reason. My own name is Robert Walters; my brother spoke German, as he was of German descent. His given name was Fred A. so there is a singular coincidence in the transposition of the names on hotel register, if nothing more and if such it was, and I was at that time in or near Kansas City. Could you trace this party, or either of them? I could

identify the handwriting of my brother's without a doubt, and if you can get permission to cut these two names from the sheet of the register on which they appear, and send them to me, it might settle a point at once, and if necessary I can preserve them and return to you. I am in poor health and laboring under business difficulties, so that I cannot come to Lawrence, or I should go and settle the point at once. As you say, the murderers ought to be brought to justice, if murder it was in the case in hand, and it also looks as though Mrs. Hillmon could not be mistaken in the body if it was that of her husband, unless wilfully."

When you wrote this letter, you say you had seen the pictures of this cadaver, and you hadn't any doubt that your brother was dead and that they were pictures of your brother; that is true, is it not? A. I don't remember now.

Q. This was in May, 1880, and you say you saw the pictures in January, 1880?

A. Well, I am not certain as to whether I saw the pictures of January, but it occurs to me that I did.

Q. That is your best recollection?

A. Yes, sir, in the winter or early spring.

Q. "Have you a picture of the man shot and of Hillmon?

Respectfully, C. R. WALTERS.

If you have pictures, please send to me and I will return them."

2184 EX. 39. Nov. '99, W. C. H.

(Counsel reading.) "St. Louis, Mo., May 9th, 1880.

H. S. Clarke, Esq..,

Dear Sir: Your last at hand. The picture intended for you was sent me by my sister, and I herewith send same to you with request that you be kind enough to preserve it and after having satisfied yourself, return same to me—"

Q. Now, I will get you to state whether that was not the picture I showed you; if that is not the picture that you sent to Mr. Clarke in this letter?

A. I don't know; at this time whether it was or not.

Q. I will read further where it speaks of his not having any mustache.

"as it is the last picture of my brother my folks had. I have one of later date but as it is more flattering, and not as true and as I have not got it at hand, either, I prefer to send you this. This picture was taken some few years ago and lacks the mustache, but otherwise it is a true likeness, and any one who knew my brother would I think recognize it at once."

Q. Is that your opinion now, that any one who saw that picture would recognize your brother, that knew your brother would recognize him?

A. Well, yes, that knew him, yes, sir.

Q. You state in this letter it is a true likeness of your brother? A. I think it was at the time it was taken.

Q. Did you believe at that time when you sent that letter to the sheriff that any one who knew your brother would recognize him from that likeness? A. I presume I did.

"I believe I have nothing further in way of information that would be of account to you, but should you desire anything I can supply, I will cheerfully comply with any demand you may reasonably make on me, and if you can possibly procure the papers containing account which you first mentioned, or a picture of Hillmon, Brown or the dead man whom you believe to be Hillmon, and whom my folks mourn as my brother, (which you certainly can, in your position) I
2185 trust you will do me the kindness to do this, as I am, of course, anxious to have everything bearing on this subject, especially as I am not yet convinced as to my brother's death or whereabouts."

Q. When you wrote this letter to him, you stated here you are not yet convinced of your brother's death, and yet you say that in January, you had seen these pictures and was satisfied that your brother was dead and that those were his pictures?

A. I think I was satisfied of that at the time I wrote that letter.

Q. "Also, has the dead man's grave been properly cared for, and is its freshness been preserved?

Trusting you will comply with my injunctions as regards pictures, &c., and also confer with me in regard to your convictions, &c., after having examined same, I remain,

Yours respectfully, C. R. WALTERS.

224 Walnut.

P. S. Could you trace Sorf and Robert Walter? And how long after the death in question was the latter in Lawrence?

C. R. W."

EX. No. 40. Nov. 99. W. C. H.

St. Louis, Mo., May 22nd, 1880.

H. S. Clarke, Esq.,
Lawrence, Kansas.

Dear Sir: Your favor of nearly a week since came promptly to hand but I have been so busy and unwell that I could not answer sooner.

The other picture of my brother desired by you I have not at hand but may have it in a week or two. It is in my sister's possession (in Iowa). Otherwise, I would send it to you cheerfully, although from your statement as to the time of Sorf's

stay in your city, I think it will be hardly necessary to send you the last picture, as my brother was never in Lawrence previous to the spring of 1879."

2186 Q. You say you received letters from him from there in 1879? A. Yes.

Q. In this letter you state that he never was in Lawrence prior to the spring of 1879?

A. My impression is that I received letters from there in 1878.

"And never in Kansas prior to the summer of 1878. I was the last of our family who saw him. I saw him in Missouri (at Warrensburg in Johnson county, where I was then located) in July of 1878. He visited me for a week or so and then went to Paola, Kans., where he remained a short time, after that he went to Topeka, and in the spring of '79 towards Lawrence. I received but a few letters from him as he never wrote often."

[—] Now, you say that you received a letter from him twice a month. Is this statement here correct that you never received letters from because he did not write often?

A. Well, sir, my impression is that I received letters from him; I was in the habit of receiving letters from him about twice a month. Some of those statements were made to Mr. Clarke for the purpose as I have explained on the witness stand heretofore.

Q. That were made for that purpose? A. Yes, sir.

Q. You understood that Mr. Clarke was the sheriff of that county?

Q. I understood that Mr. Clarke was working against the interest—understood from several parties he was working against the clearing up of this mystery in the interest of the other party.

Q. And when you found that an effort was being made to find out the facts in reference to this matter, you wrote that your brother had never been in Lawrence until the spring of 1879, when you knew that was not true?

A. That might have been the case.

Q. That is what you claim now with reference to these letters? A. I do not claim that altogether.

Q. When you ascertained that Mr. Clarke was trying to find out the facts in relation to this matter, you misled him by sending him false letters; is that so? Let us get right at the proposition. Do you say when you learned that Mr.
2187 Clarke was desiring to find out the facts in relation to this matter, you wrote him false letters?

A. I was led to believe that Mr. Clarke was not after the facts.

Q. I didn't ask you that. It wouldn't make any difference—were you opposed to anybody's finding out what the facts were? A. No, sir.

Q. You wanted the facts to be discovered, didn't you? Were you to be benefited in any way or your feelings to be appeased in any way by giving false information to a man who was trying to find out about it, whatever his purposes were?

A. I might have been, yes, sir, if he were going to—

Q. (Reading): He then went to Paola, Kansas, where he remained a short time, after that he went to Topeka and in the spring of '79 towards Lawrence. I received but a few letters from him as he never wrote often. He wrote me but a few letters in ten years previous to the visit he made me at Warrensburg."

Q. Now, you say that he wrote you twice a month?

A. He did not previous to the visit he made me at Warrensburgh. I do not claim he wrote me twice a month previous to the visit he made me in Warrensburg.

Q. What particular object had you then, if you wanted to mislead or deceive Mr. Clarke, what, if any reason had you, or what was your idea of writing him that you got but few letters from him in ten years, if that was not true; can you explain to the jury why you would tell that kind of a story or falsehood?

A. I was not supposed to be as accurate in my statement to Mr. Clarke under the circumstances as I would be to people ordinarily.

Q. But your brother was lost then; you did not know whether he was dead or not, and people were endeavoring to find out the facts.

[—] At the time those letters were written, you admitted a few minutes ago I had testified I was convinced he was dead.

Q. You were convinced?

A. The situation as it occurred to me at the time
2188 these letters were written was that Mr. Clarke had been deceiving me, had misled me in regard to [these] matter and that he was working up the case in the interest of Mrs. Hillmon as against our side—family—

Q. Our family side? A. —Side, as much as he could.

Q. Which side was your side of the case? How did you come to have a side of the case?

A. We had a family interest.

Q. You wanted to find out whether your brother was actually dead or not, didn't you?

A. The supposition is from your own statement a few minutes ago that I was convinced he was dead, and I was convinced that he was dead when I saw those pictures.

Q. That is what you testify now? A. Yes, sir.

Q. But when you were writing, at the time you said you were not satisfied he was dead, while writing this, do you in-

tend to say to the jury that [this] statements that you made in that letter were false and that you knew they were false, and that you made them to mislead Mr. Clark?

A. I think that is correct, that is, in regard to some of them.

Q. I will read further: "As he never wrote often. He wrote me but a few letters in ten years previous to the visit he made me at Warrensburg. I may have the last letter he wrote me, and if so will give you the contents when I get to it. it is in a trunk I left in Iowa with a number of private papers, if I have it at all, and I will probably go there in a few weeks and rummage them over in search of it. My other papers are of such a nature that I cannot trust them to be overlooked by any one else, or I should have had this looked after before this. You could gain nothing yourself by going to Iowa, as I can and will give you all information in our possession regarding this affair, besides your going there would be very distasteful to my folks as they are deeply mourning the dead man at Lawrence as their relative, particularly my mother who is now almost deranged over the sad affair. But I will if not dis-
2189 appointed in certain monetary matters, make the trip to Iowa and would also, if I could raise the funds make an incognito trip to Lawrence to fully satisfy myself in this matter (as by going there I could undoubtedly from the tone of your letter, learn some things which cannot well be communicated otherwise and perhaps also throw some light upon it for others. If there is any doubt of the dead man being my brother, of course, the sooner I know it the better (the better also for all others concerned). I have no sympathy with the insurance companies you mention whatever for they have no interest at heart but their own and of course no thought of justice in the matter, if they really believe the man in question to have been murdered. As for myself, if the man has been murdered, as supposed, and is my brother, as far as I could, would move heaven and earth to have the perpetrator brought to justice, but if on the other hand, there should be any reasonable possibility of doing injustice to others and that there is really a mistake in this matter, I will also do my utmost and leave no stones unturned towards rectifying the error and "restoring unto Caesar the things which are Caesar's," &c., and I feel under obligations to yourself for the information bearing upon the subject thus far received.

As regards your other questions, will say: My brother I think had had some dentistry performed on his teeth (a few fillings perhaps) he also had a high instep and corns on his feet. Tho' I cannot give you a more positive description than the one already sent you aside from this, as my brother and I were only a few times together in the past ten years. I usual-

ly have a good eye for noticing such things and can picture it all off to myself but as to a description for others, I do not know how I can excel the one already given you. If I could see the handwriting you mentioned on hotel register, I think I could at once decide as to whether it was that of my brother or not, if this could have any bearing in the case. I thank you for the newspaper clipping sent me (which I herewith return) and also for the picture of Hillmon. I should be pleased to have a copy of all newspaper articles, coroner's inquests, &c., bearing on the subject and if possible for you to obtain duplicate of the one enclosed and copies of any others that may have appeared, I shall be under additional obligations to have them for preservation. The one herein returned you is very erroneous in several things as my brother's name was not Frank Walter and my father is not an Odd Fellow, but a Mason, &c. Believing this to be about all that I can now furnish you, I remain,

Yours very resp'y,

C. R. WALTERS.

Address 4200 Broadway,
Care Yost,
St. Louis, Mo.

And if anything further is wanted of me demanding haste, your letter must reach me by Wednesday morning next or it will probably not come to hand for a week or two.

C. R. W.

2190 EX. NO. 41. W. C. H. NOV. 99.

Near Ft. Madison, Ia., Aug. 9, 1880.

H. S. Clarke, Esq.
Lawrence, Kas.

Dear Sir:

Your favor of a few days since at hand. In reply to your question as to whether my brother was vaccinated will say, yes, as an infant he was. I believe this is the only question of concern to you not previously answered by me.

As regards other import of your letter, I must say that I can find no objection to same whatever. A "square deal," I think, is all that any of us can demand and all I want to see in the present matter is as with yourself, to have it shown up in its fullest light.

I feel certain that I had several of my brother's letters last written to me but to find them since my return is impossible. Other parties besides yourself are desirous of knowing their contents but thus far all search on my part has been unavailable. Besides, I have no sympathies in this matter as it now stands, and as I know it. All I desire is a thorough investigation and justice meted out in fullest measure.

I believe I have nothing else in way of information for you; but should be pleased to know everything in connection with this case in your possession that you dare trust me with. Of course, I recognize your position and do not expect the inside secrets. Those belong to your profession. However, I should like to have you trust me with all real facts in the matter you can which do not interfere with yourself, and if things should terminate so that I can be of assistance to you hereafter, I should certainly endeavor to return to you like in like measure.

Very respy,

C. R. WALTERS.

2191 EX. NO. 42. Nov. 99, W. C. H.

Office of Rich Hill Mining Review.

Rich Hill, Mo., Feb. 20, 1881.

H. S. Clarke, Esq.,
Lawrence, Kansas.

My Dear Sir and Friend:

Your favor of the 2nd instant was forwarded to me from Ft. Madison, and like yourself I feel that a meeting between us could not or should not, be averse to either, although it might result in nothing of advantage so far as I can see to either party as regards information, yet it might afford us some slight satisfaction as to a better understanding of certain matters and for my part, I should be pleased to meet you if for no other reason than to express to you my satisfaction with your treatment of me and mine; but could you not come directly to this place as well as to Kansas City, as I am in a position here which demands almost my constant presence, otherwise I should cheerfully accede to your request, besides you could use your own convenience about coming here and find me in the office of the "Mining Review," whereas, in an appointment at other place, it would probably inconvenience us both to a greater or less extent. Please let me hear further on this.

It has been my intention to get off to Lawrence sooner or later but thus far I have seen nothing that could be accomplished thereby as I know of nothing but what I have already imparted to you, concerning my brother or the case in your hands. We have had no further information of any kind regarding this matter.

Yours truly, etc.

C. R. WALTERS.

"Review" Box, Rich Hill.

12672

2192

EX. 33. C. H. N.

EXHIBIT No. 38. Nov. 99. W. C. H.

St. Louis, Mo., May 5th, 1880.

H. S. Clarke, Esq., Lawrence, Kansas:

My dear sir: As per previous promise I write you this p. m. Since I wrote you before I had written to Iowa and have received reply to effect that a picture of my brother was sent you, &c. Should it not have reached you I could now send you another. I have none of his handwriting and can give you no other information asked because I do not possess it. I do not know that he ever worked in Lawrence, and do not at present know where he did work last. Years ago he worked in this city and in Quincy, Ill., also in Burlington, Iowa. He was in Kansas City a while but don't think he worked there; was on his way to Colorado by way of Atchison Topeka and Santa Fe Route, I think, when I last heard of him; but was looking for work in Kansas towns on that route on account of weather being too severe to make Colorado a pleasant climate at that season, and may have worked in Lawrence; may have signed a fictitious name to hotel register as you suggest as young men frequently do such things without apparent reason; my own name is Robert Walters; my brother spoke German as he was of German descent; his given name was Fred A. so that there is a singular coincidence in the transposition of the names on hotel register if nothing more, and if such it was and I was at that time in or near Kansas City. Could you trace this party or either of them? I could identify the handwriting of my brother's, without a doubt and if you can get permission to cut these two names from the sheet of the register on which they appear and send them to me, it might settle a point at once, and if necessary I can preserve them and return to you. I am in poor health and laboring under busi difficulties, so that I cannot come to Lawrence or I should go an settle the point at once. As you say the murders ought to be brought to justice if murder it was in the case in hand and it also looks as though Mrs. Hillmon could not
2193 be mistaken in the body if it was that of her husband, unless willfully. As to your last inquiry, Wiseman wrote me sometime since, but I do not know what he is now doing. Is he still with the insurance companies? He gave my folks the clue which caused them to believe the dead man their son and my brother. Have you a picture of the man shot and of Hillmon? Resp'y.

C. R. WALTERS.

If you have pictures please send me. I will return them.

2194 By the Court: Was the statement in your letter that your brother had a scar on his leg, the result of the bite of a dog, a true one or otherwise?

A. Yes sir, that was a true statement; I have made that statement on the witness stand. So far as the description goes I think the description is all straight in these letters. Now, I desire to make a little explanation in regard to—

By Mr. Hutchings: Just wait a minute until I turn you over to the other counsel.

And in answer to re-direct interrogatories propounded to him by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. If you desire to make an explanation, you may do so now.

A. I desire to say this, that at the time those letters were written to Mr. Clarke, I had been prompted by friends that he was a detective in the interest of Mrs. Hillmon; that there was a mystery here that we wanted cleared up, and that he assumed that he wanted to clear up, but he was really in the employ of Mrs. Hillmon, and for me to be very careful about making representations to him. Then I had a feeling of vengeance in the matter and was naturally suspicious on all sides, and while I had no sympathy for the insurance companies as expressed there, still I had the fear that the murderer would not be brought to terms unless he was brought there by the insurance companies, and that prompted me to make some statements to Mr. Clarke that may not be altogether true.

Q. In the letter of May 9th, you say: "as I am of course, anxious to have everything bearing on this subject, especially as I am not yet convinced as to my brother's death or whereabouts." What do you say to that?

A. I was convinced as to his death when I received those pictures from my father; up to that time, I never was.

2195 Q. How did you come to write this?

A. I don't remember now unless it was from a desire to mislead Clarke and to keep him in the dark. I don't remember all the little details and motives at this time which governed me at that.

Q. Now, in the description which you wrote to Clark on May 22d, 1880, you say: "As regards your questions, will say that my brother, I think, had some dentistry performed on his teeth, a few fillings perhaps." What knowledge, if any, did you have of the fact that he had fillings in his teeth?

A. I had none whatever. I don't know whether he had or had not had any dentistry performed at any time.

Q. Now, further in that same letter of May 22d, you state "Besides your going there would be very distasteful to my

folks as they deeply mourning the dead man at Lawrence at their relative particularly my mother who is now almost deranged over the sad affair." Was that true? A. Yes sir.

Q. Now, you spoke in your cross-examination of his having a gold ring. Do you remember of his wearing a gold ring?

A. Yes, he wore a heavy gold ring, a plain gold ring, the last time I saw him.

Q. On which finger, if you recollect?

A. I am not certain about that; it was on one of his little fingers; on one of the small fingers, of one hand.

Q. Did you notice this scar at the time he was in Holden, Missouri, at the time you spoke of his being in Holden, Missouri?

A. No sir.

Q. Or Warrensburg; which place was it that you met him?

A. I saw him at both places.

Q. Well, did you notice this scar at the time he was taking the bath to which you have referred? A. No sir.

And in answer to re-cross interrogatories propounded to him by C. F. Hutchings, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

2196 Mr. Walters, I would like, if you can, to state just when it was that H. B. Munn came and saw you at Rich Hill?

A. Well, sir, I don't remember that; it seems to me that Mr. Munn was there to see me before Mr. Clarke was; it occurs to me that Mr. Munn was there on two different occasions.

Q. Can you fix the date can you give us some idea as to the date that Mr. Munn came there to see you?

A. No, sir; I could not; I might by turning to the files of my paper.

Q. Could you state the year?

A. No, sir; I cannot at this time.

Q. Is it not a fact that Mr. Munn came there to see you after you had written all these letters to Mr. Clarke?

A. I don't know, sir.

Q. Is not that your best recollection?

A. I haven't any recollection upon that point; it occurs to me that I saw Mr. Munn first in Iowa before I went to Rich Hill.

Q. How is that?

A. It occurs to me I saw Mr. Munn at one time in Iowa; I don't know whether that was before I went to Rich Hill or not. I was in Iowa before I went to Rich Hill; Mr. Munn came up to see my father, and I was there at that time. Yes, I saw Mr. Munn before I did Mr. Clarke.

Q. What time would you say you saw Mr. Munn?

A. Well, sir, I cannot give the date.

Q. Did you see Mr. Tillinghast?

A. I think not; I don't remember Mr. Tillinghast.

Q. Did you see Mr. Wiseman before you came here to testify?

A. I think not. I think I either met Mr. Wiseman in Kansas City or Leavenworth the first time I saw him; it occurs to me, according to my best recollection at teh present time, it was during the first trial of this case; I don't remember of seeing Mr. Wiseman before that.

Q. I want to ask you Mr. Walters: You have testified at every trial of this case, have you not?

A. I don't know that, sir.

Q. Well, you remember of testifying twice in this case when I have cross-examined you, don't you?

A. It occurs to me—

2197 Q. Twice in Topeka?

A. I am positive of that now.

Q. You have a very poor memory, have you not?

[Q.] On some points I have.

Q. Were you not in Topeka and testified in 1895 before Judge Thomas? A. I was at Topeka to testify in this case.

Q. In 1895?

A. I don't remember how long ago it has been.

Q. Whether it was two or three or four or five years ago?

A. I remember that I testified; I have testified under your cross-examination, I remember that.

Q. In Topeka? A. I think it was Topeka.

Q. You have been shown these letters before haven't you? Every time you testified? A. Yes, sir.

Q. Did you ever testify before that these letters contained falsehoods that you had purposely written? Did you ever say that before this term? A. I have made an explanation.

Q. Did you ever say before that you purposely misrepresented facts and that these letters were falsehoods?

A. I think I did.

Q. You have testified to that before?

A. I made an explanation showing—

Q. I am not asking about an explanation; you have made an explanation this time, but I want your best recollection as to whether you ever told any twelve men who were jurors in this case, that these letters were falsehoods?

By Mr. Barker: He has not said the letters were falsehoods.

A. I don't remember it.

Q. You don't remember whether you have or not?

By the Court: He has not said the letters entirely but that they contained falsehoods.

Q. You don't remember whether you ever testified so at any other trial or not? No, sir.

2198 By Mr. Green: Do you remember whether that question was ever asked you?

A. I don't remember that it ever was.

By Mr. Hutchings:

Q. Wasn't each one of these letters read on your cross-examination just as they have been this time, and were you not asked to explain how you came to make these statements inconsistent with your testimony?

A. I don't remember as to that; I think some of them.

Q. You were asked as to some of them? A. Yes, sir.

Q. And you explained them? A. I think so.

Q. But you did not at that time state that they were false?

A. It has been a very difficult matter for me to get any proper explanation in your cross-examination, and it may be that I did not make the full explanation before as I have this time.

Q. Now, Mr. Walters, what has there been about any cross-examination of mine—what do you mean by that? Haven't I been very civil and all that kind of thing? You say that you have not been able to explain that these statements were falsehoods on account of my cross-examination. I would like to have you explain to the jury in what respect. Do you think my cross-examination would prevent you from telling the whole truth?

A. I don't think I was ever given an opportunity before; I do not mean to reflect upon your cross-examination at all.

Q. These other attorneys here have always heard you testify, have they not? A. Some of them.

Witness excused.

2199 Mrs. Elizabeth Rieffenach, a witness produced by the defendants, being first duly sworn to testify to the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to [him] by James W. Green, Esq., counsel for the defendants, testified as follows, to-wit:

Q. Mrs. Rieffenach, where do you reside?

A. At Fort Madison, Iowa.

Q. What is your full name? A. Elizabeth Rieffenach.

Q. What was your maiden name? A. Elizabeth Walters.

Q. What was your father's name? A. Daniel Walters.

Q. Where does he reside? A. At Fort Madison, Iowa.

Q. How long have you resided at Fort Madison, Iowa?

A. Always.

Q. Born in Fort Madison? A. Yes, sir.

Q. Is your father still living? Yes, sir.

Q. What was your mother's name?

A. Elizabeth Walters.

Q. Is she living? A. Yes, sir.

Q. When did she die, Mrs. Rieffenach?
A. 3rd of March, 1888.
Q. Do you know whether or not it was during one of the trials of this case?
A. It was just before, I think; well, during, I think.
Q. Were you present on the trial of the case during that time? A. No, sir.
Q. What prevented you, if you know?
A. Well, the sickness and death of my mother.
Q. Now, what brothers and sisters, had you?
A. I did have two brothers and two sisters besides myself.
Q. What were the names of your brothers?
A. Charles Robert Walters and Frederick Adolph Walters.
Q. Charles Robert is the one who had just testified?
A. Yes, sir.
Q. And your sisters' names?
A. Fannie D. Walters and Anna L. Lewis.
Q. Is your sister Anna married? A. Yes, sir.
2200 Q. When did you last see your brother Frederick Adolph Walters? A. The 26th of March, 1878.
Q. Where did you see him at that time?
A. Fort Madison, Iowa; at home.
Q. Did he leave Fort Madison at that time? A. Yes, sir.
Q. Where were you residing at that time when Frederick Adolph left Fort Madison?
A. At home with father and mother.
Q. At that time you were unmarried? A. Yes, sir.
Q. Now, since that time where have you resided?
A. Fort Madison, Iowa.
Q. How far has your residence been from your father's?
A. Not more than two blocks at the farthest.
Q. Who, of the family resides and have resided all the time with your father? A. Sister Fannie.
Q. Do you visit at their place?
A. Yes, almost every day.
Q. During all this time? A. Yes, sir.
Q. Now, after your brother Frederick Adolph left home, you may state whether or not you heard from him?
A. Yes, we did.
Q. About how often, Mrs. Rieffenach, did you hear from your brother?
A. About every two weeks, one member of the family.
Q. One member of the family would hear from him about every two weeks? A. Yes, sir.
Q. Did you have letters from him direct? A. Yes, sir.
Q. Addressed to yourself? A. Yes, sir.
Q. Which of the other members of the family would hear from him?

A. Sister Fannie and father once in a while.
Q. Now, do you remember where you heard from him?
A. Yes, sir, after he left home.
Q. After he left home, the first letter that came was from—
A. Council Bluffs, Iowa.
Q. And then do you remember where was the next?
A. I don't know that I can give them in exact rotation, but I can about—Kansas City.
2201 Q. About what time was it that you heard from him from Kansas City if you remember?
A. It seems to me it was in June, 1878.
Q. Do you remember where you heard from him next?
A. Holden and Warrensburg.
Q. Do you know what he was doing in Holden and Warrensburg? A. He went to visit my brother.
Q. Where did you hear from next, if you remember.
A. It seems to me it was Paola.
Q. Paola, Kansas? A. Yes, sir.
Q. After that where did you hear from him?
A. Aladdin, Kansas, I think.
Q. Any other place? A. Lawrence and Emporia.
Q. Now, when did you hear from him last?
A. The last letter we received from him was the beginning of March, 1879.
Q. Where was that addressed from: Was that a letter or postal card? A. Letter I think.
Q. Where was it from? A. From Wichita, Kansas.
Q. Do you know where that letter is? A. No, sir, I don't.
Q. Was that addressed to you? A. Yes, sir.
Q. Do you know what became of that letter?
A. It was lost in some manner; the last I saw of it was when I was getting ready to move after I was married was the last time I saw the letter.
Q. When would that be?
A. That was about the 19th or 20th of August, 1879 was the last time I saw that letter.
Q. Do you remember whether that was a postal card or a letter? A. I think it was a letter.
Q. In the process of moving—
A. Yes, sir, separated from some of the other letters.
Q. Have you been able to find it? A. I have not.
Q. Have you looked for it? A. Yes, sir.
Q. Have you looked for it in all places where you would expect to find it? A. Yes, sir.
2202 Q. Now, if you please, will you state as near as you can the contents of that letter.

A. Wichita, Kansas March 1st, 2nd, 3rd or 4th, I can't state the exact dates, but it was dated, he said that he expected to leave— Do you want me to state the letter?

Q. Yes, state the contents of the letter as near as you can.

"Dear sister and all: I now in my usual style drop you a few lines to let you know I expect leaving Wichita on or about March 5th with a certain Mr. Hillmon a sheep trader for Colorado and parts unknown to me. I expect to see the country now. News of no interest to you as you are not acquainted here. I will close with compliments to all inquiring friends.

I remain, Very truly your brother,
FRED ADOLPH WALTERS."

That is as near as I can give it.

Q. Do you remember of giving a deposition in this case, Mrs. Rieffenach? A. Yes, sir.

Q. Where was that taken? A. My first deposition?

Q. Yes. A. At Fort Madison.

Q. Do you remember when that was?

A. It seems to me it was in the spring of 1880.

Q. Have you heard from this brother since? A. No, sir.

Q. Has he ever returned from Fort Madison? A. No, sir.

Q. You still reside there and have continuously?

A. Yes, sir.

Q. Now, will you describe your brother as near as you can.

A. He was a larger man than my oldest brother, coarser, had long limbs, dark brown hair, prominent forehead, high cheek bones, what I call a Roman nose, dark brown wavy hair, his mustache was some shades lighter; full set of large white teeth; his hands were broad and long fingers; what I would call he had a large hand.

Q. Do you know his height?

A. No, sir, I don't; I know he was taller than my oldest brother; he was much coarser.

2203 Q. Do you know whether or not he had any scars?

A. Not that I know of, No, sir.

Q. Did he have any scars on his body that you know of.

A. Not what I would call scars.

Q. Do you remember of his having been bitten by a dog?

A. I remember the dog bite; he was a small boy; I remember of seeing the mark but I wouldn't call it a scar; I didn't call it a scar at that time.

Q. Did you see that mark afterwards?

A. I saw it, yes, several years before he left home

Q. About how old was he when you last noticed that mark?

A. I can't say exactly; he might have been fourteen or fifteen years old.

Q. Do you remember whether he wore any ring or not?

A. He did when he left home, yes, sir.

Q. On which finger did he wear it?
A. On one of his small fingers; I couldn't say which one.
Q. What sort of a ring was that, do you remember?
A. A plain, heavy ring.
Q. Now, what character of teeth did he have?
A. He had a very elegant set of white teeth, straight, what any one would call a perfect set.
Q. How were they as to size? A. Rather large and long.
Q. Was there any difference in the size of his front teeth, the upper front teeth?
A. The front teeth were larger than the others.
Q. Did he show his teeth?
A. He showed them very plainly when he would laugh or talk.
Q. Now, did any other member of the family resemble him, have a strong family resemblance?
A. Yes, sir, I think sister Fannie resembled him very much.
Q. Now, in what respect would you say they resembled each other?
A. Well, as to the color of the hair, the prominence of the cheek bones, the nose and the teeth.
2204 Q. Is your sister Fanny here present. A. Yes, sir.
Q. How about the hand, what sort of a hand did he have? A. Hand?
Q. Yes. A. He had a broad hand with long fingers.
Q. A little louder.
A. A rather broad hand and long fingers.
Q. Do you know your brother's handwriting?
A. Yes, sir, I do.
Q. I will ask you to look at the letter which has been marked by Sabert M. Casey, Notary Public, Exhibit C, and state in whose handwriting that letter is.
A. My brother's, Frederick Adolph Walters.
Q. Now, will you look at the envelope which has been marked by Sabert M. Casey, Exhibit C, and state in whose handwriting that is? A. My brother's, also.
Q. Will you look at the picture which has been marked Exhibit B, and state of whom that is a picture?
A. That is a picture of my brother, Frederick Adolph Walters.
Q. Do you know about when that was taken?
A. Year before he left home, I should judge.
Q. About how old was he when he left home?
A. Twenty-three years old, I think.
Q. Will you look at the two pictures which have been marked Exhibit No. 29 and Exhibit No. 30, and state if you

recognize these as pictures of any one you have known and if so, state who that person was. A. Yes, sir I do.

Q. Whose picture?

A. Pictures of my brother, Frederick Adolph Walters.

Q. When did you first see those pictures, Mrs. Rieffenach, or pictures identical with these?

A. January, I think, in the year 1880.

Q. Where did you see them? A. At Fort Madison, Iowa.

Q. At what place in Fort Madison?

A. At my father's house.

Q. Who had the pictures?

A. They were sent to father and father brought them home.

2205 Q. Did he show them to you? A. Yes, sir.

Q. And the family? A. Yes, sir.

Q. Who was present when he showed them to you?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. Mother and I think my sisters.

Q. Which sister?

A. Both sisters; Sister Fannie and Anna, I think.

Q. Now, what was said and done at the time those pictures were shown to you?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and calling for hearsay. Objection sustained, the defendants and each of them duly excepting.

Q. State what if anything your mother did at that time?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection sustained, the defendants and each of them at the time duly excepting.

By Mr. Barker: We offer to prove by the witness Elizabeth Rieffenach, that the two pictures, to-wit, Exhibits 29 and 30, were shown to the witness and her sister, Fannie Walters, by their father, Daniel Walters, in his house; that his daughters, (the witness and Fannie Walters saw them, and immediately recognized them as pictures of their brother, Frederick Adolph Walters) that before the mother had seen the pictures, the father accidentally dropped one of the pictures on the floor; that while it was being picked up, the mother saw it, and exclaimed, "Oh, it is my son," and immediately fell into a swoon.

By the Court: The part in parenthesis you may show; that which is not in parentheses is excluded.

To which action and ruling of the court the defendants and each of them at the time duly excepted.

2206 Q. Mrs. Rieffenach, do you know the date of your mother's death? A. Third of March, 1888.

Q. What was her age at the time of her death?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepting.

A. Sixty-three years.

Q. Now, you may state if there is a tombstone erected in your family lot in Fort Madison?

The plaintiff objects to the question as incompetent irrelevant and immaterial. Objection sustained, each of the defendants at the time duly excepting.

Q. What, if any inscription has been placed upon the tombstone in the cemetery at Fort Madison with reference to your brother Frederick Adolph Walters?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection sustained, the defendants and each of the defendants at the time duly excepting.

The defendants offer, in writing, to show by the witness now upon the stand, that the following inscription is inscribed upon the family tombstone in the grave yard at Fort Madison, Iowa: Frederick Adolph Walters, born January 25th, 1855, died February 17, 1879. Interred at Lawrence, Kansas.

On the tombstone erected by Daniel Walters, the father.

The plaintiff objects to the offer as incompetent, irrelevant and immaterial. Objection sustained, the defendants and each of them at the time duly excepting.

Q. Will you look at the pictures which have been marked Exhibits 29 and 30, and state if you recognize them as the pictures of any one whom you have known in life, and if so, state whom?

A. Yes, sir, I do, as pictures of my brother.

Q. What was that brother's name?

A. Frederick Adolph Walters.

Q. When did you first see those pictures?

A. In January, 1880.

2207 Q. At your father's house? A. Yes, sir.

Q. Now, Mrs. Rieffenach, have you lived in Fort Madison ever since your brother, Frederick Adolph Walters, went away in 1878. A. Yes, sir.

Q. How far, during that time, have you lived from your father's house? A. At farthest two blocks.

Q. Has your brother, Frederick Adolph Walters, ever returned to Fort Madison since the time he left there as you say in the spring of 1878? A. No, sir, he has not.

Q. Have you ever heard from him by letter since the time you spoke of receiving a letter from Wichita, in the fore part of March, 1879? A. No, sir.

And in answer to cross interrogatories propounded to her by Mr. L. B. Wheat, counsel for the plaintiff, the witness testified as follows, to-wit:

Q. Mrs. Rieffenach, I will ask you if this is your signature here on page 156 of this bundle of depositions?

A. I think it is.

Q. Your deposition was taken at that time? Is that your signature to this deposition?

A. I don't know what that is but that is my signature.

Q. I will ask you to look at page 101 of the same bundle of depositions, and read the first few questions. Start off.

By Mr. Green: I submit that is not the proper way to cross-examine a witness.

By the Court: What are you asking her now?

By Mr. Wheat: I am asking her to look at this deposition where she was sworn, at the commencement of it.

By Mr. Green: The witness has testified on direct examination that she gave her deposition in Fort Madison and that she thinks it was in 1880.

By Mr. Atwood: It is conceded that this is her deposition.

By Mr. Green: Yes.

2208 Q. You stated in your direct examination what you say you considered a copy of the letter you received from your brother? A. Yes, sir.

Q. I will ask you if you did not state in this deposition—You said it was taken in 1880? A. I think so.

Q. Was it not taken in 1881?

A. I said about the spring or summer of—

Q. 1881? A. I was not certain.

Q. Commenced in May. I will ask you if you did not, when you were giving that deposition, say that letter was in the words, "Wichita, Kansas, March 4th or 5th, 3rd or 4th, I don't know, 1879. Dear Sister and all: I now in my usual style drop you a few lines to let you know I expect to leave Wichita on or about March the 5th with a certain Mr. Hillmon, a sheep trader, for Colorado and parts unknown to me. I expect to see the country now. News are of no interest to you as you are not acquainted here. I will close with compliments to all inquiring friends. Love to you all.

I am, truly your brother,
FRED ADOLPH WALTERS."

Didn't you on that occasion state that the letter was in those words?

A. Yes, sir, to that effect; I think I did the same to-day.

Q. I ain't asking you about what you said to-day. Will you look at that, what I have read, and will you tell me whether that is not what you said on that occasion?

A. I understood you; I heard you read it.

Q. I want you to look particularly?

A. I say it is not my writing; I heard you reading it all right.

Q. Did you or did you not on that occasion so testify that was a copy?

A. To that effect, yes sir; I don't say that it was word for word; I don't think I ever did state that the words were just exactly as I stated them; I gave them to the best of my recollection.

2209 Q. I will ask you if this question wasn't asked you: "Please to state the contents of that letter as near as you can right through from the beginning to the end, commencing at the date and reciting it right through to the end," to which you answered—Didn't you make that answer on that occasion?

A. That is the answer that I stated to-day; that is as near as I can remember.

Q. Will you look at what purports to be the signature of Frederick Adolph Walters. Is it signed Walters or Walter?

A. Well, he usually signed his name Walter.

By Mr. Wheat: I move to strike that out; I didn't ask how he usually signed it.

By the Court: Yes, that is what you said—the signature to the letter. Was it Walter or Walters?

A. I can't say to that now.

Q. Look at that writing?

A. He never signed his Frederick Adolph Walters; it was F. A.

Q. I ain't asking you how he signed it? A. There it is.

Q. I will ask you if you did not on that occasion say that he signed it Fred Adolph Walters? A. I did there, yes, sir.

Q. That was very soon, compared to the present time, after you received that letter? I will ask you if your memory was not much better then than it is now with reference to whether he signed it Walter or Walters?

A. He signed it mostly Walter.

Q. I ain't asking you what he signed mostly. I move to strike out her answer.

The Court sustained the motion, the defendants duly excepting.

Q. I am asking simply whether your memory at that time wasn't better than it is now? A. I suppose it was.

Q. You said something about a dog bite on this occasion. I will ask you if you did not when that examination was going on, these questions and answers that I will read to
2210 you were not made by you: "You stated, I believe, that your brother was bitten by a dog. Do you remember on which leg he was bitten?" To which you answered "No, sir, I do not."

Q. The next question: "State if you please about when it was you last noticed any effect from that bite," to which you answered, "About eight years ago."

"Was there any sore from the effect of the bite, at that time," to which you answered. "No, sir, there was not."

Q. Next question: "If there was any mark at that time, please describe it?" To which you answered, "It was what I would call a dent, with the skin some drawn."

Q. Next question: "State the extent of that dent. Whether it was deep or otherwise," to which you answered, "No, sir, it was not deep; it was what I would call a dent in the flesh, is the only name I can give it."

Q. Were those questions put to you and did you make those answers?

The defendants object to the question because it does not tend to impeach the witness in any way.

By the Court: No, I think not; ask her what she says now, and if she says anything different from that, it will be competent to contradict her.

By Mr. Wheat: She has already testified to that mark. I was going on the examination in chief. I will ask her, however.

Q. You said on your direct examination, I believe, that your brother was bitten by a dog. Do you remember on which leg he was bitten? A. No, sir, I do not.

Q. State, if you please about when it was you last noticed any effect from that bite?

A. It was several years before he left home, I think.

Q. Wasn't that question put to you when you were being examined in the taking of this deposition?

A. I guess it was.

Q. And didn't you answer on that occasion:" About
2211 eight years ago." A. That may be, yes, sir.

Q. Now, I will ask you another question:

"If there was any mark at that time, please describe it?"

A. It was just as you stated it was, a dent in the flesh with the skin drawn, is the only way that I ever could describe it.

Q. You gave a description of your brother on that occasion, didn't you? A. Yes, sir.

Q. I believe you said something about his nose?

A. Yes, sir.

Q. I will ask you to state whether his nose at the end of it was blunt?

A. Yes, sir, what I would call blunt; that is my judgment; my opinion.

Q. That is what you would call it? A. Yes, sir.

Q. You mentioned his hair; you described his hair?

A. Dark brown, wavy hair.

Q. I will ask you whether it was coarse or fine?

A. Rather coarse in my judgment.

Q. I will ask you to look at this exhibit marked No. 36 and state of whom that is a picture?

A. That is a picture of my brother Frederick Adolph Walter.

Q. What did you say now; did you now say Walter or Walters; I didn't understand you?

A. I said Walter or Walters; I don't know, well, it is either.

Q. I want to know which you meant to say?

A. Frederick Adolph Walters; I am speaking of the past; I put the S on it.

Q. Do you know about when the picture was taken?

A. I should judge that picture was taken four or five years before—he was about 18 or 19 years old, I should judge.

Q. Four or five years before he left home?

A. I should think so.

Q. That would be somewhere about 1873 or 1874? State whether that was a good picture of him or not at that time?

A. Yes, at that time it was.

Q. I will now present to you exhibit No. 33 at this trial and ask you to state if that is a picture of any person that you ever knew?

2213 A. I think that is a copy of my brother also.

Q. You think it is a copy of this small one?

A. Yes sir, I do.

Q. You think it is a copy of this 36?

A. No, not of that same number, no.

Q. Don't you think it is a copy of the picture marked 36?

A. These pictures have been copied in some way or another, maybe not of that picture.

Q But one just like it, whether it is not really the same picture enlarged? A. That is what I think it is.

Q. When did you first hear from your brother Frederick Adolph Walters after he left in 1878, from what place and on what date? A. I can't say the date.

Q. Can you approximate the time?

A. Yes, sir, I still have letters from April; I have one now.

Q. Have you any of them here? A. Yes, I have.

Q. Will you please let me see some of them? A. Yes sir.

Q. Let me see the first letter you received.

[—]The first one I have with me is April 22nd, from Council Bluffs.

Q. This is dated April 19th, 1878, is it not?

A. I never noticed the date of it.

Q. Where was that letter from? A. From Council Bluffs.

Q. Will you show the next one?

A. There is a postal card. That is Council Bluffs, June 3rd—Kansas City—

Q. Never mind. From where did you receive the next letter? A. Kansas City, I think.

Q. From where did you receive the next letter?

A. I suppose I am allowed to refer to these I have with me?

Q. No, I ain't asking you to refer to any; I am now asking you for your memory?

A. The next, I think, was Warrenburg.

Q. That was when he was there with your brother in the summer of 1878? A. Yes sir.

Q. From where did you receive the next letter?

A. Aladdin.

2214 Q. From where the next letter?

A. I think the next was Paola, Kansas.

Q. From where the next letter?

A. Aladdin, I think, Douglas county.

Q. From where the next letter?

A. Lawrence, I think.

Q. Can you tell me the time of year?

A. It must have been in January some time.

Q. January of what year? A. 1879.

Q. In January, 1879, you received a letter from him in Lawrence?

A. I am not certain it was in January; I say about that time, about January. I am not saying it was January because I could not unless I would refer to my letter.

Q. Then from what other place did you next receive a letter? A. Emporia, Kansas.

Q. When?

A. February 10th, is the post mark on the letter.

Q. Was it in 1879? A. 1879.

Q. How many letters did you receive from him at Emporia?

A. I can't say.

Q. Did you receive a letter from him at Wichita?

A. Yes sir.

Q. Prior to this letter that you have endeavored to give us a copy of? A. Not to my knowledge, no sir, at present.

Q. That was the first letter from Wichita? A. I think.

Q. That you ever heard of, was it? A. I think.

Q. How often did he write? A. About every two weeks.

Q. It is the last letter that is copied in your deposition. Who did you first show that to outside of your own immediate family, brothers, sisters, father or mother, or some of them?
A. Besides them?
Q. Yes.
A. I don't know that I ever showed it to anybody.
Q. State whether you had that letter when Mr. Munn came there first? A. No sir, I think not.
Q. State whether you had that letter when Mr. Tillinghast first came there? A. Not that I know of, no sir.
2215 Q. When do you remember first seeing Mr. Munn connected with this matter? A. I don't remember.
Q. When did you first see the pictures of the corpse?
A. Some time in January, fore part of January.
Q. I will ask you if your brother Charles R. Walters was then there? A. At home?
Q. Yes. A. No sir, I think not.
Q. How long after that time before he came home?
A. I can't say.
Q. Do you remember when you first saw Mr. Tillinghast?
A. I do not.
Q. You remember seeing him, do you?
A. No sir, I do not, at the present time.
Q. Do you remember seeing Mr. Munn?
A. Mr. Munn I remember, yes sir.
Q. When do you remember seeing him?
A. I saw Mr. Munn here at the trial in 1885; I think Mr. Munn was present.
Q. Didn't you see him in Fort Madison?
A. Yes sir, but I couldn't tell the time when.
Q. When was it with reference to the time of receiving the pictures of the corpse that you mentioned?
A. I can't say.
Q. Was it before or after? A. I think it was after
Q. How long after? A. I could not say.
Q. When did you first see Mr. Wiseman?
A. I don't remember; I don't know Mr. Wiseman.
Q. Now, take your letters, and look at the places; take the first one.

Mr. Green objects to the question as not proper cross examination. Objection overruled, the defendants an deach of them duly except.

A. If I am allowed to say, these are not all of my letters that I received; only a part of them.
Q. Where are the others? A. They were destroyed.
Q. Why did you preserve these and destroy the others?

A. I just took care of these and after my brother
2216 had disappeared, of course, these letters were more precious than they were while he was living.

Q. When were the others destroyed?

A. I could not say; at times; I did not preserve all of them.

Q. They were destroyed before or after you supposed your brother was dead? A. I can't say—Before, of course.

Q. Why were the others destroyed and not these, then?

A. Oh, it just happened that these were put aside in a trunk and stayed there I suppose.

Q. Now, state whether you did not have a large number of letters still in your possession when your deposition was being taken?

A. No I think not, not a larger number than I have now, I don't think.

Q. Don't you think you had more then than you have got here now? A. I think not.

Q. Give me the date and the place from whence you received the first letter? A. Council Bluffs, April 22nd.

Q. What year? A. The postmark is 1878.

Q. What is the next communication from him, whether a postal card or letter? A. Council Bluffs, June 2nd, 1878.

Q. The next one? A. Kansas City, June 7th, 1878.

Q. What was the date, when was the next one mailed and from where? A. Warrensburg, June 17th, 1878.

Q. Where was the next one from?

A. June 6th, 1878, Holden, Missouri.

Q. Where was the next one from?

A. Paola, Kansas, July 10th, 1878.

Q. Date of the next one?

A. Paola, Kansas, August 4th.

Q. Date of the next one?

A. Aladdin, Douglas county, Kansas, 9th month, 15th, 1878. That would be September.

Q. Date of the next one?

A. Lawrence, October 4th, 1878.

Q. And the next one?

A. Lawrence, October 10th, 1878.

Q. Date of the next one?

A. Lawrence, October 19th, I think.

Q. Date of the next one?

A. Emporia, Kansas, February 9, 1879.

2217 Q. Did you ever receive any letter from him from Wichita previous to the last one?

A. Not to my knowledge, no sir.

Q. If you did, you would remember it, wouldn't you?

A. I don't know whether I would or not.

Q. I will ask you in what part of the country he was, from what part of the country his letters came to you previous to the one there of February 9th, at Emporia?

A. I don't understand.

Q. From whence, according to the best of your remembrance, did the letters come that he wrote to you between the last letter you mentioned at Lawrence, and the letter of the 9th of February, 1879. A. I don't remember.

Q. Do you remember anything about that?

A. I don't quite understand.

Q. You say you received letters about once in two weeks.

A. About.

Q. There is a long gap between October 17th, 1878, and February 9th, 1879?

A. I do not say that these were all of my letters.

Q. I understand, but there is a long gap of time. Now, you received letters from him during all of that time, if I understand you?

A. I suppose some other member of the family during that time; they were not all directed to me.

Q. Did you receive any letters?

A. No, sir, I cannot say; I don't know.

Q. Did you see any letters from him to any other persons, of dates intervening [intervening] those two dates, October 17th, 1878, and February 9th, 1879?

A. Yes, sir, I know we received letters.

Q. Did you ever hear from any friends of his being in Wichita, Kansas, prior to the time when you received the letter a copy of which is set forth in your deposition?

A. Not that I remember of now.

Q. You don't remember of ever hearing of his having been there? A. Not that I remember now.

Q. Don't you think you would if you had heard of it; don't you think you would remember it, if he had been work-
2218 ing for Holsnider there in Wichita a month or a month and a half or two months; do you think you would have heard of it?

A. I don't know that I would have heard who he had been working for or not.

Q. Let me ask you, didn't he usually inform you in his letters what he was doing? A. No sir, not always.

Q. If I understand you, you never heard of his being in Wichita nor of his working for Holsnider?

A. Not that I remember now, no sir.

Q. Do you know what he was doing in Emporia?

A. No sir, I do not.

Q. How long was he there? A. I can't say.

Q. Have you the Emporia letter? A. Yes sir.

Q. Will you let me see it. Did you ever receive any other

letter from him at Emporia than that one?

A. I don't know; I can't say.

Q. Did you ever hear what he was doing in Emporia?

A. I can't say.

Q. You know nothing about what he was doing there. Did he ever say anything in any letters you have here or heard from, about going to Colorado? A. Yes sir.

Q. I am not speaking about the last one.

A. No, not in the other letters.

Q. Not in any other letter. Did you ever know of his being in Leavenworth, Kansas?

A. Not that I know of now, no sir.

Q. Did you hear of Simmons & Staiger or Staiger & Simmons, either one, in connection with the place where he was working? A. Not that I know of, no sir.

And in answer to re-direct interrogatories propounded to her by James W. Green, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Mrs. Rieffenach, take this letter which is marked Lawrence. What is the address of that letter?

The plaintiff objects to the question for the reason
2219 that the letters themselves are the best evidence. Objection overruled, the plaintiff duly excepts.

A. Miss Fannie D. Walter.

Q. How is it signed? A. F. A. Walter.

Q. Take the postal card from Council Bluffs: How is that addressed?

A. Miss Lide M. Walters, Post-office box 116, Fort Madison, Iowa.

Q. Take the postal card sent from Lawrence; how is that addressed?

A. Miss Lide M. Walters, Fort Madison, Iowa.

Q. How is it signed? F. A. Walter.

Q. Take this letter sent from Kansas City; How is it addressed?

A. Miss Lide M. Walter, Fort Madison, Iowa.

Q. How is that signed? A. F. A. Walter.

Q. Take the postal card from Warrensburg; how is that addressed, please?

A. Miss Lide M. Walters, Fort Madison, Iowa.

Q. How is it signed? A. F. A. Walter.

Q. Take the postal card from Paola, Kansas; how is that addressed? how is that addressed?

A. Miss Lide M. Walters, Fort Madison, Iowa.

[A.] How is that signed?

A. I think that is F. A. Walters.

Q. Take the postal card from Aladdin.

By Mr. Wheat: Let me interrupt you a moment. In order to cut the matter short, just offer all these letters and postal cards and the envelopes in evidence and we will not object.

Q. Take the postal card from Aladdin, Kansas; how is that addressed? A. Miss Lide M. Walters.
Q. How is it signed?
A. Your brother, F. A. Walter.
Q. I think I have shown you the one from Council Bluffs; if so, I will show it to you again. How is that addressed?
A. Lide M. Walter.
Q. How is that letter signed?
A. Your brother, Fred A. Walter.
Q. Did I ask you in regard to the one from Lawrence?

The plaintiff objects to the evidence as secondary evidence.

2220 By the Court: I assume the purpose of this is that the papers are already in evidence, and in order to save time, counsel is calling the attention of the witness to certain facts in the letters.

By Mr. Barker: The contents of the letters have not been offered by either party: It is only the addresses on the letters and the signatures to the letters. Some question has been raised here as to whether the name was Walter or Walters.

By Mr. Atwood: We offer them as part of the cross-examination of the witness.

By Mr. Green: State the address on that please.

A. Miss Lide M. Walter, Fort Madison, Iowa.

By the Court: I suppose there may be a great many facts in these letters incompetent for the consideration of the jury, and there may be other facts which are competent.

By Mr. Hutchings: We have not had time to read them over, but we would like to have them considered in.

Q. How is it signed? A. F. A. Walter.
Q. Take the letter from Emporia; how is that addressed?
A. Miss Lide M. Walter, Fort Madison, Iowa.
Q. How is that letter signed, if you know?
A. Fred A. Walter.
Q. It is suggested that I omitted one question in my direct examination. I will ask you to look at the letter which has been marked heretofore by Sabert M. Casey, Notary Public, Exhibit C, and state in whose handwriting that letter is?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled the plaintiff duly excepting.

A. Of my brother.

Q. And the envelope? A. Of my brother also.

By Mr. Green: Exhibit C is the Kasten letter.

Q. By Mr. Green: Now, I will offer in evidence, the addresses and signatures on each of the letters and postal cards which have been exhibited to the witness, and ask that
2221 the jury may be allowed to compare those signatures with the signature to the Kasten letter.

The plaintiff objects to the admission of the evidence unless it is accompanied with an offer of the contents of the postal cards and letters.

By the Court: That is unnecessary from their standpoint. They are offering them simply to show that the signature to the Kasten letter is the same as the signature to these letters. They may be considered in evidence. But perhaps I misunderstood your purpose. If it is simply to show that the name was signed part of the time Walter and part of the time Walters, an exhibition to the jury would be improper.

By Mr. Green: The object is to show that he universally signed his name Walter, and that the Alvina Kasten letter is also signed Walter; also that the jury may compare the signatures to these letters which are not charged to be forgeries, with the signature to Katsen letter, whose genuineness, I believe has been challenged.

By the Court: That may be done.

To which ruling of the Court, the plaintiff at he time duly excepted.

Witness excused.

The several letters and postal cards produced and identified by the witness Mrs. Riefenach, were read in evidence by the plaintiff, and are respectively in words and figures as follows, to wit:

2222 Macedonia, Apr. 29th, '78.

Dear Sisters: As I have not much to do and can not get my Mail out of the Office I thought I would drop you a few lines. The reason that I can not get my mail is that over (2/3) Two Thirds of the Population of Macedonia are down with the Small Pox and the People will not let any one in or out of town, so I can not get to the P. O. to get my mail. The last report we heard from there were that 15 were sick abed, and the Population is only 35 or 40. what brought the Small Pox here is simply this there was a stranger came here sick and

so the Citizens or as I should say those Families took care of him and the Doctors (2 in number) were sent for. They asked him if he ever had the Small Pox he said he had, and so they thought it must be Black Measles. After fooling around with him for a week or so he was so far gone that he Kicked the Bucket (or in Plain words Died) and since then nearly all that waited on him are down a bed. The Doctors have them all at one Place and think there is no danger of it spreading any further than it has already gone. This is about all the news that I can pick up for such a large City as Macedonia (Population 40½). Please tell A. D. K. if she has not yet written to Address to M—Pottawatime Co., Ia. I am well as ever hoping this to reach you the same, I remain Your

Brother F. A. WALTER.

P. S. Give my regards to enquiring friends.

FRED A.

(On the envelope:) Lyde M. Walter, Fort Madison, Iowa. (P. O. Box, 116.)

(Post-mark:) Council Bluffs, Ioa., Apr. 22.

Council Bluffs, Sunday, June 2nd, 1878.

Dear Sisters: I received your letter some time ago & also those Photographs much obliged for the same. I start for Nebraska to-morrow. When I get settled down will write you a letter. We have had several Hail Storms the last week and done considerable damage. Otherwise every thing looks prosperous. Give my Compliments to all enquiring Friends.

Your Brother, F. A. W.

(Post-mark:) Council Bluffs, Ioa., Jun. 3.

(On the postal card:) Miss Lyde N. Walter. P. O. Box 116, Ft. Madison, Iowa.

Kansas City, Mo., June 6th, '78.

Dear Sisters: I arrived here this morning 3:30 o'clock found Charley Schott all O. K. I will have to stay here about a week for this is quite a city and as Lodging does not cost
2223 me any thing only my meals. This is all for this time for there is no news that would interest you and I have had a dull Head Ache all day on ac't of riding all night.

Your Brother, F. A. WALTER,
Care C. N. Schott,
407 Delaware St., K. C., Mo.

P. S. Write Amediately.

(On the margin:) Compliments from C. W. Schott.

(On the envelope:) Miss Lyde M. Walter, Ft. Madison, Iowa.

(Post-mark:) Kansas City, Mo., Jun. 7.

(Postal Card.)

Warrensburg, June 17, '78.

Dear Sisters: I arrived here a few days ago and found Bob enjoying good health. I have not yet heard from you in regard to my Kansas City Letter. I shall stay here a few days longer and then will start for parts unknown. Lyde I am much obliged for those Photos you sent me, as there is no news that would interest you I will close hoping the rest of the family are enjoying as good health, as Bob and Myself are.

Yours, F. A. WALTER.

(On the postal card:) Miss Lyde M. Walters, Ft. Madison, Io.

(Post-mark:) Warrensburgh, Mo., Jun. 17.

(Postal Card.)

Holden, July 6th, '78.

Rob will write in a day or two and give you particulars about my whereabouts, &c.

Hearty as ever. Yours as ever, FRED A. W.

(On the postal card:) Miss Lyde M. Walters, Ft. Madison, Io. (Lee Co.)

(Post-mark:) St. L. & Atch. R. P. O., Jul. 7.

(Postal Card.)

Lyde & Fannie: I arrived here safe & sound as usual and have struck a job but do not know how long it will last. Please let us hear from you in a long letter as soon as possible.

Your Bro., F. A. WALTER.

Paola, Kans, July 10th, 1878.

(On the postal card:) Miss Lyde M. Walters, Ft. Madison, Iowa.

(Post-mark:) Paola, Kan., Jun. 10.

2224 (Postal Card.)

Paola, Kas., Aug. 4th, '78.

Dear Sister: Your letter came to hand in due time, and as there is no news to amount to any thing I thought I would drop a postal to let you know that I am still alive if nothing else. Give my Compliments to Oscar & Tell Chas. Lopmon if he don't answer that card that there will be a Dutch Funeral the next time I run across him. This is all for this time with Love to all I remain Your Bro., F. A. WALTER.

(Address:) Miss Lyde M. Walter, Fort Madison, Iowa.

(Post-mark:) Paola, Kan., Aug. 5.

(Postal Card.)

Aladin, Douglas Co., Kas., 9, 15, '78.

Dear Sisters: I received your Postal last night—was glad to hear from you. I have been sick nearly all last week but

am up and around again, and feel as young as ever (in a horn). I hope by the time this reaches you Farther & Annie will be all O. K. again.

Your Brother, F. A. WALTER.

(Address:) Miss Lyde M. Walters, Fort Madison, Iowa (Lee Co.).

(Post-mark:) Aladdin, Kans., Sept. 18, '78.

(Postal Card.)

Lawrence, Oct. 4th, '78.

Dear Sisters: I left Aladin for Lawrence the other day simply to try and get Cured as I have been to low for the past two weeks to write, I thought I would let you know that I am still alive, and think I will be all right in a week or so as I have employed the best Dr. in Lawrence to wait on me.

F. A. WALTER.

(Address:) Miss Lyde M. Walters, Fort Madison, Iowa.
(Post-mark:) Lawrence, Kan., Oct. 4, 11 a. m.

Lawrence, Oct. 10th, '78.

Dear Sisters & All: Your letters came to hand last night—was glad to hear from you. You advise me to come home if I would that would not cure me as far as care goes you could not take any more than the family I am stopping with for they treat me just as though I was one of the Family so you need not be alarmed about me. And as my health is improving fast I think in a week or so to be able to go to work again. I have not heard from Rob for over a week is he in good health or don't you know. Please answer these few lines Amediately and give me full particulars about the Family. This will be all for this time. I will try and write more the next. Give my Compliments to Spreen and tell him that he did not send that book he promised (viz. Constitution & By
2225 Laws of K. of P.) also tell Eugene to drop me a few lines and oblige Your Brother,

F. A. WALTER.

(On the Envelope) Miss Fannie B. Walter,
Fort Madison, Iowa.

(Post-mark) Lawrence, Kan., Oct. 10, 9 A. M.

Central Hotel,
Lawrence, Kansas.
John Anderson, Propr.

Lawrence, Oct. 18th, 78.

Dear Sister & All: Your letter was received yesterday, sorry to hear of the misfortune Farther had for I don't think P. Walter will give him a cent. I wrote to Rob about a week ago, as

he said if I run short for me not to hesitate in calling on him or I should of called on one of you Girls for a small sum of money. as both of you are earning some thing please see "Rob" and if he has not attended to it will one or both of you try and send me ($5) Five Dollars as I have run into Debt a little, for Medicine and the Dr. said that I will have to take it a little easy yet for a week or so until I get a little stronger before I undertake to work. see Rob and have him or either you attend to it amediately Please and I will send it back as soon as I possible can. If you see Eugen tell him that I will write to him in a short time (as I have only one P. Stamp left and no money to buy any with I will have to save it at present) so I cannot write to him, but you need not tell him about the stamp business. this is about all for this time with Compliments to all I remain your True

Bro. F. A. WALTER.

P. S. Please answer by Returning Mail and oblige,

F. A. W.

(On the envelope) Central Hotel, Lawrence, Kansas, John Anderson, Propr. Miss Lyde M. Walter, Fort Madison, Iowa.

(Ports-mark) Lawrence, Kan., Oct. 19, 7AM.

Emporia Kans Feby 9th 79

Dear Sisters: It has been some time since I last wrote to you so I thought it no more than write for me to drop you a few lines, for you would not let me hear from you otherwise. I have been having a Couple shakes lately but think I have got them Checked now for I have not shook since a week to night otherwise I feel well & Eat harty I have not been doing any thing for some time but as the Weather is Moderating I think I will get a hold of something soon now. there is not much of anything in the Amusement line going on here so I am not Enjoying myself any to good but have to be Contended without Amusement there is not any News that would interest you so I will make these lines as short as possible. tell Rob 2226 that I received his Card (postal) in due time. And Congratulate Farther on the 14th for me.

I remain as ever Your

Brother F. A. WALTER.

(Lyon Co) Emporia Kans

P. S. Write Soon.

Compliments to Annie Baker & the rest of the good looking girls)

FRED. A. WALTER.

(On the envelope) Miss Lyde M. Walter, Ft. Madison Iowa (Lee Co)

(Post-mark) Emporia Kan. Feb 10.

* * * * * * * * * * * * * *

2227 Fannie Walters, a witness produced by the defendants, being duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to her by James W. Green, Esq., counsel for the defendants, testified as follows, to-wit:

Q. You may state your name, please, and place of residence? A. Fannie Walters; Fort Madison, Iowa.

Q. How long have you resided at Fort Madison, Miss Walters? A. Over thirty-nine years; all my life.

Q. With whom do you reside at Fort Madison?

A. With my father, Daniel Walters.

Q. How long have you resided with him? A. All my life.

Q. Of whom did your father's family consist? A. When?

Q. We will say in 1878?

A. My father, mother, brother Robert, brother Adolph, sister Elizabeth and sister Anna.

Q. Is your father still living? A. He is.

Q. Is your mother still living? A. No, sir.

Q. When did she die? A. March 3rd, 1888.

Q. Now, you may state when you last saw your brother Frederick Adolph Walters?

A. On February 26th, 1878; I mean March 26th; that was a mistake.

Q. Where did you see him at that time? A. At home.

Q. You may state whether or not he parted from home at that time? A. I don't undertsand the question.

Q. Did he leave home at that time?

A. He left home; that is when he bade us farewell, yes, sir.

Q. Do you know where he went?

A. He left home for the west.

Q. Where did you hear from him the first time, if you remember?

A. I think it was Macedonia, Iowa, or Council Bluffs; one or the other.

Q. About how long was that after he left home?

A. I could not tell exactly, but it was very soon after he left.

2228 Q. Do you remember where you next heard from him? A. I do not.

Q. Could you mention any other places from which he sent letters to you?

A. Yes, Macedonia, Council Bluffs, Kansas City, Warrensburg, Holden, Aladdin, Paola, Leavenworth, Lawrence, Emporia and Wichita, I think, all those places.

Q. Were you in correspondence with him? A. I was.

Q. How often did you hear from him?

A. I cannot say how often; I would, but the family would hear from him regularly about every two weeks.

Q. State whether or not he was writing to different members of the family? A. He was.

Q. Now, at that time, in 1878, where was your brother Robert Walters living?

A. I think he was either at Holden or Warrensburg.

Q. Where did your sister Elizabeth live?

A. She lived at home with us.

Q. And your sister Anna, also? A. Yes, sir.

Q. Now, has either of your sisters since married?

The plaintiff objects to the question as incompetent, irrelevant and imaterial. Objection overruled, the plaintiff duly excepts.

A. Yes, they are both married.

Q. Now, after they were married, where did they reside?

The plaintiff objects to the question as incompetent, irrelevant and immaterial; objection overruled, the plaintiff duly excepts.

A. In Fort Madison.

Q. About how far from your father's house?

A. Sister Elizabeth always lived within a block or two, while sister Anna has for years of her married life lived within two miles on the outskirts of the town.

Q. At the time that your brother Frederick Adolph left home, what were the relations between him and the family?

A. Most friendly.

Q. Did they at any time cease? A. No, sir.

Q. Where did you last hear from him?

A. Wichita, Kansas; I think.

2229 Q. Do you remember about the time?

A. We received it the first few days in March, 1879.

Q. Who of the family at Fort Madison received the last letter from him?

A. It was either sister Elizabeth or myself; I could not tell.

Q. Now, since about the first of March, 1879, have you ever received any communication from him? A. No sir.

Q. Has any member of the family, to your knowledge, received any? A. No sir, they have not.

Q. Have you ever seen him since then? A. No sir.

Q. Has he ever returned to Fort Madison since that time?

A. No sir.

Q. Now, Miss Walters, will you give a description as well as you can, of the personal appearance of this Frederick Adolph Walters?

A. He was a tall, robust man, raw-boned; don't know his exact height, with dark hair, dark eyes, had a perfect set of teeth, and his mustache was some shades lighter; had a Roman nose, quite prominent cheek bones, long fingers.

Q. How were his arms and legs in comparison with his body?

A. They were considered somewhat long in proportion.

Q. Do you know as to the size of his feet? A. No sir.

Q. Did he to your knowledge, have any jewelry?

A. Yes sir.

Q. What did he have if you remember?

A. He had a plain gold ring, a silver watch with a hair guard, slide and gold locket, and an Odd Fellows' pin, three linked pin.

Q. Did he wear this gold ring? A. Yes sir.

Q. Do you remember on which finger he wore it?

A. On one of his little fingers, I could not tell which hand.

Q. Was he wearing that at the time he left home?

A. He was.

Q. I wish you would look at the letter which has been marked Exhibit C by Sabert M. Casey, and state if you know in whose handwriting it is; if so please, state. A. Yes sir.

Q. In whose handwriting is it?

A. That my brother Adolph's.

2230 Q. And the signature to it; will you please observe it; in whose handwriting is that?

A. That is his signature.

Q. Will you look at this portion of the envelope which has also been marked by Sabert M. Casey, Exhibit C, and state in whose handwriting the address on that letter is?

A. That is also his.

Q. Now, as to the color of his hair; what would you say as to that Miss Walter? A. Very dark brown.

Q. How would it compare with the color of your hair?

A. I think it was somewhat similar to the shade of my own. Of course, mine is streaked with gray now.

Q. As to the shape of his nose, how would that compare with yours? A. It was similar to mine.

Q. And as to his teeth?

A. They were very much like mine.

Q. Would you have any objection to showing your teeth to the jury? A. No sir.

Q. If you will, please. The witness does so.

Q. I think you said his teeth were perfect?

A. They were, yes sir.

Q. Will you look at the picture which is marked Exhibit V, and state to the jury whose picture that is, if you know?

A. Yes, that is a picture of brother Adolph.

Q. Now, will you please look at the picture marked Exhibit No. 29 and No. 30, and state if you knew the person in life of whom those are pictures?

A. Yes, these are pictures of my brother.

By Mr. Green: I desire to place certain of these pictures in the hands of the jury, and I shall request Miss Walters to remove her glasses, and I would like to have the jury compare this side view picture with the profile of the witness.

By Mr. Hutchings: We object to that as incompetent, irrelevant and improper.

By the Court: It may be done. To which ruling the plaintiff at the time excepted.

Q. In regard to the hair of your brother, Frederick Adolph, you may state whether it was straight or otherwise?

2231 A. His hair was what I would call wavy.

Q. When he talked or laughed, did he show his teeth? A. Yes sir, quite distinctly.

Q. Which teeth did he show when he would laugh?

A. He would show them all, because he would generally laugh heartily.

Q. Upper and lower both? A. Yes sir.

Q. When did you first see the pictures marked No. 29 and No. 30 if you remember, or pictures similar to them?

A. Were they the last ones you showed me?

Q. The pictures of the body?

A. The beginning of January, 1880.

Q. Where was it that you saw them?

A. At our house at home.

Q. Who had them? A. Father.

Q. Do you remember what time of day it was?

A. I do not.

Q. Who was present at the time he showed you those pictures?

A. Father and mother, my two sisters and myself.

[Q.] By Mr. Barker: We offer to prove by the witness Fannie Walters, that the two pictures, to wit, exhibit 29 and 30, were shown to the witness and her sister Elizabeth Rieffenach, by their father Daniel Walters in his house; that his daughters (the witness and Elizabeth Rieffenach, saw them and immediately recognized them as pictures of their brother, Frederick Adolph Walters); that before the mother had seen the pictures, the father accidentally dropped one of the pictures on the floor; that while it was being picked up, the mother saw it, and exclaimed, "Oh, it is my son," and immediately fell in a swoon.

The plaintiff objected to the offered evidence as incompetent, irrelevant and immaterial and hearsay.

By the Court: The part in parentheses, you may show; that which is not in parentheses, is excluded.

To which ruling of the Court, the defendants and each of them at the time duly excepted and still except.

Q. Now, you may state whether or not you recognized those pictures when you saw them at your home? A. I did.

2232 Q. Whom did you recognize them as being pictures of? A. Of my brother Adolph.

A. How soon after you were shown them did you recognize the pictures? A. Immediately; as soon as I saw them.

Q. What was your mother's age at this time?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

A. She was about 55; in her 55th year.

Q. Did you ever, at any time, erect a monument to your mother?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and hearsay. Objection sustained, the defendants and each of them at the time duly excepting.

The defendants here offer to prove by the witness that the following inscription is inscribed upon the tombstone erected by Daniel Walters in the grave yard at Fort Madison:

Frederick Adolph Walters, [both] January 21, 1855. Died March 17, 1879. Interred at Lawrence, Kansas.

The plaintiff objects to the offer as incompetent, irrelevant and immaterial and hearsay. Objection sustained, the defendants and each of them at the time duly excepting.

And in answer to cross interrogatories propounded to her by L. B. Wheat, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. When did you say your mother died?

A. March 3, 1888.

Q. And when did you say that these pictures that have been mentioned were exhibited to you?

A. These of the body, of the corpse?

Q. Yes, at the time you were just speaking of, I mean the time of the exhibition you were just speaking of.

A. At the beginning of January; I don't know the date; it was from the 3rd to the 5th of January, 1880.

2233 Q. Your mother died some eight years after that?

A. Yes sir.

Q. Miss Walter, will you please look at this picture marked Exhibit No. 36, at this trial, and state whether you recognize that as a picture of any person?

A. Yes sir, that is a picture of my brother Adolph.
Q. The one— A. That died.
Q. That we have been talking about?
A. When was that taken?
A. I could not tell.
Q. I will ask you to look at Exhibit No. 33 at this trial and I will ask you to tell me whether you recognize that as the picture of any person?
A. I should think that a copy of the other small picture.
Q. You think it is copy of this? A. Yes sir.
Q. Now, state if you recognize that No. 33 as the photograph or picture of any person? A. Yes sir.
Q. Of whom? A. Of my brother.
Q. The same brother? A. Yes sir.
Q. Called Frederick Adolph Walters, is that right; he is the one you recognize it as? A. Yes sir.

Q. In this comparison of noses, I will ask that the jury be permitted to look at this picture Exhibit 10, and to compare it with the lady's nose.

By Mr. Ware: Consent.
By Mr. Wheat: I will also ask that the jury compare the nose in exhibit 33, and also in the little one, No. 36.

Q. Your deposition was once taken in this case, was it not?
A. Yes sir.
Q. I will ask you if that is your signature, Fannie Walters?
A. Yes sir.
Q. You gave your deposition in this case at what time?
A. I could not tell you.
Q. As near as you can remember?
A. The beginning of 1880; some time in the summer of 1880.
2234 Q. Well, the beginning of 1881, was it not?
A. I could not tell exactly.
Q. I will ask you if you remember a man by the name of H. B. Munn? A. Yes sir.
Q. I will ask you if you remember a man by the name of Tillinghast. A. No sir.
Q. You don't remember a man named Tillinghast?
A. No sir, never heard of him.
Q. In connection with this case? A. No sir.
Q. Were you present when Miss Kasten's deposition was taken in this court? A. No, sir.
Q. Do you remember a man by the name of Wiseman?
A. No sir.
Q. Can you tell me whether you remember of having seen any of these insurance agents before you saw these pictures?
A. No sir.

Q. You were expecting some pictures when they arrived, were you not? A. No sir.

Q. Who brought the pictures to you? A. Father.

Q. You stated in answer to questions asked you by Mr. Green that your brother's teeth were perfect?

A. Yes sir.

Q. Do you feel sure of that?

A. I am positive of it.

Q. Do you mean to apply that to every single tooth?

A. Yes sir, so far as I know.

Q. Well, how far do you know?

A. I have never known of his having any dentistry done, or complain of toothache.

The plaintiff moves to strike out the answer as not responsive to the question. Motion overruled, the plaintiff excepts.

Q. If I understood you, you said he opened his mouth a good deal, carried his mouth a good deal open in laughing? Showed his teeth a good deal?

By Mr. Green. She has not said anything of the kind.

Q. How was it about that?

A. Please ask the question again.

Q. Did he have his mouth open a good deal or not;
2235 did he carry his mouth open; was he in the habit of having his upper lip raised or not? A. No sir.

Q. Was there anything unusual in that respect, so far as you know? A. No sir.

Q. His teeth were perfect— Compare them with the eye teeth? You said as far as you knew. Now, I want to get at it in detail how far you knew, I mean. Take his eye teeth to start with.

A. So far as I knew, all his teeth were perfect.

Q. I want to ask you some questions with reference to that; I want you to come down to see how far you knew. Take his eye teeth for a basis, take his upper eye teeth to start upon; can you state whether he had any imperfect teeth back of his eye teeth? A. Not to my knowledge.

Q. Was your knowledge sufficient to enable you to state whether he had or not? A. I think so.

Q. You think then if there had been any imperfection in any of the teeth, either back or front of either of the eye teeth, you would know it, do you? A. Yes sir.

Q. Were not some of his teeth broken? A. No sir.

Q. None of them? A. None of them to my knowledge.

Q. Any of them broken off?

A. Not to my knowledge.

Q. Do you think you looked at them close enough to be sure of that?

A. I think I saw them often enough.

Q. To be sure that no corner of any of them was broken off? A. Yes sir.

Q. You feel certain of that? A. Yes sir.

Q. How certain can you be? Are you as certain of that as of anything? A. Yes sir.

Q. Miss Walters, do you remember this dog bite on him?

A. No sir.

Q. You don't remember it? A. No sir.

Q. Do you remember any scar or mark or dog bite on him?

A. Not of my personal knowledge.

2236 Q. I will ask you to state whether at the time your deposition was being taken, whether this question was asked you: "Did you ever know anything about his having been bitten by a dog on the back of one of his legs," and your answer thereto, "Yes sir."

The defendants objects to the question as not a proper way to impeach the witness. The Court overruled the objection, to which ruling of the Court, the defendants and each of them at the time duly excepted.

[—] "Did you ever know anything about his having been bitten by a dog on the back of one of his legs?"

A. Not from my personal knowledge; only from hearsay.

Q. And did you not to such question asked you in that examination answer, "Yes sir?" A. I don't remember.

Q. I will call your attention to page 60 of this bundle of depositions where it speaks about your being sworn. I just want to draw your attention to it. At page 100, you will see what you said was your signature. I wish you would run over these pages and see if that is your deposition taken some time in 1881.

A. I have no doubt but this is my deposition. I don't know as I need to go through it; there is no need to refresh my memory for I didn't swear to anything except that I remembered and I don't intend to swear to anything except what I remember at the present time. I think that is all that is expected of me at the present time, is it not, Judge?

Q. Do you remember the questions of dog bite on your brother, Frederick Adolph Walters, being asked you at that trial?

A. I don't remember to-day, no sir.

Q. I will have to offer the whole deposition in evidence, and then ask her particularly about particular parts of it. I offer the whole deposition in evidence.

The defendants object to the offer of the same as incompetent, irrelevant and immaterial.

By the Court: The rule as to contradicting a witness
2237 is very clear. If you contend that she made certain statements in that deposition the reverse of what she now testifies, call her attention to the particular statements and if she denies having made them, or says that she does not remember, and they are contradictory to what she says now, then you may subsequently call her attention to the deposition.

Q. Question 4. Will you give a description of the personal appearance of your brother Frederick Adolph Walters, beginning with the hair?"

Wasn't that question asked you? A. I don't remember.

Q. I will skip down to the next place where I find his name mentioned.

Wasn't this question asked you: "Do you know where the last letter you say your brother Frederick Adolph Walters wrote to your sister from Wichita about March 5th, 1879, is." Do you remember that question being asked you?

A. I don't remember, no, sir.

Q. To which you answered: "I don't, but I know where there is one that can prove." Do you remember that answer to such a qestion as that? A. I do not.

Q. Now, when your deposition was being taken, were you not asked this question: "Q. Do you know anything about his having been bitten by a dog on the back of one of his legs?" to which you answered "Yes, sir." Do you remember that question and answer being asked?

A. I don't remember, no, sir; I don't remember that answer.

Q. Then, wasn't the next question asked you, "Did you ever see the place where he was bitten," to which you answered, "Yes, sir." A. I don't remember.

Q. Do you remember such a question being asked you as that? What is the fact about it; did you ever see the place where he was bitten I am asking you the question now; did you ever see the place where he was bitten?

A. I really don't remember whether I saw it or just have it from the rest of the family, their speaking of it; I don't remember that I ever saw it.

2238 Q. You don't remember that such a question was asked you? A. No, sir.

Q. You have already answered that you don't remember answering? A. Yes, sir.

Q. What is the fact as to whether, what do you say the fact is; what is the fact now as to whether you saw where he was bitten?

A. Of my own knowledge, I don't know. It was just what I heard from the family.

Q. It was family talk? A. Yes, sir.

Q. Now, the next question: "(68) State where it was as near as you can remember," to which you answered, "I think it was in the calf." Was that question so answered by you?

A. I suppose so or it would not have been down there; I don't remember.

Q. Can you tell me anything of your own knowledge where that dog bite was; state where it was as near as you can remember? A. I don't remember anything about it.

Q. Don't you remember such a question being asked you, and you answered, "I think it was in the calf?"

A. I don't remember.

Q. With reference to the hair of your brother, state whether it was coarse or fine?

A. Why, it was medium; it was not real fine, and was not coarse.

Q. I will ask you if on that examination, this question was asked you: I will ask you this: Was your brother's hair coarse or fine I am asking that question now?

A. I think it was medium; it was not real fine nor real coarse.

Q. On that examination, when you were giving your deposition, were you not asked this question: "Was your brother's hair coarse or fine?" and if you did not to that, make answer: "Rather coarse." A. I don't remember.

Q. You have attended this court at every trial of this case?

A. I think all but one.

Q. Which one did you not attend?

A. The one that was held in 1888.

Q. At all the other trials, you have attended?

A. I think I have.

Q. And testified as a witness? A. I think so.

2239 Q. I will ask you if, at the court-house in Topeka, when this case was being tried before Judge Thomas and a jury, you did not—You attended the trial in 1895?

A. I think I did.

Q. You remember that trial, do you not, before Judge Thomas, in 1895? A. I think I do.

Q. Ain't you certain? You said you attended all the other trials? A. I don't remember but I am almost certain I did.

Q. You are certain that you attended all of them except the trial of 1888? A. I think I did.

Q. I am not speakin of 1885, but 1895; you think you attended before Judge Thomas? A. I think so.

Q. Now, I will ask you if in that trial, this question was not asked you by Mr. Hutchings: "Now, about this dog bite, you have seen that, have you not?" to which, did you not answer: "Years ago when I was quite young."

[—] I don't remember.

Q. What about the fact? A. Sir?

Q. How about the fact? How is it about the fact? Did you see that dog bite?

A. I don't remember now whether I did or not.

Q. You don't remember now whether such question was asked of you and you made such answer or not?

A. No, sir, not to-day.

Q. I will ask you if this question was not asked you by Mr. Hutchings at that trial: "I understood you to say this morning that you didn't know anything about the dog bite except from hearsay; how is that; you have actually seen it?" To which you answered, "I have seen it when I was younger." Didn't you make such an answer to that [to that] question?

A. I don't remember to-day; I suppose I did at that time.

Q. Well, is it a fact that you did see it when you were younger?

A. I say I don't remember to-day whether I did or not.

Q. You don't remember whether you did or not?

A. No, sir.

Q. You can't say whether you made such answer or not?

A. No, sir.

Q. I believe you mentioned something about his nose in answer to one of Mr. Green's questions, did you not, you
2240 gave a description of his nose. Now, with reference to his nose. If I understand you, you remember his nose?

A. Yes, sir.

Q. Now, I will ask you whether his nose was crooked sidewise or not? A. Not that I knew of.

Q. If it had been crooked sidewise, you would have known it would you not? A. If it was noticeable, yes, sir.

Q. Didn't you notice him enough to have noticed it if it had been out of line? A. If very much so, I think so.

Q. If it had been any out of line, wouldn't you have noticed it? A. I don't know; I suppose so.

Q. You think you would don't you?

A. Yes, if it was noticeable.

Q. So that you think his nose was not crooked sidewise?

I think not.

Q. I will ask you in reference to this hearing from Wichita. When was it that you heard from him from Wichita?

A. It was the beginning of March, 1879.

Q. About what time did you hear from him?

A. I could not tell you it was all the way from the 2d or 3rd to the 5th.

Q. Somewhere from the 3rd to the 5th that you got a letter or whatever way you heard?

A. It came about from the 3d to the 5th.

Q. You are sure of that, are you? A. Yes, sir.

Q. Can you tell me whether you ever heard from him more than once from Wichita? A. I cannot, no, sir.

Q. Do you remember of hearing from him more than once at Wichita? A. I don't remember to-day, no, sir.

Q. Where did you hear from him last before hearing from him at Wichita?

A. I don't remember; I think it was Emporia; I am not certain.

Q. Can you tell me when that was that you heard from him at Emporia? A. No, sir.

Q. Can you fix it at all within a month? A. No, sir.

Q. Can you fix it within two months?

A. Oh, it was not that long.

2241 Q. Fix it as near as you can then, please.

A. I would rather not for I cannot tell you, definitely; it might have been two weeks or a month.

Q. I wish you would do the very best you can to fix it when you heard from him at Emporia.

A. I expect it was—

Q. I don't want what you expect; I want your recollection.

A. I don't know; I don't recollect.

Q. Don't recollect when? A. No, sir.

Q. Do you recollect whether you heard from him more than once at Emporia? A. I do not.

Q. Where did you hear from him last before you heard from him at Emporia? A. I don't remember.

Q. Have no recollection? A. No, sir.

Q. How often did you hear from him during January and February, 1879? A. I could not tell you how often.

Q. I only want your memory.

A. I can't tell you definitely, no sir.

Q. Tell as near as you can? A. About every two weeks.

Q. Yet you can't tell from whence you heard from him?

A. No, sir.

Q. Can you remember of hearing from him at any point between Lawrence and Emporia?

A. I can't answer that question as I am not acquainted with Kansas well enough to know; I know different stations that we heard from him in Kansas, but I don't know which was first or last.

Q. You don't know where the places are along between those places?

A. No, I don't know the places between those places, no sir.

Q. Can you remember where you heard from him in December, 1878? Do you remember of hearing from him in Decemer, 1878?

A. Oh, we certainly did, but I don't remember.

Q. I ask you if you remember? A. No, sir.

Q. You don't remember of hearing from him in December, 1878? A. No, sir, I do not.

2242 Q. Then, how can you say that you certainly did, if you don't remember?

A. Why, because we always heard from his regularly.

Q. How can you say you always heard from him, if you can't remember?

A. I can remember that we did, but I can't remember the dates.

Q. I am not asking you now for the specific dates. Can you give me any further reason or answer why you can say that you did hear from him, and yet cannot state where or when?

A. I can only give that answer, that we always heard regularly from him once—

Q. How can you say you always heard regularly from him?

A. Because it was his custom and we had—

Q. You are sure you heard from every two weeks?

A. On an average we heard from him regularly, not regularly every two weeks but on an average; sometimes he would write oftener.

Q. Would it be as much as three weeks between the times you would hear from him?

A. I don't know; it might have been.

Q. Would it be as much as four weeks?

A. No, until after the last time we heard from him, no sir.

Q. Didn't you get letters from him at Sun City and Medicine Lodge and all along that line? A. No, sir.

Q. Did you not get letters from him at Medicine Lodge?

A. No, sir.

Q. You say you never heard from him at Medicine Lodge?

A. No, sir.

Q. Sure of that? A. Yes, sir.

Q. Sure you didn't hear from him from Sun City?

A. Yes, sir.

Q. Sure you didn't hear from him at Medicine Lodge?

A. Yes, sir.

Q. Did you ever hear of his being at Medicine Lodge?

A. No, sir.

Q. In any shape, form or manner?

A. Not until after his death, no sir.

Q. I am asking about hearing from him? A. No, sir.

By Mr. Wheat. I move to strike out what she said about after his death as not responsive. Stricken out.

Q. Did you ever hear from him more than once, did you or any member of your family ever hear from him more than once at Wichita?

2243 A. I don't remember, no sir, hearing more than once.

Q. That is the time you have already mentioned as from the 3rd to the 5th of March, 1879? A. Yes, sir.

Q. That is the only time? A. To my best recollection.

Q. Can you remember of hearing from him more than once at Emporia? A. I can't remember, no sir.

Q. You have no remembrance of more than once at Emporia? A. No, sir.

Q. You can't remember the time when that?

A. No, sir, not definitely.

Q. Can you come within a month of the time?

A. I might but it would be guess work.

Q. I don't want guess work, except what is a recollection in your mind? A. No, sir, I could not.

Q. Didn't you hear that he was working in Emporia for a considerable length of time? A. Not from him, no, sir.

Q. That is all I am talking about from him? A. No.

Q. I don't want to be misunderstood about that; I want to know what you heard from him?

[A.] Didn't you hear that he worked in Wichita for a considerable time? A. Not from him, no sir.

Q. It is from that my questions are applicable.

Q. In your examination in chief you mentioned Leavenworth as one of the places that you heard from him?

A. Yes, sir.

Q. Did you mean Leavenworth, Kansas? A. Yes, sir.

Q. This place? A. Yes, sir.

Q. Can you tell me whether you heard from him as working for Simmons & Staiger? A. No, sir.

Q. Did you hear from him as working for Staiger alone?

A. No, sir.

Q. Did you ever hear from him as working for Simmons?

A. No, sir.

Q. Did you ever hear from him as working at all at Leavenworth? A. I don't remember.

Q. But you did hear from him as being here in Leavenworth at some time? A. Yes, sir.

2244 And in answer to redirect interrogatories propounded to [him] by Mr. Green, counsel for the defendants, the witness testified as follows, to wit:

Q. Can you tell me, Miss. Walter, as to the relative time of the taking of the photograph Exhibit V and No. 36. Which was taken first if you know?

A. The 36 was taken first; I don't remember when that was taken; but this is later, was taken sometime near Christmas in 1877 shortly before he left home.

Q. That is exhibit V? A. Yes, sir.
Q. And the other was taken prior to that?
A. I don't remember just when; I don't remember the time, no, sir.
Q. Now, when you spoke of hearing from him, did you refer to letters directed to yourself alone, or to yourself and other members of the family? A. To the immediate family.
Q. Now, prior to his leaving there in 1878, where had he been residing? A. Before he left?
Q. Yes. A. At home with the family.
Q. Were you living there at the same time? A. I was.
Q. Where did he make his home when he was in Fort Madison up until the time he left there?
A. With father; with the family.

By Mr. Wheat:
Q. You said that the picture Exhibit V was taken Christmas, 1877. I understood you to say; was that right?
A. Yes, sir.
Q. So that it was taken before 1878? A. Yes, sir.
Q. And this other picture of your brother of which the large picture of your brother is a copy, you say, if I understand you right, you can't say when that was taken?
A. I don't remember; that was taken prior, at an earlier period.

Witness excused.

2245 The defendants and each of them again offer in evidence of James S. Crew, the testimony of J. W. Blythe and the testimony of Dr. E. D. F. Phillips, already offered, and excluded by the court, and read in connection therewith, certain clauses from the policies and application of the defendants, in evidence herein, upon the subject of fraud.

The court denied said offer, to which action and ruling of the court the defendants and each of them duly excepted.

2246 C. H. Nettels, a witness produced by the defendants, being duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. Barker:
Q. Have you read the testimony of Mrs. Hillmon given upon the trial of 1885 as found in this book? (Handing book to the witness.) A. Yes, sir.
Q. Does she anywhere in that testimony testify that her husband had a mole upon his back?

The plaintiff objects to the question as not being a proper way to impeach a witness. Objection overruled, the plaintiff excepts.

A. No, sir.

Cross Examination

By Mr. Wheat:

Q. Was Mrs. Hillmon asked any questions about a mole on her husband's back?

A. She was not; the word mole is not mentioned in her testimony.

Witness excused.

And here the defendants and each of them having concluded their evidence rested their causes.

2247 And thereupon, at the conclusion of the defendant's evidence, the plaintiff in order to further maintain the issues upon her part, offered and adduced evidence in rebuttal as follows, to-wit:

2248 C. H. Nettles, a witness already sworn in the cause, testified in behalf of the plaintiff on rebuttal as follows, to wit:

Direct Examination

By Mr. Wheat:

Q. You reported the testimony given upon the trial of the Hillmon cases in 1895. A. Yes, sir.

Q. Was Fannie Walters a witness at that trial.

A. She was.

Q. Did you take down her testimony correctly? A. I did.

Q. I will ask you if on the trial in 1895, she was asked this question on cross examination: "Now, about this dog bite; you have seen that, have you not?"

A. I have no independent recollection of the question being asked but the transcript from which you are reading is a transcript of her evidence given upon that trial made by myself and it is correct. I should say she was asked that question.

Q. And did she to that question make the following answer: "Years ago when I was quite young." A. Yes, sir.

Q. Was this question put to her and this answer made thereto at that time: "I understood you to say this morning that you did not know anything about the dog bite except from hearsay; how is that? You have actually seen it? A. I have seen it when I was younger."

A. Yes, sir, that question was asked and that answer given.

Cross Examination

By Mr. Barker:

Q. I will ask you if upon her direct examination at that trial, she was asked the following questions and made the following answer thereto:

"Q. Do you know of any identifying marks, I will call it identifying marks, that your brother had, of your own knowledge. A. Nothing in particular; I do not know of my own knowledge, no sir.

2249 "Q. Do you know whether he had a scar; did you ever see it? A. I may have seen it, but it has been so long ago that I expect that scar—well, I do not remember except from hearsay."

A. Yes, those questions were asked and those answers given by her.

By Mr. Wheat: I now read from the deposition of Fannie Walters, taken at Fort Madison, Iowa, and on file in this case, questions 61, 62, 63, 64 65, 66 and 68, as follows:

61. Have you any knowledge of your brother, Frederick Adolph, ever being hurt in any way.

Ans. I have no knowledge. I have been informed.

"62. What injury or hurt have you been informed he had?

Ans. A cut on one of his hands.

"63. Did you ever see the place where he was cut?

Ans. No, sir.

"64. Did you ever know anything about his having been bitten by a dog on the back of one of his legs? Ans. Yes, sir.

"65. Did you ever see the place where he was bitten?

Ans. Yes, sir.

"66. When did you last see it?

Ans. As much as twelve years ago.

"68. State where it was as near as you can remember?

Ans. I think it was in the calf.

By Mr. Green: Q. In that connection I desire to read now all that she said in regard to that matter, in regard to the scar.

(Mr. Green now reads questions 64, 65, 66 and 68 already set forth above. Also the following questions and answers:

"67. It was on the back of his leg just above the ankle?

Ans. I don't remember."

2250 "71. Can you state about how large the scar was?

Ans. I cannot.

"100. Can you state when your brother Frederick Adolph received that dog bite? Ans. I cannot.

"101. Do you remember who he used to work for at the time? Ans. He did not work at all.

"102. Whereabouts was he when he received the bite?

Ans. In Fort Madison, opposite his home.

"103. Whose dog did the biting?

Ans. I can't answer that question by my own knowledge.

"104. Whose dog was it reputed to be?

Ans. Mr. George Rieffenach.

"105. Was he at the time of that dog bite or directly afterwards engaged at working in a cigar shop here in Fort Madison? Ans. No, sir.

"106. Do you remember the circumstance of his being bitten? Ans. I do not.

"107. Then of your own knowledge you do not remember when he was bitten? Ans. I do not.

"121. You stated in your cross-examination that your brother when a child had been bitten by a dog and that the last time you saw it was some twelve years ago. Now, when you last saw your brother's leg where the bite was supposed to be, how did it appear to your best recollection?

Ans. I don't think I can give a description of it; I was too young at the time."

2251 Dr. S. F. Neely, a witness produced by the plaintiff in rebuttal, being first duly sworn, testified as follows, to-wit:

Direct Examination

By Mr. Atwood:

Q. Your name, please, doctor? A. Shaw F. Neely.

Q. Residence? A. Leavenworth city.

Q. Are you a physician and surgeon? A. I am.

Q. What medical institution did you graduate from?

A. I graduated from the medical department of the Pennsylvania College of Gettysburg, and also graduated from the medical department of the University of Pennsylvania.

Q. I will ask you to state to the jury in your own phraseology—to give a description of a normal vaccine sore, the way it appears?

The defendants and each of them object to the question as not proper rebuttal. Objection overruled, each of the defendants duly excepts.

A. When vaccine lymph has been introduced into the system of a person, who had not been previously vaccinated, either by puncture or abrasion of the cuticle, there is usually very little manifestation of any kind except it might be a little redness due to irritation, which it is not specific at all, until after the 48th hour, or until after the second day; then at the point or the points of the insertion of the lymph there is a local engorgement or swelling and elevation. That is designated by the authorities as the papule. On the summit or top of the little elevation, from the third to the fourth day appears ves-

cicle; it contains a clear liquid. It corresponds in shape usually or always, to the shape of the wound at which the virus was introduced; that is, if it be a small puncture, it is circular in shape; if the abrasion be lengthy it is not circular but oval in shape. That vesicle continues to increase in size until about the end of the 8th day from the insertion of the
2252 lymph. It has a peculiar appearance in this: That the summit of it, the top of it, is depressed, is what the authorities say umbilicated. That term is applied to its resemblance to the tucking in of the navel, the umbilitis. That vesicle is divided in its interior, by partitions of tissue, and if it be punctured, there is only a limited amount of oozing of the contents of it because it only comes from the segments of the vesicle that the pucture involves. As I have said, it continues to increase in size until about the end of the 8th day, and then around the vescicle or vescicles appears an areola of inflammation; the parts become reddened usually to the extent of an inch or three inches perhaps in diameter; if the lymph has been inserted at more than one point that redness will run together and coalesce, in the language of the authorities; sometimes the redness extends beyond that areola, it extends up and down the arm and along the course of what we call the lymphatic vessels, that is, the little vessels that connect the glands, especially of the arm. This areola and the size of the vesicle increase until about the end of the 10th day, after which it decreases, the redness and the inflammation subside, and at the center of the vesicle it begins to dry and the formation of a crust or scab commences at that particular point and increases until the end of the 14th or 15th day. By this time, the inflammatory pustule or the areola as you might term it, around the pustule— I have gone just a little too fast. Before this 14th day, before the drying of the scab, the contents of the vesicle changes, and what was in the vesicle becomes opaque and muddy, and gradually yellowish, or changes from a vesicle to a pustule; from a clear liquid it changes to a yellowish, or pus; from a clear liquid to a yellowish liquid or pus, and it is the drying of that pus that forms the scab on the tissues that are adjacent to the contents of the pustule. Now, ordinarily, as I have said, by the 14th or 15th day, that scab is complete, the period of dessication, in other words, has become complete, and then the tendency is to the
2253 healing up of the sore underneath the scab; it becomes covered with new cuticle and separates from the circumference to the center of the crust and by the end of the 20th to the 25th day in a natural case, the scab is cast off of itself. Now, that is the course of a natural vaccination. It is modified, however, at times by different circumstances. The circumstance of age in itself modifies to an extent the

character of a vaccination. It is not so speedy in the person of a child as it is in a grown person. Climate has some effect on its course, and what we call individual peculiarities, or susceptibilities of the system, idiosyncracies, professional men call them, influence the course of a vaccination. In some persons it has no effect whatever; they are wholly insusceptible to the influence of the vaccine lymph. In others, they remain insusceptible for a number of years, and then vaccination will take as it is ordinarily stated. Others will take vaccination but once, and never again. I am an illustration, in so far as my present age is concerned of that. I was vaccinated once; I have been vaccinated a great many times since and have never taken vaccination a second time. There are others whom it will protect for a number of years and re-vaccination will then take. Persons whom have once been vaccinated, and are re-vaccinated—the sore may pursue a normal course, or about the course I have described. In others who have been re-vaccinated, the course of the vaccination is not as I have described, but it may vary; it may come to a sudden termination at one of its stages, and the crust will form much earlier than at the period I have stated. In some, in many, on the other hand, the crust will not be detached until a much later period. I have cases of my own where the original crust was not detached for nearly three months. There are also cases where the appearance of the vesicle does not occur until much later than the 4th or 5th day. I have personally known of one case, at least, where I did not discover the vesicle until as late as the 9th day.

2254 Q. Does that conclude your answer, doctor?

A. Practically.

Q. You say the duration of the inflammation of the sore, to use the language that comes readily to the layman's lips, is dependent on a measure, upon the surrounding circumstances and condition of the patient; is that a fact?

A. Yes, and also dependent, I may state, upon the character of the virus used.

Q. Bovine virus?

A. Yes, bovine virus, that is, virus taken from a cow; it is more potent in its effect upon the system than virus that has passed through the system of individual. It has a magnified effect.

Q. When you say more potent, do you mean by that that it makes the sore sorer? A. Yes.

Q. And prolongs it?

A. Prolongs the duration of it, yes.

Q. How about climatic conditions, whether or not exposure to the cold would affect it, and if so, how?

A. Well, climate has some effect.

Q. I don't think you quite grasped my question. Suppose during the winter months or the spring months a man was [—] good deal of moving about in a wagon, and camping out on the ground over night, exposed to the weather in that way to the cold, would that tend to have any effect upon a sore in the way of prolonging it or not?

A. I should say not materially, unless the cold affected, that is, I mean directly; that is, unless the cold affected the general system in some way; the fact that a vaccinated person was knocking around would show of course that he was subject to external irritating influences, and that probably would have a greater effect than anything else. I failed to state to the jury that any irritant applied to the sore will intensify the inflammation, and perhaps prolong the period at which the crust would be shed, for instance, the rubbing of the clothing or an injury received on the arm; of course, all those things would have a very material influence upon the duration of that sore.

2255 Q. Where the injury or irritation that you speak of augmented the inflammation, would that tend to prolong the period that the sore would appear upon the arm?

A. Yes, injuries certainly would.

Q. Now, you spoke, as I understood you, at the 12th or 14th day, that there was an elevated tendency of what I will call the scab, a tendency to come off and heal up. Did I understand you correctly when I understood it that way?

A. Yes, I said when the crust had been formed, when the period of drying or dessication is complete, that then the healing process proceeds from the circumference of that sore proper, not from around the inflammatory blush that is around the areola that I spoke of, but from the circumference of the sore proper, and a new cuticle is formed underneath the scab, and from 6 to 9 days, from the 20th to the 25th day, that crust is thrown off by nature, and it leaves a big cicatrix or mark which I did not describe.

Q. Describe that mark; is it durable?

A. It is usually permanent; not always.

Q. When you say that it will be thrown off in 20 to 25 days, you mean where it is absolutely normal?

A. Where it is absolutely normal it will be thrown off of itself.

Q. But where these extraneous conditions that I spoke of, injury or rubbing or anything of that kind come in, then is the period prolonged or shortened? A. Prolonged.

Q. You say that you have an instance in your mind where the scab remained upon the arm for three months?

A. I will not state the definite time, but the instance; I understand the gentleman will testify here as a medical expert,

Dr. Walters was the man; he can state positively for himself as to the course of his vaccination.

Q. Now, when this pus, what I will call matter, this yellowish substance that appears in the pustule dries and this hardened crust is formed, in the first instance, what is that known as, primary or secondary or what sort of a scab, if it has any name similar to that?

2256 A. Well, you can properly designate it as a primary crust, but let me explain about that. That is ordinarily the only crust that is formed; the secondary crust is only the result of accidental inflammation.

Q. In the event that the scab after it arrives at this stage that you spoke of as being loosened around the edges, is it then easily detached from the arm or the reverse?

A. It is easily detached.

Q. A comparatively slight blow or push would remove it when it comes to that stage; I am speaking of an accident.

A. I don't know what you mean by comparatively slight.

Q. Of course, if it is knocked off, it has got to be knocked off by some force?

A. Yes. I will state that the crusts that form on persons that are vaccinated are very frequently prematurely detached.

Q. Do I understand you mean that they are prematurely detached, that they are knocked off before they would naturally fall off?

A. In children, the rubbing of their clothes, itself will, or accidental injury.

Q. When that takes place—prematurely detached, I will put it, or knocked off before in the course of nature they would come off, if any sore or scab is formed then, what name is sometimes given to it?

A. Where it is prematurely detached, while there is a certain degree of inflammation remaining on the surface, where the cicatrix will form underneath the primary scab, there would be perhaps what you would understand as a secondary scab form, or crust, the thickness of which would largely depend upon the extent of the inflammation.

Q. Is the normal vaccine scab of average thickness; I mean, does one resemble the others in thickness; I express myself rather awkwardly, but I think perhaps you get what I mean?

A. The normal vaccine crust should contain nothing but the results of the drying of the pustule. But if there be underneath a degree of inflammation, there may be tissues underneath that crust attached to the scab which would

2257 materially thicken it. For instance, ulceration may occur at the base of that crust, and it may involve the attachment of considerable tissue, that is underneath or at the base of that scab.

Q. I think you used the expression as the inflammation progresses there was induration and that sort of thing, meaning as I understand, thickening, and what I and perhaps the jury would call inflammation manifests itself?

A. You do not apply your remarks to the crust?

Q. No, I am speaking of the whole sore.

A. Now, that induration that you hear of as applied to vaccination is the result of the inflammation surrounding the vaccine sore proper.

Q. Yes, that is the way I understood it.

A. And the induration is round in the neighborhood of the areola I have described.

Q. The areola I think you said, was colored?

A. It is the colored portion of the skin; every man who has been vaccinated will understand what that means; it is the discoloration around the sore.

Q. I have understood it that way, as indicative or as indicating the whole sore, or the whole swelling; the areola you designate the color kiven given by the congestion of the blood vessels at that point?

A. That is my understanding, that the areola designates the inflammatory discoloration around the pustule, as it is applied to a vaccine sore.

Q. Now, will that inflamed condition—I will use that word to indicate the thickened—the swelling that is found there on the arm under these condtions, is that sometimes augmented in prolonged induration by accident or injury or may it be?

A. Oh, yes.

Q. In the light of what you have just said, I will ask you whether or not it is anything extraordinary from a medical standpoint to find a vaccine sore very much prolonged beyond 20 to 25 days from the time that the virus was inserted?

A. It is a very common occurrence, especially in my army experience, I may add.

Q. Were you a surgeon in the army?

A. I was an assistant surgeon.

Q. You were going to say that the extending beyond the 25th day was a common occurrence in your army experience?

A. Yes sir.

2258 Q. When the pustule is formed, that as I understand, is what you call the sore; the place where the matter is. Is that the pustule?

A. Yes, where the pus is.

Q. When that is once formed, I will ask you whether or not all the tissues, the skin at that point, is destroyed, so that there is no piece of skin at that point, I mean the outer skin?

A. I do not understand your question, but I think I can make it plain; I think I have your idea in the question. As I understand you, you wish to know as to whether the vesicle

or the pustule carries to its surface the whole of the skin, raises up the whole skin?

Q. No, that is not what I mean; I mean whether or not if all the pus was removed from that little pustule, all the matter, or the liquid then in the pustule was removed, would you not be right down on the flesh as distinguished from the skin?

A. No, sir.

Q. Would not? A. No, sir.

Q. What portion of the skin is destroyed if any portion of it is by the presence of this matter, this pus?

A. The vesicle, and also, of course, the pustule would have the same covering over its surface that the vesicle had; it simply carries up with it a part of the epithelial layer of the skin.

Q. Explain what that means.

A. A part of the cuticle, a part of the scarf skin; you understand what that means, the scarf skin?

Q. That which raises up when there is a blister?

A. Such as would be raised up as the covering for a blister. The true skin would lie underneath the contents of that vesicle and pustule, and would not be destroyed during the progress of the vaccination unless ulceration should occur underneath that pustule, and destroy it in that unnatural way.

Q. Now, at the 12th or 14th day, at the time you described the scab as tending to loosen around the edges, which, as I understand you, if the thing was permitted to pursue the normal course, would finally result in the shedding of
2259 the scab, would the scab be so closely adherent that it could not be picked up, could not be picked up with a sharp instrument like a knife?

A. I have never seen a vaccine scab that I could not detach with a knife.

Q. I mean by detached, not by cutting it off, of course, but by picking it up? A. It is usually easily detached.

Q. That is what I mean. What I am trying to get at is this, you have described, as I understand, that at the 14th or 15th day, along in that neighborhood, the scab is in such shape that it could be easily detached?

A. Well, before that time, before it dries, before there is perfect desiccation, it is easily detached then because there is pus underneath it, and the natural inclination of it after that time is to detach itself in a comparatively few days.

Q. The fact then that a particular sore or scab is so closely adherent, hard to be removed, so much so that it could not be picked up at the edge, I want you to tell the jury whether that is indicative of or appears like a vaccine scab at the 12th or 14th day or not, the fact that it sticks close and is adherent?

A. That has not been my experience with a vaccine scab.

Q. You say you have known that in your army experience, the prolongation of the vaccine sore beyond the 25th day, was a common occurrence. Can you recollect the longest period?

A. It has not been uncommon in my private practice.

Q. As well as your army experience? A. Yes.

Q. You have frequently known of the crust being retained, that is, the non-shedding of the crust, for a much longer period than 25 days? A. A much longer period than 25 days.

Q. What is in your mind; would you mean for 30, or 35 or 40? A. Longer than that even.

Q. Longer than any of those? A. Yes, sir.

Q. So the mere fact that a particular vaccine sore, or the place where a vaccine sore had occurred at a point in a man's arm where the virus had been inserted, the fact that 25
2260 days after that virus was inserted there was found on that arm and at that place, some evidences of the vaccination, that is, swelling, more or less swelling, and a closely adherent scab, would there be anything about such a situation as that to make it impossible that that sore was more than 25 days, or was 25 days old, speaking from a medical standpoint?

A. I think not, sir.

Q. Turning from testimony as an expert relative to medical matters, I want to ask you a question in regard to a matter or two. I will ask you whether or not you were U. S. marshal for the district of Kansas at the last trial of this case?

A. I was.

Q. At the time it was tried at Topeka before Judge Williams? A. Yes, sir.

Q. Your office occasioned you to be in attendance upon the court at that time; is that a fact? As U. S. marshal you were obliged to be in attendance upon the court?

A. I was, most of the time.

Q. I will ask you if you there saw a man by the name of Stuart, Dr. Stuart? A. I did.

Q. The same Doctor Stuart who testified here; perhaps you were in the room when he was testifying?

A. Part of the time. I know Dr. Stuart very well.

Q. He is the same Stuart who testified on the stand here as a doctor on this trial? A. Yes, sir.

Q. Now, I will ask you this question, whether or not at the time, I think on the very day that he testified at the last trial of this case before Judge Williams, in the rotunda of the Throop Hotel in Topeka, on the evening of the day he testified, if, in a conversation with him, this, in substance transpired between you: If you asked him how he could be positive or certain about the identity of that body in the light of all that had transpired, and that he in reply said to you, this: That he was not sure, and when he stripped up the sleeve and saw

these vaccine marks at the point where he had inserted
2261 the virus in the arm of John W. Hillmon, that his doubts were increased. Did he in substance state that at that time and place or not?

The defendants object to the question for the reason that it is not the question that was asked Dr. Stuart, and because no foundation has been laid for such a question.

Q. I will ask you to state if you know Dr. Stuart?

A. Yes, sir.

Q. The same one you testified you saw and had a talk with at the time of the last trial at Topeka when he was a witness and you were U. S. Marshal of this court; is that right?

A. Yes, sir.

Q. Now, I will ask you if in the rotunda of the Hotel Throop in Topeka, on the day when he testified, or rather the evening of that day, that is, the day that Dr. Stuart testified, he stated to you in his conversation at that time and place in substance as follows: That when he viewed the corpse brought to Lawrence, supposed to be the body of Hillmon, that he was in doubt about the identity of the corpse, and when he stripped up the sleeve and saw the sores at the places corresponding with the points at which he had introduced the virus into the arm of Hillmon, that had greatly increased the doubt as to the identity of the cropse. Did he in substance say that?

A. In substance, yes, sir.

Q. Now, adverting just a moment to the sore again. I want to read to you what was given as a description of this sore by Dr. Stuart so as to get your opinion upon
2262 whether or not it discloses such a situation as to a medical man would preclude its being 25 days old or more. In response to a question by Mr. Hutchings to give a description of the sores on the arm of the body, he uses the following language:

"There was a dark spot or sore, two of them, on the arm, in size half to three-quarters of an inch in diameter, perhaps, surrounded by a hardened thickened portion of skin running together between the two more or less. The extent of this thickened hardened condition around the sore was perhaps an inch and a half or two inches in diameter, with the sore in the center; as I said, the sore itself was dark and roughened, not raised much, if any, above the general surface of the skin. That was the general appearance. Then my object in cutting it—as I cut through one of them, made a central incision right across through the center of the sore, passing through the hardened, thickened skin about it for a distance of an inch and a half, removing a piece of skin half or three-quarters of an inch wide, to observe the depth or thickness of

that hardened or inflamed portion of skin surrounding the sore, I found that the thickness varied, I did not take any definite measurement, but I should say from half an inch more or less shading off to the margin of it. The cut surface presented a reddish or pinkish hue still maintaining the characteristics of the inflammation that existed from the vaccination, the central part, the sore. I made an effort to lift up and remove the crust, as it seemed to be, from the other I found I could not do it, it was adherent, I found. Its thickness was very slight, and under the sore was also this reddened and thickened condition resulting from the inflammation and the filling up with blood product." Now, Dr. Neely, I will ask you if that description precludes the possibility or probability that that sore was 25 days old or more?

2263 The defendants and each of them object to the question as incompetent, irrelevant and immaterial and not a proper question. Objection overruled, the defendants and each of them duly except.

Q. State what it does show; what would it show as regards age.

A. May I read that? Is that the testimony at this trial?

Q. Yes, that was asked him at this trial and he said that was a proper description. What does it show about the age, if anything?

A. It does not show anything definitely. May I explain?

Q. Yes, I shall be glad to have you do so.

A. He states that the sore itself was dark and roughened and not raised much if any above the general surface of the skin; that was the general appearance. Then, my object in cutting it—as I cut through one of them, made a central incision right across through the center of the sore passing through the hardened thickened skin about it for a distance of an inch and a half, removing a piece of skin half or three-quarters of an inch wide to observe the depth or thickness of that hardened or inflamed portion of skin surrounding the sore, I found that the thickness varies; I did not take any definite measurement but I should say for half an inch more or less shading off to the margin of it. The cut surface presented a reddish or pinkish hue still maintaining the characteristics of the inflammation that existed from the vaccination, the central part of the sore. I made an effort to remove the crust as it seemed to be from the other; I found I could not do it; it was adherent. I found its thickness was very slight, and under the sore was this reddened, thickened condition resulting from the inflammation and the filling up with blood product. [A.] I take it that [when] he means—when he says under that

sore, under what he supposed to be the crust, in his testimony throughout, he speaks—

The defendants object to the statement of the witness.

Q. Confine yourself to this statement; just this state-
2264 ment of Dr. Stuart.

A. He speaks—I mean simply to say that he describes that vaccination as a sore, that is, the central part; he does not include in his description the inflammation of the skin surrounding the vaccination proper. Now, here is his statement. "The cut surface—

By Mr. Ware: What is the question before the house?

A. I asked to be permitted to explain this business. He says, "I made an effort to lift up and remove the crust, as it seemed to be." He does not assert positively that it was a crust. "I found I could not do it." "It was adherent." He further makes the statement that it was very thin. His description is not inconsistent with the crust of a primary vaccine sore having been shed, in his description of that sore.

Q. I think you said the shedding of the crust occurred somewhere, ordinarily, unless it was prolonged by some means—

A. From the 20th to the 25th day, ordinarily.

Q. Yes sir, and that very frequently some influences act to prolong that much beyond that time?

A. Yes sir. He states that he could not detach it with a knife. If that was an early crust, I mean, a crust that had just matured, a crust which just dried up, say at the 14th or 15th day; if it was a later crust it would not be difficult to detach it, because the processes of nature itself throw it off, and the thinness of the covering of this original sore is not inconsistent with the idea that the original crust had been cast off; it does not preclude the idea that it might have been cast off.

Q. Does that conclude your examination of the reason why it does not show the age?

A. The fact that there was inflammation surrounding that sore, to use his language, does not preclude the idea that it was an older sore. He states here in his answer that that inflammation was greater between the two sores; it would nat-
urally be greater between the two sores, because so
2265 close together, and the inflammation extending from each sore would intensify the conditions in that particular territory.

Q. That might be true even if the primary scab had been shed?

A. That might be true; that induration of the witness, it seems to me, that may be kept up by artificial causes.

Q. By artificial causes, you mean something that happened to the sore? A. Some irritating, rubbing influence.

Q. A blow, or sleeping upon the hard ground?

A. Dye from the clothing getting into the sore, will irritate it very much and the clothing itself. The amounts of the engorgement that he described—

Q. What are engorgements?

A. The engorgement of the blood vessels, the condition of the tissues underneath the surface of that surface and surrounding the surface of that sore, would not necessarily draw an inference as to the age of the sore; I take it that the amount of the moisture due to the engorgement, I mean simply the filling up of the blood vessels, from his description, there was necessarily a leakage from the blood vessels there, an infiltration of the tissues that would be necessary to cause this induration of the tissues and the sore; the filling of the blood vessels in itself would not create that contusion; the other would be necessary. Now, the amount of that contusion, it seems to me, would rather preclude the idea of the drying of a natural vaccine crust at its base, at its surface that it would be attached to the cuticle; but the extreme thinness that he describes is not a correct description of a vaccine crust.

Cross-Examination

By Mr. Green:

Q. Doctor, if I understand you right, the first thing which appears after the insertion of the virus, is a redness of the skin, with a slight pimple, is that correct? A. Yes sir.

Q. Then about the 4th or 5th day, there is what you called a papule formed?

2266 A. Well, what you have just described as the pimple, from about the 3rd to the 5th, appears on the summit of the vesicle.

Q. Up until the time this papule is formed, you would not be able to tell whether you had successful vaccination or not, would you?

A. You would not be able to tell then, Mr. Green?

Q. Yes.

A. Because you might have a papule formed that would occur in an unsuccessful vaccination.

Q. As I understand you you might have papule and not have a successful viccination?

A. Yes, sir. You might have a papule; that has nothing to do with the specific effect of the virus.

Q. But would you [—] able, doctor, to tell from the papule, as to whether it was a papule formed and rising from the vaccination? A. No, sir.

Q. You would not be able to tell that? A. No, sir.

Q. So that if on the 5th day, upon examination you would find a well formed papule, or vescicle—when does the vescicle form?

A. From the third to the fourth day, usually it appears. Then it gradually develops.

Q. Let me ask you in regard to the vescicle; would you be able to tell from the appearance of the vescicle as to whether it was a true vaccine vescicle or not?

A. From the early appearance of it?

Q. Well, the 4th or 5th day?

A. Yes, that would be the earlier appearance. You would not.

Q. Would not be able to tell then? A. No, sir.

Q. So that, if I understand you correctly, you would not be able to tell on the 5th day, we will say, upon the formation of this vescicle, whether you had a successful vaccination or not?

A. No, sir. It would be extremely probably if proper lymph had been introduced at that point, and the papule had formed, followed by the vescicle, it would be extremely probable that that would be a successful vaccination that would proceed in an ordinary course, but you could not tell that.

Q. So that you would say from that, that when Dr.
2267 Stuart examined that vaccination that he had made on the arm of John W. Hillmon on the 20th of February, that on the 25th he could not tell from what he observed then, whether that was a successful vaccination or not?

A. He could tell that that vaccination had taken, but he could not tell positively that it would not absorb at some part of its course.

Q. Then I am mistaken; I have not understood you. I have understood you to say that you could not tell from an examination of this vesicle whether it was a true vaccination vesicle or not?

A. You understood me to say and I did say that you could not distinguish it. Now, I am speaking,—suppose I knew nothing about the man being vaccinated; suppose it was on some other part of a person's body, and I was called to look upon a little vescicle that would usually form from the 3rd to the 4th day, and had not watched its further course, I could not positively tell that that was a vaccine vesicle; I could, perhaps, later in its course.

Q. You could by the 8th day tell? A. By the 8th day?

Q. Yes. Now, we will take now a normal vaccine sore. We will speak about a normal vaccine sore, and if on the 5th day you find a well formed vescicle arising from the vaccination, the virus, then what is the next stage that you would expect to find in that vaccine sore?

A. I would not expect to find a well formed vescicle on the 5th day; I would expect to find a vescicle.

Q. You would find a vescicle there?

A. Yes, but not a well formed one.

Q. If you found a vescicle, what would you expect next? The next stage?

A. I would expect a gradual development of that vescicle; I would expect it during the next three days to acquire certain characteristics, distinguishing—two or three characteristics,—not absolutely so; that is, it would become depressed in the center, umbilicated. Then another characteristic of it would be that it would become cellular, divided up and partitioned.

2268 Q. It forms into cells?

A. Yes, sir. Now, that is not a positive characteristic of a vaccine vesicle; you also find that in small-pox; you have that kind of a vescicle in small-pox; you have it taking that course.

Q. That is what forms the pit; what we call the pit?

A. Well, the pit is a scar, a cicatrix, and the little indentations in the cicatrix, the little depressions that you find there; correspond to the segments or divisions of the vescicle or pustule.

Q. But on the 8th day in a normal vaccine sore, you find now that vescicle developed and filled with lymph, do you not?

A. Yes, sir.

Q. And it begins to dry at that period? A. No, sir.

Q. It does not begin to dry? A. No, sir.

Q. What then causes the depression in the center of the scab?

A. There is no scab there at that period, at the end of the 8th day.

Q. What causes the depression then in the center of the sore? A. The center of the vesicle?

Q. The center of the vesicle?

A. It is due to the tucking in of the center by these partitions of tissue within the vescicle; the vescicle is swollen, bulged out, and the attachment of that tissue underneath cause tucking; that is, the border, the circumference of the vescicle is bulged higher up there than the center, this way. Having my fingers represent those partitions, then the vescicle would bulge out around the circumference by the lymph within the vescicle.

Q. Do you find that appearance in a sore caused by a wound? A. No, sir.

Q. It is peculiar, is it not, to a vaccine sore? A. No, sir.

Q. What other sores do you find it in? A. Small-pox.

Q. That is akin to a vaccine sore; the smallpox sore; they are kindred; one dispels the other?

A. The one protects the system against the other to an extent.

2269 Q. But the stages of vaccine sores correspond somewhat with the smallpox, do they not?

A. It does; the smallpox vesicle presents that same segmentation and umbilication.

Q. Then you would say, wouldn't you, doctor, if you found that character of a sore upon a man's arm, that it was either occasioned by vaccination or the small-pox?

A. Yes, I will make another little modification. Occasionally, you will find, not often you will find that same pitting in chicken-pox; you will find that same depression but not often.

Q. Now, after the 8th day, what is the next stage in the progress of a normal vaccine sore?

A. The appearance of an inflammatory blush around the vesicle, which indicates that the constitution has become specifically involved.

Q. Is that inflammatory blush peculiar to a vaccine sore?

A. You have an inflammatory blush surrounding almost any sore, but when you find this, you find that condition around that vesicle about the 8th day, a little earlier, or perhaps a little later, but ordinarily about the 8th day; it is evidence, additional evidence, if you choose, that that is a vaccine sore.

Q. Now, that inflammatory blush lasts about how many days in a normal case?

A. It begins to decline ordinarily about the end of the 10th day, that is, two days after its appearance.

Q. Then at the 10th day what is the appearance of the vesicle?

A. At the 10th day the contents of the vesicle—it is no longer a vesicle—the contents have changed, it gradually become apaque, in place of being a clear liquid; that is the period in which it changes from a vesicle to a pustule.

Q. What you might call matter? A. Yes, sir.

Y. And then does this pus from that stage begin to dry?

A. About the end of the 10th day ordinarily that pus begins to dry at the center of the pustule.

Q. And about the 13th or 14th day, this pus is dried up?

A. About the end of the 10th day, ordinarily that
2270 process of dessication is continued clear out to the circumference of the pustule.

Q. And then it forms what you might term a scab?

A. Yes sir.

Q. Now, after this scab is formed, then I understand in an ordinary vaccine sore, by the processes of nature, this sore, you might say, begins to heal, and a skin begins to form under this crust or scab from the circumference?

A. From the circumference, I say, from the skin around the circumference of the crust or underneath the crust, that is a continuation of the skin from the circumference inward, a new cuticle is formed underneath that scab from the circumference towards the center, and when that process has proceeded sufficiently far, the scab is cast; it is thrown off, it leaves the sore with this thin delicate cuticle.

Q. Now, when nature begins to form this cuticle underneath the scab then the scab begins to detach itself does it not? A. Yes sir.

Q. And as that process goes on, it heals, you might say; I am not using medical terms, may not properly describe it altogether, but my idea is that this healing process goes on and it heals from the circumference towards the center of this sore?

A. Yes, that is the cicatrix; that would be the cicatrix.

Q. Now, prior to this healing process, the edge of the sore is closely adherent, is it not, to the surrounding tissue?

A. You mean prior to the covering of that cicatrix?

A. No, I mean prior to the time this healing process commences.

[—] It is then attached formly or attached to the surrounding tissue, this scab has not begun to separate at all?

A. No sir, the scab prior to that has not become separate.

Q. Now, this healing process goes on until the 20th, from the 20th to the 25th day, when it has become complete so that the scab will drop off of itself? A. Yes, sir.

Q. Any little flip of the finger or rub or anything would rub it off? A. Yes sir.

2271 Q. Now, would you say in a majority of cases this scab in a normal vaccine sore, would be ready to drop off from the 20th to the 22d day? A. I would say so, yes sir.

Q. I understand you to say further in your direct examination that there may be sores that are exceptions to this rule, which governs the ordinary vaccine sore?

A. Yes, the human system is not governed by any mathematical rules.

Q. But the ordinary rule is that in a majority of cases, from the 20th to the 22d, and from that to the 25th day, the scab is thrown off by nature itself? A. Yes sir.

Q. Now, is there anything, doctor, in the appearance of this vaccine scab, from the texture of it, or the component parts of it, which would distinguish it from a scab formed by a wound?

A. It is probably a little darker; they often speak of these true vaccine scabs, to judge by the books, of the inflammation being of a mahogany color.

Q. Now, as to the substance of the scab itself. I understand you that this scab is formed from this lymph which is thrown up, and which has dried down and formed the scab?

A. The scab is formed from not only the lymph, but from the structures of that pustule, and perhaps there may be attached to the scab underneath some of the products of the inflammation, and some destroyed tissue; some tissue destroyed by inflammation at the base of the scab. But your idea is that the scab is formed wholly of the pus; that is not the case; the scab includes all these elements.

Q. But is it not of a different color, and different texture from a scab which is formed from the drying up of blood, a scab which is formed on a sore produced by a wound?

A. Well, the scab formed by the drying up of pus may be of a little different texture from a scab formed by the drying up of blood, but it is very difficult at all times to determine what the scab was the result of, but the real thing you would judge by would be the color.

2272 [—]Would you say you could tell—a person I am talking now, of experience—could you tell—you have had experience in these matters, could you tell a vaccine scab found on an arm, from a scab which was produced by a wound?

A. Well, if I didn't know anything of its history, of the history of that sore, and the circumstances, like the location on the arm, I would not like to swear very positively as to what kind of a scab it was, if I simply saw the crust and nothing more. As to the appearance and size of the scab, there is very little variety in them because, as a rule, the lymph is not inserted over a very large area or surface; it is either by puncture or a little abrasion, and the scabs, of course, will vary in size owing to the extent of the surface in which the virus is inserted into the system, wherever it may be inserted; but the appearance of the crust, its color, and irregular surface would be the only semi-distinguishing marks. I was going to speak about that irregular surface.

Q. Now, as I understand, a true vaccine scab has a kind of a notched surface around the edge, does it?

A. Oh, it may have just a little mulberry appearance, but that is not a distinctive feature of the vesicle or pustule; it may be punctured and cause oozing of the contents and that would destroy that condition.

Q. I am speaking all the time, doctor, of a normal vaccine sore?

A. Well, I am trying to give you answers accordingly. If you will permit me to explain further, if there be any irregularity of the surface of that crust, it is due to that same division of the pustule that I have described; but a destruction of those partitions, that is, I mean their injury, or anything of that kind, would destroy that effect of the crust.

Q. If it is destroyed through injury, then it would not be a normal sore, would it?

A. It would be a normal sore, yes, that had been subjected to the influence of the accident; but the vaccination would be what you might call a normal, referring to its specific character.

2273 Q. Is it not a fact that a vaccine scab is tougher than a scab formed by an injury?

A. Well, not necessarily, no sir.

Q. Is not a scab formed by the drying of blood more brittle; blood alone? A. Yes sir.

Q. Now, you spoke about this being prolonged by rubbing; would not that simply mean that the inflammation would be continued?

A. The rubbing would affect the degree of the inflammation, and consequently the course of the sore in that respect.

Q. Would the rubbing have the effect of destroying any of these tissues, and allowing the blood to infiltrate into the scab; would that be sufficient to prolong it?

A. Rubbing that would not destroy?

Q. Merely rubbing now [with] surface of the sore by a shirt?

A. Rubbing has the effect of irritating, and increasing the inflammation and that inflammation would extend, not only around that sore crust, as you speak of it, but underneath it, and would influence it in that way.

Q. What effect do you think climate would have upon it, the weather? A. You mean cold weather?

Q. Yes.

A. Not very much, I should not think, unless it would be from cold affecting the subject in some other way than through the sore.

Q. What do you term a secondary scab, doctor?

A. A scab that is formed at the side of the original scab that had been previously cast off.

Q. And when the original scab has been removed from some injury [or] some extraneous force, then you would expect to find a secondary scab, would you?

A. I didn't get the first part of the question.

Q. I say after the primary scab had been removed by some extraneous force, some injury or otherwise, you would expect to find a secondary scab? A. Why, yes.

Q. That secondary scab would be formed largely of blood, would it not?

2274 A. Well, blood and lymph and tissue that was destroyed by the inflammatory process.

Q. Now, is it not your experience that you can tell from the appearance of the scab, whether it is a primary or a secondary scab? Tell it from the condition of the sore?

A. Yes, sir.

Q. Now, up until the time that this scab begins to separate itself, you might say, from the cuticle on the outside, up until the 14th day, would it not be difficult to remove that?

A. No, sir.

Q. As a scab? A. No, sir.

Q. Prior to the 14th, day, supposing the scab should be removed by extraneous force, then you would be able to tell?

A. I have stated that in the ordinary vaccination desiccation is concluded about the 14th day. Prior to the 14th day, there would be more or less— Now, I have also stated that it dries from the center towards the circumference, and prior to that time, there would be more or less pus underneath there, more or less liquid, not just up to the 14th day, but very frequently; you take the surface of that scab that is, the top of it; and you push it down, there is a kind of a boggy feel to it; therefore, if there was liquid around the circumference of the sore, it seems to me it should not be very difficult to detach it.

Q. To detach it as a whole?

Q. You detach the circumference of a vaccine crust, and you will not have any difficulty in taking it off as a whole.

Q. Now, as I understand you, in your direct examination, that it is not infrequent that a person may be vaccinated successfully in childhood and afterwards vaccination take, as we speak of it? A. Yes.

Q. It is not infrequent? A. It is not, no, sir.

Q. Now, the last questions you were asked, and the last answers you gave in your direct examination, were based upon these descriptions which Dr. Stuart gave of that sore, or contained in this paper? A. Yes, sir.

Q. The last questions you were asked were based on this paper? A. Yes, sir.

2275 Q. Doctor, may a person be vaccinated successfully with virus taken from the arm of another?

A. Yes, sir.

Redirect Examination

By Mr. Atwood:

Q. I want to ask you, doctor, whether or not, what we will call, postmortem digestion ever takes place, that is, whether or not food left in the stomach of a person killed accidentally, will be dissolved by the action of the then existing gastric

juice, or whatever things there are in the stomach; do they act as a solvent so as to make a liquid of it?

A. To an extent, yes, sir.

The defendants and each of them object to the testimony as not rebuttal. Objection overruled, the defendants and each of them duly except.

By Mr. Greene:

Q. Now, would there be any such a thing as digestion after death. A. You might call it digestion if you wish.

Q. You say you might call it digestion?

A. I say you might call it digestion. It is solution; it is practically the same thing except that one goes on under vital surroundings, and the other does not; it would simply be solution. You take the digestive fluid of the stomach outside of the stomach and submit food to it, and it is practically the same process.

Q. That is, it dissolves it? A. Yes, sir.

Q. It is not what you call digestion, but it dissolves it; that is, if a piece of meat is put into gastric juice, it will dissolve it?

A. Well, it is digestion; it is practically; it is solution or digestion, just as you choose to call it.

Q. Now, supposing a person had eaten a meal composed of bacon and bread and coffee half an hour before he was accidentally killed, might that bacon and bread be dis-

2276 solved?

A. Under favorable circumstances it might, at least, partially.

Witness excused.

2277 Dr. W. W. Walters, a witness produced by the plaintiff in rebuttal, being duly sworn, testified as follows, to wit:

Direct Examination.

By Mr. Atwood:

Q. Your name is W. W. Walters? A. Yes, sir.

Q. Physician and surgeon? A. Yes, sir.

Q. Practitioner in this city? A. Yes, sir.

Q. Graduate of the Pennsylvania Medical College?

A. Yes, University of Pennsylvania.

Q. How long have you been in practice here?

A. 16½ years.

Q. Speaking in the light of your experience as a medical man, I will ask you to state to the jury whether or not it is anything remarkable or exceptional that a vaccine sore should extend beyond the 25th day?

A. It is exceptional but it is a very common exception; it very often happens.

Q. Have you ever had any particular experience in that line? A. Yes, sir.

Q. What experience have you had?

A. I never had many cases that extended beyond that time, but the one that impressed me is one I had on myself. I was vaccinated in 1878 or 1879 here in Leavenworth, and the vaccination pursued a normal course up to the time of the exfoliation, up to about, along the 20th to the 23rd day—

The defendants and each of them object to the statement of the witness as not competent. Objection overruled, the defendants and each of them duly except.

A. It then pursued the course of an ulcer for three months which had to be treated as a local ulcer. It was a vaccination from the [the] fact that I had been vaccinated, I should judge fifty times since that and it never has taken, which proves conclusively that was not a poisoned wound, but was a vaccination; it continued sore—I have a scar now which shows it very plainly; it continued sore, in a condition of ulceration, for three months.

2278 Q. What experience have you had, if any, in the treatment of smallpox patients?

A. I have seen a great many cases; I have been through three epidemics of smallpox.

Q. When you say been through them, been through them as a physician treating patients? A. Yes, sir.

Q. And of course you speak in the light of the information obtained from that source as well as the authorities?

A. Yes.

Q. Supposing a man would eat a light meal of bacon and such, and within half an hour come to a sudden death, and 17 days after that a post mortem does not disclose any contents of the stomach; would that be anything extraordinary?

A. No, sir, it would be what you would expect.

Q. Will you explain to the jury why that is so?

A. Well, when you decide to eat your meal, of course, there is action going on in the stomach all the time; the gastric [—] is being secreted and thrown out to receive the food, to digest the food that is coming into the stomach, and when you take the food into your stomach there is another preparation which nature has provided to liquefy the food in the stomach to begin the process of digestion; that process goes on as a mechanical as well as a vital process; in other words, that can be done outside of the body as well as in the body; the juice has been taken from the stomach and placed upon food and the digestive process continued just the same out of the body as in it.

Q. This process that you speak of, as I understand it, transforms the food into a new substance, a liquid substance?

A. It makes a solution of it.

Q. And then it is a liquid instead of what it was before, and commences to make this new substance?

A. To make liquid, yes.

Q. And then gravity causes that to be drawn through the tissues in the body, in a dead body, I am speaking of?

A. Yes, sir; gravity would carry it through to the intestines, probably, and a good deal of that liquid would
2279 pass out of the body through the tissues.

Q. Let me ask you, would the fact that the body of the man I have described to you a moment since, would have been carried in a wagon a great many miles up hill and down dale, would that tend to make any difference?

A. Yes, that would promote digestion; the shaking and mixing up of the fluid in the stomach would assist in the digestion of the food that was in there, mix that liquid in the stomach and would also assist in spreading the fluid throughout the body and carrying it into the intestines.

Q. In your opinion as a medical man, would the difficulty of determining the age of a vaccine sore be increased or diminished by the fact that the examination of the sore took place 17 days after death. Have I made my question plain? In other words, when a doctor looked at a vaccine sore on a corpse 17 days old, would he have more difficulty in determining how old that sore was than if he had looked at it in life? A. Yes, sir.

Cross-Examination

By Mr. Green:

Q. Doctor, if you put a piece of meat in a bottle containing gastric juice, what effect would that have upon the meat?

A. It would digest it; that has been done. There was a man by the name of St. John who was shot through the stomach, leaving an opening right through the abdomen into his stomach and he lived for many years afterward with that opening. He was used, he made his living by submitting himself to experiments. Gastric juice was taken out and that process proven.

Q. Now, supposing that bottle with the gastric juice was put in cold storage, would it dissolve?

A. It would interfere somewhat with the process of digestion and if it was frozen it would stop it.

Q. Is it not necessary, doctor, in order that meat shall be dissolved by gastric juice, that it should be subjected to a certain degree of heat?

2280 A. It is not absolutely necessary; it does not check the digestion entirely; it promotes digestion to have it exposed to a certain temperature, the temperature of the body; of course, at the normal temperature, it promotes it, but it does not absolutely arrest it to change that temperature somewhat.

Q. Did you ever try an experiment of that kind, doctor?
A. Yes, sir. I never tried it on a piece of fat meat.
Q. Didn't you find that it was necessary, in order to have that go on that you brought it to a certain stage of heat?
A. Not absolutely necessary; it does progress to a certain degree, but not as thoroughly as it would at the temperature of the body.
Q. Do you think now, doctor, given your bottle of gastric juice and meat, that that would dissolve if the heat was brought down to the freezing point?
A. It would dissolve; I do not say it would digest entirely; it would disintegrate, the meat in this liquid solution would probably disintegrate.
Q. Do I understand you to say a bottle of gastric juice will digest a piece of meat?
A. Will digest a piece of meat under certain conditions.
Q. Doesn't it simply dissolve it, liquefy it?
A. No, sir, well, it does liquefy too; liquefies it through the course of digestion.
Q. Similar to digestion? A. In the body.
Q. In the body?
A. You can put a piece of meat into a bottle of water and in time that meat will disintegrate and become a part of the liquid, losing its identity and shape in which it existed as meat.
Q. Is not that all it does—gastric juice? A. No.
Q. You believe in digestion after death?
A. I do, yes, indigestion after death.
Q. Do your books teach you that? A. Yes, sir.
Q. What work?
A. Well, all the physiologies that I have ever studied.
Q. Just give me the name of the work, please?
2281 A. I don't recollect any just now; I would not like to state the name of the work because I cannot remember; I think I can produce it for you.
Q. Do not the standard medical works put it down that it is not digestion proper, but liquefaction?
A. It is a modified digestion, of course, but it is digestion just the same.
Q. Now, then, you think that after a body becomes cold, that this digestion would still go on?
A. After it becomes cold. I would not say if it was frozen.
Q. I don't mean frozen; I mean after the natural heat of the body has left it? A. Yes, sir.
Q. You say in your opinion that digestion would still go on? A. Yes, sir.
Q. How long would it continue?

A. Continue as long as there was a solution of that gastric juice in the stomach; anything there for it to act upon.

Q. Would the gastric juice flow into the stomach after death? A. I don't think so.

Q. So there must have been enough gastric juice flown into the stomach before the person was killed in order that there should be any digestion?

A. The taking of food into the stomach stimulates the stomach, and the formation of this gastric juice; nature has provided that the amount of gastric juice should be sufficient to digest a meal.

Q. But it does not all flow in at once?

A. No, it has been flowing in for some time.

Q. Flows in afterwards, does it not?

A. Yes, continues to form.

Q. And if sufficient gastric juice had not flown into the stomach at the time of death, why then it would not digest the food perfectly?

A. I do not believe there is a formation of any more gastric juice after death; the vital processes stop.

Q. Do you know how long it takes to digest bacon?

A. I think it depend a good deal on the amount
2282 taken. It would take several hours to digest a piece of bacon.

Q. It takes longer than to digest some other foods?

A. No, some other foods are a good deal harder to digest than bacon. Bacon is not an indigestible food at all, there is so much fat in it.

Q. Different foods take longer and lesser periods of time to digest, as I understand it? A. Yes, sir.

Q. Bacon takes several hours?

A. No. I don't say that bacon takes several hours always but I think to thoroughly digest it it would take several hours. It is always so with any process you know. Digestion may be begun and the food may liquefy and yet not be thoroughly digested, that is, put in a position to be absorbed by the body.

Q. How long do you think it would take to liquefy if there was sufficient gastric juice there?

A. It is a hard thing to say; I have never seen it done; I would not like to say the exact length of time.

Q. It would take into the hours?

A. It would take at least an hour I should think, to liquefy.

Q. Do you think, doctor, it would be possible to tell a vaccine sore after death?

A. To say that is was a vacinne sore?

Q. Yes. A. No, sir, I don't.

Q. Don't think that would be possible? A. No, sir.

Q. You think you could not tell whether it was a vaccine sore or otherwise?

A. That is, under certain conditions; you take a vaccine sore in the early stages when the vesicle is forming, and becoming umbilicated, you could tell it but later on, after it becomes an ulcer, which would be continued until an ulcer formed, it would be impossible to tell.

Q. When would that occur?

A. That usually continues until the 23rd to the 25th day.

Q. I am speaking now of a normal vaccine sore.

2282½ [—[A normal vaccine at the early stages of it you could tell it, yes, sir.

Q. Could you do it up to the 14th day?

A. I should think you could.

Q. Now, the rule in regard to a vaccine sore is that it sheds its crust, running from the 20th to the 25th day, is it not?

A. Yes, sir. A perfectly normal vaccination runs from 20 to 25 days.

Q. The books lay it down from the 20th to the 23rd; 20th to the 23rd, do they not? A. I believe so, yes, sir.

Q. A normal vaccine sore you would expect to shed its crust from the 20th to the 25th day, would you not?

A. A normal, typical vaccine sore you would expect to do that, yes, sir.

Redirect Examination

By Mr. Atwood:

Q. But I understood you to say that a typical, normal vaccination was almost the exception, rather than the rule?

A. Well, among the working classes who wear rough shirts, the original crust is very often, I may say, in a majority of the cases, it is removed—especially among the working classes who wear wollen shirts, they knock it off and that leaves a raw surface, just as any sore would be left; a new scab forms. They knock it off and another one forms and that process may be continued indefinitely.

By Mr. Green:

Q. You could tell from the appearance of the crust whether it was a primary or secondary crust, couldn't you?

A. Yes, you could very likely tell that.

Witness excused.

2283 Doctor Jacob L. Everhardy, a witness produced by the plaintiff, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, testified as follows, to wit:

By Mr. Atwood: I promise you he is better than he looks.

[A.] What degrees do you hold? A. B. and A. M. as well as degrees in medicine? A. Yes, A. B., A. M. and M. D.

Q. You have acted as assistant county physician at one ime, have you not? A. Yes, sir.
Q. You are an instructor in the Nurse's School in this city?
A. Yes, sir.
Q. I will ask you, doctor, speaking in the light of the know-edge you have acquired as a medical man, whether or not it s anything extraordinary or unusual that a vaccine sore shall ontinue beyond the twenty-fifth day? A. It is not.
Q. I will ask you this question, doctor: A man takes—not ery much, is the language of the testimony,—of a meal, and n the course of half an hour or something like that, he meets violent death; the body is moved from the place where this ccurs some twelve miles, and is again removed eighty miles y wagon road, and a post mortem examination is held 17 lays after death; would it be anything extraordinary that no ood should be found in the stomach? A. It would not.

By Mr. Green. That is all.
By Mr. Atwood: That is where you are smart.
By Mr. Green: I will cross-examine you, doctor.

Q. By Mr. Green: What is the rule as to the time that a ormal vaccine sore sheds its crust?
A. The authorities very from the 21st to the 28th day.
284 Q. What is the rule as laid down by your books?
A. Some of the books give it all the way from the 1st to the 25th, 26, 27, 28 days.
Q. Will you give me the one that gives 28?
A. The 20th Century Practice of Medicine, in 20 volumes, ives it as three to four weeks. That is 21 to 28 days.
Q. But the books usually lay it down from the 20th to the 5th day do they not?
A. Well, in the same book are given the authorities of dif-erent men as to the 25th or 26th day.
Q. In your experience does not a true vaccine sore shed its rust from the 20th to, we will say, the 25th day?
A. In my experience among the poor people—
Q. I am not asking you about poor people; I am asking for our experience.
A. I would expect the crust to shed about the end of the urth week, to put it in round numbers.
Q. But you have them shed earlier than that?
A. Yes, sir.
Q. Have them shed as early as the 20th day?
A. No, I don't recollect of any shedding before the end of e third week; between the end of the third week and the end the fourth week.
Q. How much experience have you had in that line?
A. You mean as to years or numbers?

Q. Years and numbers.

A. I have studied medicine and practiced about seven years and have seen probably 250 cases of vaccination.

Q. Isolated cases: Have you ever passed through an epidemic of smallpox or anything of that kind?

A. Well, in what sense do you mean?

Q. Where vaccination was required of all to be had?

A. Yes, sir.

Q. Where was that? A. In this city.

Q. About how many cases did you see at that time?

A. In the epidemic I was a student in Dr. Brock's office; he had a very large number; we used to have in those days
2285 from 30 to 50 cases in the office every day and they would be coming in at the end of every week for a month.

Q. Were you admitted to practice at that time or were you a student? A. Yes, we are students yet, for that matter.

Q. You say it would not be extraordinary if a man was killed and placed in a wagon and carried a certain distance, and then carried a certain other distance, not to find any food in the stomach; would it be extraordinary if you should find any food in his stomach?

A. Well, if you would take a body and put it in cold storage and keep it cold, put it on ice, let the body be killed within ten minutes after the ingestion of food, I would say no.

Q. Suppose it was killed half an hour, not ten minutes after the ingestion of food, so that the digestive process takes place or starts. A. I would say no.

Q. You would say the digestion could not be stopped?

A. No, sir.

Q. It would go on to the end?

A. Yes, bacon and that kind of food.

Q. Have you had any experience in that line, doctor.

A. Yes, we had experience in college on dogs; never on a human being. The only case of a human being on record is the case of Alexis St. Martin of Canada about fifty years ago; he was shot in his stomach, and for years he was the subject of experiment there and in the medical centers of the United States; he traveled from one city to another.

Q. And from that experiment, doctor, you are prepared to show that this would go on?

A. Not from that experiment alone, no sir.

Q. Now, your information and your knowledge is derived from your experience and from books, is it not? A. Yes, sir.

Q. If you should find in a recognized authority of medical science that five physicians of good standing had examined a vaccine sore on the arm of a man who had been killed suddenly two weeks before, and his body had lain on the ground

over night, and then had been taken and put into a wagon and carried a distance of 15 miles and there buried, and
2286 then taken up, still in a good state of preservation, and then carried eighty miles across the country, and then shipped by rail 200 miles, arriving at the point where the examination was made in a good state of preservation, and those physicians having had long experience in smallpox cases and men of recognized authority, if you would find that in a medical book, you would take that as true, would you not?

The plaintiff objects to the question as incompetent, irrelevant and immaterial and an improper hypothesis. Objection sustained, to which ruling of the Court, the defendants and each of them at the time duly excepted.

Witness excused.

2287 Dr. W. R. Vantuyl, a witness produced by the plaintiff in rebuttal, being first duly sworn, testified as follows, to wit:

Direct Examination

By Mr. Atwood:

Q. Physician and surgeon? A. Yes, sir.

Q. Prior to going to the Philippines you resided in this city? A. Yes, sir.

Q. I will ask you to state in the light of your knowledge and experience as a medical man whether or not the fact of a vaccine sore extending beyond the 25th day is anything extraordinary or unusual? A. It is not.

Q I will ask you also, whether or not a man who eats a meal that is described as not very much, presumably a small quantity of bacon and such, and in half an hour comes to a sudden violent death, and 17 days thereafter a post mortem examination is held, the body in the meantime having been carried by wagon a distance of 90 miles or 100 miles over ordinary roads, whether or not it would be extraordinary not to find anything in the stomach, any food in the stomach?

A. It would be owing largely to what he had eaten at that meal.

Q. Bacon is the only thing that is described.

A. That is largely an oily substance; it would be largely emulsified and pass into the bowels; bacon is largely fat or oils and it would be very usual for that to be emulsified in half an hour and be in liquid form so that it would pass easily from the stomach into the small intestines.

Witness excused.

2288 Dr. J. W. Brock, called as a witness in rebuttal on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Atwood:

Q. Your name is J. W. Brock. A. Yes, sir.

Q. You are a physician and surgeon? A. Yes, sir.

Q. How many years? A. About forty-three.

Q. Your residence is in this city?

A. Yes, sir; Leavenworth.

Q. And has been for a great many years?

A. Thirty-four years, I fancy.

Q. Have you ever had any army experience, doctor?

A. Yes, sir; I was in the army four years.

Q. I will ask you to state, in the light of your experience as a physician, whether or not it is anything extraordinary or unusual or remarkable that a vaccine sore should continue up to even beyond the 25th day?

A. It is not remarkable for it to do so, I don't think.

Cross-Examination

By Mr. Green:

Q. What is the rule, in a normal vaccine sore?

A. From 23 to 26 days to a month.

Q. Don't the books lay it down from 20 to 25?

A. From twenty-three to twenty-six.

Q. And the others are exceptions to that rule?

A. As a rule. It might extend longer than a month.

Q. Yes, one case is laid down in the books where it extended 35 days before it dropped off.

A. I don't recollect that special case.

Q. As I understand you now, doctor, a normal vaccine sore, after the virus has been inserted into the arm, ifi it takes, the first thing you find there, we may say, is a vesicle about five days from the time you put it in? A. A papule.

2289 Now after the papule is formed, then the true normal vaccine sore progresses along with regular stages, doesn't it?

A. At the end of five days you will have a depression of the skin that is called "umbilicated."

Q. You will find that at about a certain number of days after you find the papule? A. Yes, sir.

Q. And then after that you find another stage of the sore, do you not? A. Yes, sir; secretion.

Q. Then about the fourteenth day you find another stage of that sore, do you?

A. At the eighth or ninth day it is perfected. It has run its course at that time; and then on the thirteenth day it begins to desiccate, that is, to dry up in the middle, and the crust extends from the center out, and then the umbilicated appearance is disappearing.

Q. That crust may fall off as early as the seventh day, may it not?

A. Not normally. I don't think of any case now where there was a healthy vaccination where it fell off in that time.

Q. It may fall off in twenty days, may it not?

A. It might.

Q. And be a healthy case?

A. It might in twenty days, but that is not the rule. It is generally from the twenty-third to the thirtieth day.

Winess excused.

2290 Dr. J. A. Lane, a witness sworn on behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination

By Mr. Atwood:

Q. You are a practicing physician and surgeon in this town? A. Yes, sir.

Q. And have been for a good many years?

A. Yes, sir; a number of years.

Q. Leavenworth is your home now? A. Yes, sir.

Q. I will ask you, Doctor, whether or not from a medical standpoint it is anything extraordinary that a vaccine scab should continue on the sore of a subject for more than twenty-five days after the time that the arm is inoculated?

A. No, sir; I don't think it is.

Cross Examination

By Mr. Green:

Q. You say it is nothing extraordinary? A. No, sir.

Q. Does it often happen?

A. Often? Yes, I should say it often happens.

Q. Now, if it was a true vaccine sore, would you say that would happen to a normal sore—what we call a normal sore? A. Yes, sir.

Q. Would that be an exception to the rule?

A. It occurs too frequently to be called an exception.

Q. Don't the books lay it down that on a normal vaccine sore that the scale or scab or crust is shed from the twentieth to the twenty-fifth day?

A. Yes, I think that is true; that is considered the usual time for a normal vaccine scab to be thrown off under normal circumstances.

Q. If the vaccination takes, the regular course, we will say from the fifth day to the formation of the vesicle, would you know that the crust would shed from the twentieth to the twenty-fifth day?

A. Yes; if you accept the normal process.

2291 Q. In the great majority of cases from the twentieth to the twenty-second day?

A. That is what I understood you to ask, from the twentieth to the twenty-fifth day.

Q. From the 20th to the 23rd?

A. I would put it from the 21st to the 23rd day.

Witness excused.

Dr. Albert Franklin Yohe, called as a witness on behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination

By Mr. Atwood:

Q. Your full name is Dr. Albert Franklin Yohe?

A. Yes, sir.

Q. What is your school?

A. Rush Medical College of Chicago; Bellevue Hospital college of New York City.

Q. What position if any do you occupy with reference to the School for Nurses?

A. I am a professor of physiology in the School of Nurses.

Q. I will ask if you are a resident of this city?

A. Yes, sir.

Q. Do you occupy any official position now?

A. I am county physician.

Q. I will ask you, Doctor, whether or not the prolongation of a vaccine sore beyond the 25th day is anything extraordinary, from a medical standpoint? A. No, sir.

Q. I will ask you this: Whether or not the gastric juice in a stomach would continue to act upon any food after death; supposing a man was killed after he had eaten say half an hour or an hour after he had eaten a meal composed of bacon?

A. The gastric juices that have been poured out in the course of half an hour after a hearty meal would continue to act and cause digestion.

Q. Does that transform the food into a liquid?

A. The whole process of digestion is liquiefaction.

Q. Then how does gravitation act upon such liquid,

2292 or any liquid, that is within the stomach.

A. Any liquid in the body is diffused through the tissues by osmosis; that is, the process of absorption goes on. Gravitation and osmosis would go on after death.

Q. Is it not a fact that the blood and other liquids of a dead man's body settle on the lower side?

A. Always gravitate; yes, sir.

Q. Downward? A. Yes.

Cross-Examination

By Mr. Green:

Q. You say, Doctor, it is not extraordinary in medical science to find [that] a vaccine sore extending beyond the 25th day. Is that a rule or an exception?

A. Well it is about half and half.

Q. You think it is half and half?

A. About half and half. There are so many cases that the scabs are irritated.

Q. Do your books lay it down that way?

A. The books take a typical case, not allowing for any [—] d not cases having irritations that come in these cases at all; hat is, a typical case without the possibility of irritation or anything else of that character, either chemical or mechanical.

Q. Then in a normal vaccine sore, when would you expect the crust to shed?

A. The crust sheds ordinarily from the 17th to the 30th day. There is a wide limitation of possibility there.

Q. Do your books put it from the 20th to the 25th day?

A. That is a typical case.

Q. I am speaking now of a normal sore.

A. I believe the books put it—the authorities vary, from the 17th—15th day to the 28th or 30th day.

Q. Do any of them put it more than 25 days?

A. I don't recollect of any, sir—in my experience.

Q. I am not speaking of your experience now, but books.

A. Just the authorities?

Q. Yes.

A. I don't recollect any of them that put it over twenty-five; no, sir.

2293 Q. Now this normal vaccine sore has regular stages has it not, Doctor?

A. Yes, sir, within certain limitations it has stages.

Q. With certain exceptions? A. Yes, sir.

Q. There isn't anything certain in your science, is there; but there are exceptions to about every rule which may be laid down in medical science, are there not? Oh, yes.

Q. But I speak of a normal sore, a normal sore that passes on from the time that the vesicle is formed on the 5th day or 8th day, when you find a different stage on the 12th and 14th day, don't you? A. Yes, sir; the books put it that way.

Q. In a normal vaccine sore about the 14th day the scab begins to separate at the edges, healing from the circumference towards the center? A. Yes, sir.

Q. The cuticle forms underneath about the 20th or 25th day, whichever time you please to put it, and sheds?

A. Yes, sir; in your hypothetical question, probably it does.

Q. Isn't that rule laid down by your books now?

A. Yes, sir; if it is qualified enough, it is.

Q. But I am speaking of a normal sore all the time, normal vaccine sore. Do the books qualify that, in a normal vaccine sore? A. Not in the sense in which you put it; I think not.

Q. Of course some one may come along and hit a fellow a blow on the arm and injure a true vaccine sore, and then it would be prolonged? A. Yes, sir.

Q. That theoretical case is the exception and not the rule, you say? A. Yes, sir.

Q. Could you tell from the appearance of a scab upon a vaccine sore, whether the scab that is found there is a normal vaccine sore, or one which had been occasioned by some injury?

A. I don't think, sir, I could tell in all cases. Very few cases I could tell exactly, postively.

Q. If an arm had been so injured that the blood would flow from a part or a whole scab that you would find there, would you not be able to tell that from a true vaccine scab?

2204 A. If any quantity of blood had flown; yes, sir.

Q. Now the question he put to you about a man digesting food after he dies—you think he could do it?

A. It is owing to how soon after the ingestion of the food he died.

Q. Suppose he had eaten a hearty meal of bacon and bread?

The plaintiff objects to the hypothesis because it is not embodied in the testimony. Objection overruled, plaintiff excepting.

Q. Suppose a person should eat now and should be suddenly killed—wouldn't you expect to find some traces of food either in the stomach or in the colon?

A. That is so broad I couldn't tell you. If a person is killed half an hour after eating food, the food is more or less digested by the gastric juice that has been poured out before death, and the process goes on then even outside of the body. Digestion is the process of liquiefaction.

Q. Wouldn't you even then say, if there was enough gastric juice had poured out to completely dilute the food which he had eaten and it had not passed from the body—wouldn't you expect to find some traces of that food?

A. If enough gastric juice had been poured out to dilute the food and a small amount of food had been taken, I think in the course of six or eight or twelve hours it would be almost entirely digested.

Q. But wouldn't you find portions of digested food still in the stomach or in the colon. Supposing it had passed into the colon, you would find something there?

A. Digestion in the process of liquiefaction.

Q. Would you say that it would so thoroughly dilute this food that it would be absorbed?

A. Yes, sir; after death the process of digestion, liquiefaction, would convert the albuminous foods into peptones that would be liquid—starchy foods converted into grape sugar—that is, in solution with the gastric juice. There might possibly be some particles there, but I don't know that there would be any.

2295 Q. If the liquid dried up, wouldn't you still find some refuse there?

A. I hardly know how to answer that question; it is so broad.

Q. Well, I will put it in this way: If you place a piece of meat in gastric juice and subject it to heat—take the gastric juice, now, outside of the body entirely, and put it in a bottle and then put some meat in that bottle and subject it to heat, and the gastric juice will dilute the meat, will it not?

A. Liquefy it; yes, sir.

Q. Now if you take that gastric juice and try it and evaporate it, you would have some remnants there, wouldn't you?

A. There would probably be some little remnants of fibrous tissue left. There might be probably—would probably; because there is more or less fibrous tissue in meat. There would be less in fat bacon than there would be in fresh beef. It would be little shreds that could hardly be considered meat at all.

Q. Now in order that there should be solution or liquifaction, must it not be accompanied with heat?

A. Why, yes, but it takes a body hours to lose its heat.

Q. Suppose a body was lying out exposed to the weather on a cold windy night.

A. I don't think a body would then entirely lost its bodily heat, if killed in apparent health, for six to twelve hours afterwards there would be a temperature about the stomach; it would not be reduced below seventy for six hours any way, because we know the normal stomach and liver is 104 and 103—along there; and it takes several hours to get below the temperature that is compatible with digestion.

Q. So that this liquifaction might go on, you think, under those conditions for several hours? A. Yes, sir.

Q. Would the stomach expel the solution after death?

A. Expel it?

Q. Yes, sir.

A. No, sir; not action after death; certainly not. Solutions escape by osmosis; pass from the normal membranes, certainly; gravitate through.

Q. Gravitate from there into the colon, wouldn't it?

A. O, no; just directly down; it would be owing to
2296 which position the body was lying in; gravitate to the most dependent portion, right through the tissues.

Redirect Examination

By Mr. Atwood:

Q. In order to get an understanding from your standpoint on the whole situation, I will ask you this question relative to the likelihood of the stomach being empty. A man takes a light meal of bacon and within half an hour meets with sudden death. The next day that body is carted ten or twelve miles to Medicine Lodge. It is buried; it is then exhumed; it is carried overland up hill and down dale for eighty miles to Hutchinson, and then taken finally by cars to Lawrence and a post mortem held which discloses what the situation is. It takes place on the 3rd of April and the death occurred on the 17th of March; that would be seventeen days afterwards. Would the likelihood that the contents of the stomach being gotten out of it be increased or diminished by such a post mortem experience as that? A. It would be increased.

Q. I will ask you this question, too. Perhaps it wouldn't be within the rule, but we [havnt] followed it closely. I will ask you whether or not the condition of a vaccine sore—whether the difficulties of telling the age of a vaccine sore would be increased or diminished by such an experience as that; that is, the intervening 17 days between death and the time that it is exhumed; would that be increased or diminished?

A. You would increase the difficulty of telling it; certainly.

Q. Your cross-examination by Mr. Green develops, as I understand, the fact that the gastric juice doesn't dilute the food in the sense that a bucket of water would dilute a bucket of meal, but changes the character of it?

A. It is purely a chemical process.

Q. So this was a liquid? A. Yes, sir.

Q. So it is not a mixture of water and food?

A. No, sir.

2297 Q. But it changes its whole character and makes a liquid of the whole? A. Yes, sir.

Q. And it would be acted upon by gravitation as any other fluid in the body? A. Yes, sir.

Recross Examination

By Mr. Green:

Q. If you liquify salt with water and then evaporate that water, what do you get?

A. Salt. Digestion is not liquification pure and simple; it is a chemical process entirely.

Q. Notwithstanding, it is liquifaction?

A. It is liquifaction, but not solution in the same sense of mixing water and solt. You haven't changed the chemical nature of salt by merely adding water to it.

Q. Do you mean to say if you take a bottle and put gastric juice in the bottle and put meat in the bottle, that it dissolves it so that there is such a chemical change of that food that if you evaporate the gastric juice you wouldn't have and residium there?

A. You would have some residium probably, but you wouldn't have meat.

Q. There would be solid matter there, wouldn't there?

A. Take the pure albuminous portion of meat and there would be no solid matter left; there might be just a slight residium or albumen.

Q. Now you say that carrying a body—I think our friend spoke of it as carting it, if I recollect the conveyance—it was taken in a spring wagon. What is there about that mode of transportation which would render it more difficult to tell whether the sore upon the arm was a true vaccine sore or not?

A. The post mortem processes which go on for seventeen days after death, alone would increase the difficulty of determining it.

Q. How?

A. The decay of the tissues; the decay that necessarily goes on in the tissues.

Q. Do you say it would not be possible for a man of experience in vaccination to tell whether it was a true vaccine sore or not?

2298 A. A man could make a fairly good guess, but he couldn't tell beyond a doubt.

Q. Why not?

A. I don't think a man could tell—any physician—no matter how experienced he is.

Q. Did you ever examine one?

A. I never examined any case seventeen days after death; no, sir.

Q. That is just your opinion? A. That is my opinion.

Q. Have you had any experience whatever in that line?

A. No; not with sores on a seventeen day old corpse.

Q. It is your judgment that it would make a difference?

A. Yes, it would; yes, sir.

Witness excused.

2299 Dr. J. D. Patterson, a witness heretofore sworn in the case, being recalled by the plaintiff, testified, in rebuttal, as follows, to-wit:

Direct Examination

By Mr. Atwood:

Q. You are the same Dr. Patterson who testified early in the trial, are you not? A. I am.

Q. I will ask you to state if you know Dr. Stuart, J. H. Stuart, I think his name is, who has been a witness in this case? A. I do.

Q. Who used to lived at Lawrence? A. Yes, sir.

Q. At the time you lived there? A. Yes, sir.

Q. I think you lived there in the month of April, 1879?

A. Yes, sir.

Q. I will ask you, Doctor, whether or not, in your office, or I will ask you first, if you ever officed in the same building?

A. Yes, sir. We had the adjoining offices.

Q. The question I desire to ask you is this: Whether or not, at your office, or in your office, or the one occupied by him, at or about the time that the coroner's inquest was being held by the coroner of Douglas County, early in April, 1879, whether or not, at that time and in that place, Dr. Stuart said, in your presence, in response to a question propounded to him by somebody else—in which the query was put to him as to whether or not the body in question was, in his opinion or believe, Hillmon, or whether the whole thing was a fraud, and he replied, "I am sure I don't know Doctor, I am sure I don't know." Did he, in substance, say that or not?

The defendants, and each of them, object to the question because it was not submitted to Dr. Stuart on his cross-examination in order to lay the foundation for impeachment.

2300

By Mr. Barker: Here is the question as it was asked the witness, Dr. Stuart, and it was passed up to the court.

By the Court: I do not see any substantial difference.

Thereupon the examining counsel takes the question presented by Mr. Barker and reads:

"Q. Now Dr. Patterson, just disregard what I have said. This is a new question I propound to you. State whether or not, in the City of Lawrence, Kansas, in the office occupied by you, or in one occupied by Dr. Stuart at or about the time of the inquest held by the coroner of Douglas County, early in April, 1879, that he, Dr. Stuart, said to you, Dr. Patterson, or in your presence, in reply to a question as to whether or not the body in question was the body of Hillmon, or whether the whole thing was a fraud, did he say, in substance: "I am sure I don't know. I am sure I don't know"?

The defendants and each of them object to the question as being incompetent, irrelevant and immaterial, and because the place is not definite. It is stated as being one of two places.

The Court overruled the objection, to which action and ruling of the Court the defendants and each of them duly excepted.

Q. Did, he, in substance, say that or not? A. He did.

Cross-examination

By Mr. Barker:

Q. You live in Kansas City now, I believe, Doctor?

A. I do, yes sir.

Q. You have been living down there for a good many years? A. Fifteen years.

2301 Q. You left Lawrence about what year?

A. Fifteen years back.

Q. You went direct from Lawrence to Kansas City?

A. Yes, sir.

Q. You have testified on every trial of this case, have you not? A. I have.

Q. You never testified to this conversation before in your life, did you Doctor? A. No.

Q. And now, after the lapse of all these years, you think that you can recollect a conversation of this kind, which occurred something like twenty years ago, Doctor?

A. Yes, sir.

Q. You think you can? A. Yes, sir. Positively.

Q. You have a remarkable memory, have you?

A. I can describe to you—

Q. I am not asking you now. When I desire anything from you I will ask you I will ask you a question.

Redirect Examination

By Mr. Atwood:

Q. What is it you want to say Doctor, that you were going to say? If it is in explanation of the question propounded to you by counsel we ask that he be permitted to explain. What circumstance, discussion, or anything, if anything did occur, that tended to fix this in your recollection?

A. I have always remembered it perfectly from the time it occurred.

Q. Was there any discussion, or anything between you and him that tended to fix it in your memory?

A. I can tell the conversation that occurred at that

2302 time, when he made the remark.

Q. I will ask you to state it?

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: Anything that served to fasten the remark in your memory you can tell.

A. He was sitting in my office. He was telling about the vaccination, about the discrepancy in the height, and about what Sam Walker said, and what the insurance people claimed, and I said, what do you think about it, and he replied: "I don't know Doctor." Those were his words.

By the Court: Q. Were your office and his office adjoining?

A. Yes sir. The door was always open at that time. His door was always unlocked.

By Mr. Atwood.

Q. You were asked if you ever testified to this fact before. I will ask you if this question was ever propounded to you at any of the other trials? A. It was not.

By Mr. Barker:

Q. Where did you say this last conversation occurred, in your office or in Dr. Stuart's office?

A. It occurred in my office.

Q. I understood you to say, in answer to the other question, that it was either in your office or in Dr. Stuart's office?

A. I should have said it was in my office, because it was.

Q. Now, you say it was in your office?

A. I have always said so.

Q. Do you remember the day on which it occurred?

2303 A. No.

Q. Do you remember who was present at the time it occurred?

A. There was not any one, save Doctor and I.

Q. You remember that he was alone with you?

A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. You have already said you never testified in regard to this matter before? A. No.

Q. You have testified on the trial of this case at each time that it has been tried? A. I have.

Q. Been called by the plaintiff in the case, have you not?

A. Not the first trial; I was called by the defense.

Q. Ever after that you have been called by the plaintiff in the case, haven't you? A. That is right.

Q. And you came up from Kansas City without a subpoena for the purpose of testifying in regard to this matter?

A. I did.

Q. You expect compensation for your trip up here?

A. My expenses.
Q. Now do you remember the first person you told in regard to this conversation? A. I have always—
Q. I ain't asking you what you have always done. I ask you if you will state the name of the first person to whom you told this conversation? A. I don't think I can.
Q. Is it not a fact now that you never—
2304 A. I can give you my impression.
Q. I don't want your impression now. Isn't it a fact that you said nothing about this conversation until since this trial? Answer yes or no.
A. I have not to the attorneys.
Q. I will ask you if you have?
A. I have spoken of this conversation.
Q. But not to the attorneys? You say you have spoken about this conversation, or had spoken about it before the last trial of this case? A. That was in 1896, I believe?
Q. Yes. A. I have spoken about it many times.
Q. But you had never spoken to the attorneys on either side in regard to it? Say yes or no, whether you have or have not? A. I am not sure. I think I did to John Hutchings.
Q. You think you told John Hutchings about it?
A. Yes, sir.
Q. John Hutchings attended in the trial of the case how many times? A. Twice or three times.
By Mr. Hutchings: Three times.
Q. Mr. John Hutchings has assisted in the trial of this case on behalf of the plaintiff three times.
A. Yes, sir. I think I told him that conversation, among others.
Q. I am not asking you, among others, I want to know when you told him that, whether it was before the third trial of this case? A. Oh, yes.

Witness excused.

2305 A. J. Phillips, a witness heretofore sworn in these causes, being now recalled on behalf of the plaintiff, testified in rebuttal as follows:

Direct Examination

By Mr. Atwood:
Q. What has been your occupation?
A. For the last twenty years I have been a policeman, constable and night watchman.
Q. What is your business now? A. Night watchman.
Q. In private or public employ? A. In private employ.
Q. There in Lawrence? A. Yes, sir.
Q. How long have you held that position?
A. Something over eleven years.

Q. Continuously? A. Yes, sir.
Q. That is your employment now? A. It is.
Q. I will ask you to state if you ever met, so as to know him, a man named Theodore Wiseman?
A. I met him frequently.
Q. Insurance agent? A. Yes, sir.
Q. You have been here before at this trial?
A. I have been here before; yes, sir.
Q. Did you see Mr. Wiseman here?
A. No, sir; I didn't see him.
Q. Do you remember the date of the arrival of the body claimed by some to be the body of Mr. Hillmon and by others not—in Lawrence in April, 1879?
A. I couldn't remember the date, but I remember the circumstance.
Q. Now with reference to that date, I will ask you if you met Theodore Wiseman, this insurance agent, at or near the office of the livery stable owned by Mr. Walker—I think he is called Colonel Walker—in the city of Lawrence in the evening of the day that dead body arrived, or the evening of the following day. A. I did.
Q. I will ask you if, when you met him, he substantially said to you: "Well, you are the man I want," or "the man we want." Did he in substance say that to you?
A. Yes, sir.

2306 The defendants and each of them object to the question for the reason that it does not tend to impeach the witness.

Mr. Green: I especially object on behalf of the Connecticut Mutual, for the reason that Wiseman was not an agent of the company, and had no authority to act in any respect for the Connecticut Mutual Life Insurance Company.

Objection overruled; the defendants and each of them duly excepting.

A. Yes, sir.
Q. I will ask you if he then said to you in substance at that time and place, "I want you to shadow Brown" meaning John Brown? A. Yes, sir.
Q. I will ask you if in reply to that you said to him in substance "do you want me to arrest him if he goes to leave town?" A. Yes, sir.
Q. I will ask you if in answer to that question I have just quoted, Wiseman said, "No; that is just what I want; I want him to leave." Did Wiseman say that to you?
A. Yes, sir; he did.
Q. I will ask you if you then said to him that if he wanted him arrested and would get out the proper papers you would

serve the warrant and assist him; otherwise you wouldn't act for him. Did you in substance say that? A. Yes, sir.

Q. Did he further say on that occasion at that time that the insurance companies didn't want something for nothing and that they would pay you well for your services?

A. He did.

Q. Did you then reply to him that you would have nothing to do with the running off of witnesses? A. I did.

Cross-examination

By Mr. Barker:

Q. You testified before in this case I believe?

A. Yes, sir; I did.

Q. You testified before in this trial—during this trial?

A. Yes, sir.

2307 Q. I believe you are the witness who testified that Hillmon was five feet, eleven and three-eighths inches high, from having been introduced to him once?

A. I didn't get in the three-eighths.

Q. You are the same party—you are the same witness?

A. Yes, sir.

Q. How long had you been acquainted with Major Wiseman at that time?

A. I couldn't tell you the number of years.

Q. I say, in 1879 how long had you been acquainted with Mr. Wiseman? A. I couldn't tel you just how long.

Q. You didn't know him at all at that time, did you?

A. Yes, sir; I did.

Q. You knew him by sight? A. Yes, sir.

Q. You knew his name? A. I did.

Q. How long had he been living in Lawrence in 1879?

A. I couldn't tell you.

Q. Do you know whether he lived there at all before that time?

A. I knew he was there off and on. I knew him and I met him.

Q. Do you know whether he lived in Lawrence at that time or not? A. I wouldn't say whether he did or not.

Q. Now can you tell when and where you first saw him, Major Wiseman?

A. I met Major Wiseman and at that time was well acquainted with him. I knew him as I knew ather citizens.

Q. He came there in 1878, did he not, the first time?

A. I say I can't give the time when he came there.

Q. He had no residence there at that time, did he? If he did, state where he lived?

A. As I say, I couldn't tell you.

Q. You don't know whether he had any residence there or not. You claim that you never had any talk with him before in regard to this matter?

A. I never did, in regard to this matter.

Q. That occurred down at Colonel Walkers'?

A. He was at Mr. Walker's stable when I went in there—in the office.

Q. He was in there when you went in there? A. Yes, sir.

Q. And then, you claim, you had this conversation with him? A. I do.

2308 Q. What do you say he said to you the first thing?

A. He turned and said I was an officer—"You are an officer"—and I said, "I am."

Q. He asked you if you are an officer? A. I said, "I am."

Q. He knew you, didn't he? A. He knew me.

Q. And you knew him; you had been working around there for some time? A. Yes, sir.

Q. And you say he asked you if you were an officer?

A. He says, "You are an officer."

Q. And you said you were? A. Yes, sir.

Q. And then didn't he say that John Brown ought to be arrested if he went to go away? A. He did not.

Q. How long ago was it that this occurred, Mr. Phillips?

A. It occurred there just as I stated in my examination.

Q. I say, how long ago? A. I can't give the dates.

Q. That occurred something over twenty years ago?

A. Yes, sir; something like that.

Q. It occurred in 1879, didn't it?

A. Well, it occurred at the time this—

Q. It occurred in 1879, didn't it?

A. It occurred at this time; at the time this body was brought there.

Q. Do you know what year that was in, whether it was 1879 or '80? A. I couldn't say positively.

Q. You couldn't say what year; it occurred at that time?

A. Yes, sir.

Q. Now you have given in detail the conversation that took place at that time? A. I did.

Q. Mrs. Hillmon lived in your family, didn't she?

A. She did at one time.

Witness excused.

2309 Arthur Simmons, a witness produced by the plaintiff in rebuttal, being first duly sworn to testify the truth, the whole truth and nothing but the truth, in answer to direct interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, testified as follows, to wit:

Q. What is your full name? A. Arthur Simmons.
Q. Where do you live? A. Leavenworth City.
Q. How long have you lived here? A. Over forty years.
Q. This has continued to be your residence during all that time? A. Yes, sir.
Q. What is your business, Mr. Simmons?
A. Manufacturer of cigars.
Q. How long have you been engaged in that business?
A. Since about 1862.
Q. How long have you been at the stand where you are now; the same place? A. Very nearly 20 or 30 years.
Q. You are alone at present? A. Yes, sir.
Q. Was that always true of your business during all those years? A. No, sir; I have had partners.
Q. How many? A. I have had two.
Q. Who was the first one and about when was that partnership?
A. That was the commencement of my business and his name was Harris.
Q. He is the one you say you had at the commencement of your business? A. Yes, sir.
Q. It began back in the early 60s? A. Early 60s.
Q. That endured for how long?
A. A year or a little over; I won't be certain how long but it was over a year, about a year, a little over.
Q. Who was the other partner? A. Dave Staiger.
Q. How is that pronounced, if it is pronounced more than one way?
A. A great many ways; the Americans called it
2310 "Stager;" the Germans called it "Stiger;" one part of the Germans and then the other part of them called it "Stager."
Q. [redacted] was your partner, you say? A. Yes, sir.
Q. [redacted]gaged with you in manufacturing cigars?
A. Yes sir.
Q. In this city? A. Yes sir.
Q. Was he your partner in 1878 and 1879? A. Yes sir.
Q. How long after that did he cease to be?
A. We dissolved partnership on the 3rd day of February, 1881.
Q. Then in 1878 and 1879 he was your partner?
A. Yes sir.
Q. What was the style of the firm under which the business was carried on?
A. Simmons & Staiger: at first it was Simmons & Company; when first we went together, Mr. Staiger got married, and said he would like to have his name up. I told him I had no objections and we styled the firm, Simmons & Staiger.

Q. What was the firm style in 1878 and 1879?
A. Simmons & Staiger.
Q. Was there during those years, 1878 and 1879, any other man by the name of Staiger engaged in manufacturing cigars in this city, if you know?
A. No, sir. I am certain there was not.
Q. You knew the men engaged in the same line of business with yourself? A. Yes sir, I do.
Q. Now, I will ask you whether or not in the manufacture of cigars, you employ cigarmakers? A. Yes sir.
Q. And you employed cigarmakers in 1878 and 1879?
A. Yes sir.
Q. I will ask you to look at that picture (Exhibit 35, Nov., 99. W. C. H.) and state whether or not that is the picture of anybody who ever worked for you? A. Yes sir.
Q. (Picture of Walters with mustache). I will ask you when your attention was first directed, if it was directed at all, to the fact of such a man as Walter working for you?
A. It was a short time ago; a strange gentleman came into store and asked me—
Objection.

2311 Q. You said a short time ago—was that after the commencement of this trial?
A. If I am not mistaken, I think it was.
Q. The one going on now in which you are a witness?
A. Yes sir.
Q. You say your attention was directed to it by a stranger?
A. Yes sir.
Q. I will ask you if your attention was directed to this matter by anybody else after this stranger spoke to you about it? A. Yes sir.
Q. Who was the gentleman?
A. It was a young man that works in the Leavenworth Times office.

The defendants move to strike out the answer as incompetent.

Motion overruled, the defendants and each of them at the time duly excepting.

Q. A Leavenworth Times reporter?
A. I presume that is his position.
Q. He is connected with the paper and you know him in that way? A. Yes sir.
Q. How long was it after your attention was directed to this matter first, that the gentleman, the Times man spoke to you?

The defendants object to the question as incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of them at the time duly excepting.

Q. That is, whether it was a day or two days; a day or two?
A. I would not be certain which it was.
Q. Then, I will ask you if the matter became a subject of discussion between yourself and anybody else? That would be the third time?

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: What is the purpose of that?

By Mr. Atwood: I am leading up to the question how he came to look at the books.

By the Court: Not the details?

By Mr. Atwood: I am simply asking if it was a subject of discussion, you understand the question whether or not it was a subject of discussion the third time; once with a stranger, once with the Times man and another time with any-
2312 body else?
A. I was going to relate what occurred with the gentleman from the Times.
Q. I don't know whether they will allow you or not.

By the Court: No, that is not proper.

Q. Was it a subject of discussion between you and the third person, besides the stranger and the Times man?

The defendants object to the question as leading, and incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of them duly excepting.

A. Yes, sir, I spoke to Mr. Sam Wheat about it.
Q. Now, I will ask you this question, whether or not during the time that you have carried on this business, and during the time that Walter worked for you way back in 1878 and 1879, whatever the time was, if you had a book, kept by you at that time, of the men who worked for you, and the work that they did?
A. I have a book with every man's name in it and the amount of work that they made, the kind of cigars that they made and the amount of it.
Q. Is this book in the paper that book? A. Yes sir.
Q. Will you open it up, please. (Does so.)

Q. I will ask you if, following the third time that this matter was called to your attention, you made an examination of this book with the view of seeing if the name of F. Walters appeared upon it? A. Yes sir, I did.

Q. Will you turn to that portion of that book, if there is any portion that does have the name of F. Walters, as one of your workmen?

The defendants object to the question as calling for secondary evidence. The court sustained the objection, to which ruling the plaintiff duly excepted.

Q. Do you know whether or not any page of that book shows that Mr. Walter worked for you there?

The defendants object to the question as secondary evidence, incompetent, irrelevant and immaterial.

2313 By the Court: The book is not original evidence.

Q. I am now simply asking you to refresh your recollection. Will you turn to any portion of the book which will serve to refresh your recollection in relation to this matter?

A. Yes sir, I have sir.

Q. I will ask if the memorandum of which you have just spoken was made by yourself?

A. Yes sir, it is in my handwriting.

Q. In your own handwriting? A. Yes sir.

Q. At the time of the business transactions of which you have spoken with him, at the time of the employment?

A. Yes sir.

Q. That is a fact, is it? A. Yes sir.

Q. Have you refreshed your recollection from an examination of this memorandum? A. Yes sir, I have.

Q. In the light of that refreshed recollection, are you able to state when it was that this man Walters, whose picture you say that is, worked for you or worked for Simmons & Staiger, if he worked for them at all? A. Yes sir.

Q. When was it?

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: He does not say he is Walters.

By Mr. Atwood: He says that is a picture of the man who worked for him. The picture is conceded to be a picture of Walters.

Br. Mr. Barker: There is no question about that.

By the Court: You have not shown when the entries were made in reference to the transaction.

By Mr. Atwood: I think the court is in error. I asked him if he made the entries at the time of the transaction of the hiring of this man and he said yes.

A. Not at the time of hiring him.
Q. At the time he worked for you?
A. At the time I paid him.
Q. At the time he was in your employ?
A. The first time he came into my employ.
2314 Q. When the entry was made, it was made in the course of your busines and of the employment of him. Now, I will ask you if you can state, having refreshed your recollection by an examination of this memorandum, when it was that the man the man of whom this is a picture, worked for you, or for Simmons & Staiger?
A. Yes sir I can tell you.

By Mr. Barker: We object, so far as the book is concerned.

By Mr. Atwood: The book is not offered in evidence.

By Mr. Barker: Let me ask the witness one question. May I ask the witness a question or two.

Q. This occurred some twenty years again didn't it?
A. Yes sir.
Q. Do you undertake to say and do you say that you have any independent recollection of that transaction, that you have any recollection in regard to it whatever except what you get from the book? A. Yes sir.
Q. Do you say that independent from the book itself; you recollect the man, do you?
A. I recollected the man well just as quick as I saw his picture.
Q. You recollect independently of the book itself?
A. Yes sir.
Q. Your mind don't need any refreshing in regard to that; it is already fresh on that subject?
A. It was fresh when I saw the picture; not previous to that.
Q. I mean with regard to his working for you, when he worked for you and all about it, it evidently impressed upon your mind—
A. When he worked for me—
Q. You remember that, do you; you remember that independent of the book, don't you?
A. I could not tell the date without referring to the book.
Q. But you remember the fact, do you?
A. I remember the man's face and working for me, sir.

By Mr. Atwood: What is the day, month and year.

By Mr. Barker: When you look at the book, is your
2315 memory refreshed or do you simply testify from the book? A. That refreshes my memory.

Q. So that you remember the date?
A. Yes, I got the dates down.
Q. Now, do you remember the facts independent of the book?
A. I don't know that I would, sir, not independent of the book itself.

By Mr. Atwood: Having refreshed your recollection, can you state the month and year, without regard to the day of the month.
A. Yes, sir, the first week's salary of F. Walters—
By Mr. Barker: Are you testifying from the books or from your recollection?

A. I told you before sir, I could not recollect the date every man has worked for me unless I refer to the book.

By Mr. Atwood: I simply ask having refreshed your recollection, as you have, without reference to the day of the month, whether or not you remember the month that is, the month and year?

A. It was in the month of May, 1879.
Q. And that you testify to, after having refreshed your recollection from this book, that you made the memoranda in at the time? A. Yes sir.
Q. You say you remember, recognized the man from this photograph? A. I did, sir, perfectuy well.
Q. What name did he go by? A. F. Walter.

And in answer to cross-interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. This book from which you refreshed your memory, I see is kept in pencil?
A. Yes sir. I don't know that all of it is in pencil.
A. I see that a name has been erased and then a name written above that?
A. Well, sir, we done that; I can explain—
A. I say it has been done, you see, don't you?
A. Yes sir, I can explain that.
Q. Just what name was that erased there?
A. Anderson.
2316 Q. The Anderson on this memorandum has been erased, has it not? A. Pencil run through it.
Q. Another name written above? A. Yes sir.
Q. That is the only erasure on that page, is it not?

A. I could not tell without looking at it now, sir.
Q. I am asking you in regard to that; it is the only erasure on that page? A. So far as I can see, yes sir.
Q. You said you have lived in Leavenworth all these years? A. Yes sir.
Q. You were living here when this case was tried in 1882, were you not?
A. If it was tried in 1882, I was here, yes sir.
Q. Well, you remember the fact of its being tried before Judge Foster, do you not?
A. I remember the case being on, yes sir, several times.
Q. Well, you remember of it being tried about that time, do you not?
A. Oh, I don't say I could recollect the time.
Q. You remember of it being tried before Judge Brewer here, do you not? A. Yes, I remember that well.
Q. You were at the trial, were you not? A. No sir.
Q. You were in and out of court several times while it was being tried?
A. No sir, the first trial I have been at.
Q. But you have been living here all this time?
A. Yes sir.
Q. And this is the first time that you have ever testified in this case is it not? A. Yes sir.
Q. Now, I understand you to say that you say that after the lapse of twenty years you recognized this photograph?
A. Yes sir.
Q. You recognized it just as soon as you saw it? didn't you?
A. I did sir.
Q. Just as soon as this photograph was presented to you you recognized it immediately as a man who had worked for you, didn't you? A. Yes sir.
Q. And you say that it was not presented to you until since the commencement of this present trial?
A. I do, sir, it was not presented to me before.
2317 Q. It was not presented to you until the trial, this present trial and then you say it was presented to you and then you hunted up this book, did you?
A. No sir, before I saw that picture I hunted up that book; didn't have to hunt for it; it is a book that we use even at the present time.
Q. You are not using it now, are you? A. Yes sir.
Q. This identical book? A. Yes sir.
Q. Used it for 20 years, have you?
A. I don't know as we have used it for 20 years; there was some time we didn't manufacture.
Q. Who do you say your partner was? A. Which one?
Q. The last partner? A. Staiger; Dave Staiger
Q. When did he die?

A. He died about 1883 or 1884, I think; I won't be certain about his death.

Q. Where did he die?

A. He died down in Kansas City, it was supposed.

Q. You don't know in regard to where he died?

A. We have never seen him since he started down there.

Q. He started down there at Kansas City, did he?

A. Started what?

Q. Started to go to Kansas City, did he?

A. That is what he said when he came in to get a cigar of me.

Q. You haven't seen him since? A. No sir.

Q. And that is the reason you say he died at that time?

A. The supposition is that he died.

Q. What other men did you have working for you at that time? A. I had Mr. Berthune, a German.

Q. Who else? A. Mr. Opel.

Q. You remember them, do you; you remember them working at the same time that you say this man was working there?

A. I don't know as to that.

Q. What I am asking you now is what other men were working for you we will say in May, 1879. Just mention one?

A. The book will show; I can't recollect, as many men as we had.

2318 Q. You can't from recollection, recollect the name of a single person who was working for you in May, 1879?

A. Yes, I can one, in particular, that is Mr. Pfeiffer.

Q. Where is he now?

A. He is in Leavenworth City manufacturing cigars.

Q. Working for you?

A. No, sir; manufacturing for himself,

Q. On his own account? A. Yes, sir.

Q. How many cigar factories were there in Leavenworth in 1879? A. I could not say exactly how many.

Q. Well, about how many were there?

A. There was one, two there was two I am positive of.

Q. Two? A. Including ourselves.

Q. Was it then, one?

A. No, sir; there was two, I say, including ourselves.

Q. One other factory besides your own?

A. There may have been more.

Q. How many men did you have working for you at that time? A. I guess from 20 to 25 perhaps.

Q. 20 to 25 working for you at that time? A. Yes, sir.

Q. How many men did you have working for you the next year? A. I could not tell you.

Q. Well, about how many? A. I could not say.

Q. Now, from 1879 up to the present time, how many men have you, how many different cigar makers have you had

in your employ? I wish you would give me the number?

A. I could not do it.

Q. You could form an idea? A. Yes, sir.

Q. Had a thousand? A. No.

Q. Well, how many? A. Had less than 100.

Q. You think you have had less than 100 in all these 20 years? A. No, sir; not in all these years.

Q. That is what I am asking you, taking from 1879 up to 1899, how many different cigar makers do you suppose you have had working for you?

A. Several, but I could not say how many.

2319 Q. A large number, haven't you? A. Yes, sir.

Q. How many do you suppose it would amount to?

A. I could not say sir.

Q. For instance, take it in 1880; you had different men, didn't you?

A. I had some that worked for me for several years.

Q. They are constantly changing aren't they?

A. Not in all factories.

Q. I mean in your factory. You might have one man this year and another one next year?

A. Yes, I might have one this week and not the next.

Q. That is the way of cigar makers?

A. Yes, like lawyers.

Q. In what respect are cigar makers like lawyers?

A. They like to travel around.

Q. You say lawyers like to travel around and therefore they are like cigar makers; is that your way of identifying men by their habits in that respect?

A. No, sir; that was only a little joke of mine.

Q. You joke on the witness stand? A. No, sir.

Q. Are you joking in regard to this other matter?

A. This is not the first time that you and I, Mr. Barker, had a joke.

Q. I am asking if you are joking in regard to the other matters? A. No, sir; I am on my oath.

Q. I was getting at how many you employed in 1880?

A. I could not tell you.

[A.] How many did you employ in 1881?

A. I could not tell you without referring to the books.

Q. You could not tell without referring to the books; can you tell by referring to the books? A. Yes, sir.

Q. And so on through all these years up to the present time? A. Yes, sir.

Q. Now, after having your attention called to these matters, how many men do you suppose you have employed in the 20 years? A. I could not tell you.

Q. You could form some idea? A. No, sir; I could not.

Q. How many do you employ now?
2320 A. Only one now here in this city. I am connected with a factory in New York.
Q. You only employ one here? A. Yes, sir.
Q. But up to 1890, hoy many do you suppose you employed? A. I could not tell you sir.
Q. Could you form any idea of how many you have employed? A. No, not without referring to the book.
Q. How long do you say this man worked there?
A. But a very short time.
Q. Well, how long would a very short time be?
A. Well, two or three or four weeks; I couldn't say; I could tell you if you will allow me to look at the books.
Q. I know, but have you any recollection in regard to it?
A. I should say about three weeks.
Q. That would be your recollection in regard to it?
A. Yes, sir.
Q. That is your recollection of the length of time a cigar maker worked for you 20 years ago?
A. Yes, sir; I should say about three weeks; I don't know.
Q. That is your recollection in regard to it, is it?
A. Yes, sir.
Q. That he worked for you about that length of time and that was 20 years ago? A. Yes, sir.
Q. Now, you spoke about somebody speaking to you in regard to this, and showing you a picture; when was that?
A. That was after this trial commenced.
Q. Do you know the man? A. Yes, sir.
Q. Was he a man in and about the court room here?
A. Yes, sir.
Q. Was he a man with a white hat?
A. I could not tell you the color of the hat he wore.
Q. Wear a white slouch hat?
A. I couldn't tell you sir.
Q. He came in there, did he? A. He came in, yes, sir.
Q. And you say he showed you a picture?
A. He showed me several.
Q. Have you got any of those pictures now?
A. No, sir.
Q. Did you retain any of the pictures?
A. No, sir.
2321 Q. You say he showed you one picture like this, did he? A. Yes, sir.
Q. You talked with him, didn't you?
A. No, sir; just a little.
Q. Didn't have any talk with him?
A. Very little, no sir, very little.
Q. What were the other pictures like?
A. Pictures that I did not recognize.

Q. You would not recognize the other pictures?
A. There was one that looked like this, and when the gentleman showed me the picture I said, "That looks something—"
Q. I am not asking what you said; I asked you what they looked like?
A. They looked like they had been taken from a human face.
Q. They were pictures of a human face? A. Yes, sir.
Q. That is as good a description as you can give?
A. Well parties that I didn't know. I couldn't give it.
Q. How long was it after that before you saw somebody else? A. In what respect?
Q. In regard to pictures, I am only speaking of pictures. I am not speaking about your general affairs. You spoke about a young man being in there to see you. I am asking when the second man was in there?
A. I told you at first that the second man came in a day or two after the first man came in.
Q. How long ago was that?
A. Since this case has been on trial.
Q. This case has been on trial for nearly a month, I believe, three or four weeks anyhow?
A. I have forgotten; I can't state when it was; I can't state exactly when it was.
Q. Can you tell on what day of the month it was?
A. No, sir.
Q. Can you tell who was in there, when he came in?
A. Yes, sir.
Q. Who was in there? A. Mr. Chamberlain.
Q. Mr. Chamberlain was in there? A. Yes, sir.
Q. That was in your place of business in Leavenworth?
A. Yes, sir.
Q. On what street is it and what is the number of the street? A. 405 Delaware street.
Q. Mr. Chamberlain was in there; does Mr. Chamberlain work for you? A. No, sir.
2322 Q. What is his first name?
A. I don't know his first name.
Q. Did he hear the conversation between you and this man? A. Yes.
Q. Let me understand, was Mr. Chamberlain in there at the time the first man came in there or the second one?
A. The second one, not the first one.
Q. Now I will ask you in regard to the—
A. I will qualify that by saying I [you] have no recollection of any person being there when that first man came in. He was a perfect stranger to me.

Q. This first man that came there was a perfect stranger to you? A. Yes, sir.

Q. Were you in your store alone?

A. I would not swear that I was alone; I have no recollection of there being anybody there.

Q. [—] he come in there with anybody?

A. No, sir, he came in by himself.

Q. About what time in the day or night was it?

A. It was at noon time.

Q. Then you recollect distinctly that you were there alone, do you not?

A. I did not say that; I could not say positively whether there was anybody there, and I couldn't say positively that there was not.

Q. Can you recollect anybody being in there?

A. If I could I should certainly do so, sir.

Q. Will you state the name of the man, the first man that came in? A. No, sir, I don't know his name.

Q. What kind of a looking man was he?

A. He was quite a respectable looking gentleman.

Q. I know, but all people are respectable looking, the most of them. I want a description of the man now. What was the color of his hair? A. I could not tell you.

Q. How tall was he? A. Medium height man.

Q. Did he have whiskers?

A. I couldn't say; he just came in and—

Q. I am asking you for a description of the man who first showed you this picture? A. He didn't show me the picture.

Q. What did he do?

A. He came in and asked me if my name was Simmons.

Q. That is all that took place between you and him?

A. No, sir.

2323 Q. I thought you said— Am I mistaken in regard to that, that that is the first time you saw the picture, when this man showed it to you?

A. No, sir, he didn't show me any picture.

Q. He didn't show you any picture? A. No, sir.

Q. Well, now, did this third man—What was the other's name that came in?

A. I don't know the gentleman's name but he is connected with the Leavenworth Times.

Q. You don't know his name?

A. No, I know him well; I think his name is Edwards, though.

Q. He is a small man, is he? A. Yes, sir.

Q. And the other man you can't describe at all?

A. Well, I told you he was a medium sized gentleman, very respectably dressed; I didn't take any notice of his dress; he just came in and went right out.

Q. When did you first see a picture of this kind, this picture or one like it?
A. The first time I saw it was afer finding the name.
Q. I am not asking in regard to that; just state the date as definitely as you can without reference to finding anything.
A. The first time I saw it was when Mr. Hutchings showed it to me.
Q. Mr. Hutchings showed it to you?
A. Yes, sir, showed me several.
Q. The gentleman present on my right?
A. That gentleman there.
Q. When was that?
A. At my store sometime a little after noon or about noon.
Q. Of what day? A. I don't know the day.
Q. You don't know the day when he showed you this picture? A. No, sir.
Q. This was the first time you had seen this picture or anything like it? A. I never saw it before in my life.
Q. Never saw anything that purported to be a picture similar to it?
A. No, sir, never heard of it; never knew the man had one taken.
Q. Never knew anything about it? A. No, sir.
2324 Q. So the fact of it is Mr. Hutchings showed you this picture? A. Not that alone.
Q. I know, but this picture with others? A. Yes, sir.
Q. Down at your place of business? A. Yes, sir.
Q. Now, look at the page which I show you and see how many men were working for you at that time?
A. Mr. Bethune—
Q. You need not read the names, just say how many; you can count them, can't you? A. 22, sir.
Q. You had 22 different cigarmakers working for you at that time? A. Yes, sir, on that date.
Q. Now, take this, for instance, April 26; how many men did you have working for you? A. 24, sir.
Q. You had 24 working for you on the 26th day of May, 1879? A. This is marked April here.
Q. What is this? A. May.
Q. Did it take two entries?
A. This is for the week ending April 26th, and this for the week ending May 3rd.
Q. So I was right, on April 26th?
A. You were right, April 26th, but you said May afterwards.
Q. How many men did you have working for you on the 17th day of May, for instance, that was working for you on the 26th day of April?
A. Is that the 17th of May there?

Q. Yes, what changes had there been from that time; I am asking what changes there had been, what men were working for you at that time that were working for you on the 26th day of April, 1879? A. April 26th?

Q. Yes; that is the same one you read before; what men had been discharged and others had taken their places at that time, if you know?

A. On April 26th, one man by the name of Dill was discharged or quit—That I can't answer, whether I discharged him or he quit.

Q. He had gone, had he?

A. Yes, sir; there was three of them.

Q. Three who were working for you on April 26th, were not working for you in May?

2325 A. I can't tell by looking at these. There was only one man quit work or discharged from May 10th to May 17th.

Q. I was asking from April 26th to May 10th?

A. I don't know as I can tell without putting the names down. About how many changes have been made to May 10th?

Q. Yes? A. I think three, sir.

Q. I see you have your books here. You have no recollection in regard to these changes except by the books, have you?

A. No, that is all.

Q. That is all you know in regard to the matter, is what these memoranda show? A. Yes, sir.

Q. Now, take your book and look at it as well as you can: Can you form any estimate of how many different men you had working for you since 1879?

A. I will have to go all over the books.

Q. Can you form an estimate from your books now of the number of men? A. It will take some time.

Q. You have got your books before you and you know in regard to your business; I am asking now if you can form any estimate of the number of men who worked for you for the last 20 years?

Objection.

A. I shall have to go over the books and put the names down; I can't tell in any other way or make any estimate except by counting the names, no, sir, in 20 years.

Q. You couldn't from your knowledge of your business, and the number of men you have employed and all that sort of thing, you couldn't form any basis? A. Of what?

Q. Of the number of men you have employed during the time you have been in business here? A. No, sir.

Q. You have employed a great many, haven't you?

A. Yes, sir.

Q. What would you say in regard to two or three hundred men? A. What, in that time?
Q. Yes? A. We have had fully that, yes, sir.
Q. What would you say in regard to five hundred?
A. I couldn't say.
Q. What would be your best judgment in regard to it?
A. I couldn't say.
2326 Q. Couldn't say in regard to that? A. No, sir.

And in answer to redirect interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. How many times does this name Walter appear on your book? That is the way they treat your book, when you let them have it.
A. They have got it all mixed up.
Q. They didn't get you mixed up, so it is all right. How many times does it appear in the book?
A. I will tell you in one minute, if you please.

The defendants object to the question as incompetent, irrelevant and immaterial.

By the Court: It is relevant in view of the question about the erasure in one place.

A. Mr. Walter worked for the firm of Simmons & Staiger and received three weeks' pay.
Q. Answer the question, how many times the name appears on the books? A. Twice.

The defendants move to strike out the next to the last answer as not responsive to the question. Motion sustained, the plaintiff duly excepting.

[—] How many times does the name appear on the books?
A. Twice for three weeks.
Q. Does that cover the time that this man worked for you?
A. Yes.
Q. I will ask you if you have examined that book with a view to determining whether or not the name appears at any other time than those two times?

The defendants object to the question as incompetent, irrelevant and immaterial and leading. Objection sustained, the plaintiff duly excepting.

Q. I will ask you if, after an examination of your
2327 book, you are able to state whether or not this man worked for you at any other time than the time you have described?

A. No, sir, he did not.
Q. Or any man by the name of Walter?
A. No, sir, it only appears that once Walter.
Q. Mr. Barker called your attention to what he called an erasure and what you called drawing a pencil through a name and writing the name of Walter over it. I guess you will have to come up here. I will ask you what explanation you have of that?
A. If you gentlemen will please look. I mostly paid off the factory; I did the work, went around among the men, examining their work, and looking after the stuff, and Mr. Staiger was mostly doing the packing; that is what we mean by packing is sorting out the colors of the cigars and putting them up in boxes. My part of the business was principally the buying of the tobacco. I would take the work from their tables, what they had manufactured on the Monday would be taken on the Tuesday morning, in each case. When I came on to the week ending May 10th, Mr. Anderson made 900 cigars, and the following week, or that night, he was discharged or quit, I don't know which.

By Mr. Barker: To that statement what Mr. Anderson did, I object.

A. I was just going to show you how his name came here.

By the Court: Proceed.

A. When Mr. Anderson quit or was discharged Mr. F. Walter took his place in the shop, and to keep the columns even, as you gentlemen will see all through this book we would take and mark out a name and put the other man over it.
Q. So Anderson's name has the pencil drawn through it?
A. Anderson's name has the pencil drawn through it.

By Mr. Barker: The book is the best evidence.

By Mr. Atwood: If you will allow us to offer this that is what we want.

A. The first week's work that Mr. Walter made, he made 800 cigars that he got his pay for on May 17th; on May 24th; he made 1200 cigars and on May 31st, he made 900 cigars.

Q. He made them on those days, or was that the 2328 accumulation? A. The accumulation of the week.

Q. Let me ask you this question: When did you write that word, these letters, F. Walter? I will ask you first if you wrote it? A. Yes, that is my writing.
Q. And when did you write it?
A. I must have written it on—

By Mr. Barker: Have you any knowledge or recollection of writing it? A. Yes, I can swear to my writing.

Q. Have you any recollection of when you wrote it?
A. I wrote it when I took his work on the Tuesday morning.

By Mr. Atwood:
Q. Have you ever written that or anything else at that point since? A. No, sir.
[—] Is that the same Walter?
A. That is the same Walter and in my handwrite.

By Mr. Atwood: I will offer this book in evidence.

The defendants object to the book as incompetent, irrelevant and immaterial. Objection sustained, the plaintiff at the time duly excepting.

Q. I will ask you this question, then: I will ask you if at other points in this book, you have similar entries to that where there is a line drawn through one name and another written above?

The defendants object to the question as incompetent, irrelevant and immaterial, not the best evidence and leading.

By the Court: This book is not competent.

To which ruling of the Court, the plaintiff duly excepted.
Q. I will ask you if this entry was made in the regular course of your business? A. Yes, sir.
Q. Was it made in pursuance of the customs regarding your business at that time? A. Yes, sir.
Q. When one man quit and another one took his place in the shop? A. Yes, sir.

2329 Q. I will ask you this question: Whether or not this is the first book, and perhaps the only book, in which this part of your business is entered?
A. No, sir, it is not the only one, sir.
Q. State whether it is the first book in which entries are made of the amount of cigars by the month, made by your men?
A. No, sir, we have other books; that is one that we have used for a number of years.
Q. I mean of these men whose names appear there, I don't mean the first book used in your business? A. Yes, sir.
Q. But in the course of your business, the entries of the men and the amount of the cigars they have made, are they entered in this book, or in some other that is the men whose names appear here? A. Oh, yes. Yes, sir.

And in answer to recross interrogatories propounded to him by Geo. J. Barker, Esq., counsel for the defendants, the witness testified as follows, to wit:

Q. Will you look at this picture which is marked Exhibit 36, and state if you know, of whom that is a picture?

A. I saw that picture. It was shown to me, and I said that puts me in mind of some one—

Q. I am not asking you what you said; I am asking you if you recognize that picture?

A. No, sir, I wouldn't have recognized that as being Walters.

Q. By whom was this picture shown to you?

A. I think Mr. Hutchings. He showed me several at the time and that was among them.

Q. At that time he talked to you about Mr. Walters, did he? A. He didn't say much about him.

Q. Did he tell you how tall a man he was?

A. No, sir, he never did.

Q. And the color of his hair? A. No, sir.

Q. Didn't say anything about that?

A. No, sir, never a word, sir.

Q. The size of his hands? A. No, sir.

Q. You remember now, do you, at this lapse of
2330 time, the personal appearance of the man, do you?

A. I recollect him well, sir.

Q. You could give the color of his hair and the color of his eyes, couldn't you?

A. I don't know that I could positively the color of his eyes.

Q. You could the color of his hair? A. Yes, sir, I can.

Q. You are not sure about his eyes? Do you remember in regard to his teeth particularly?

A. No, sir, I never noticed his teeth.

Q. Don't remember anything in regard to those?

A. I don't remember whether he had good teeth or bad teeth; I never noticed his teeth.

Q. So you don't know anything in regard to them?

A. No, sir.

Q. Did you associate with him? A. I had to.

Q. Saw him a good deal? A. Oh, yes.

Q. Seen him laugh, didn't you?

A. I may have heard him laugh.

Q. Don't you know whether you saw him laugh?

A. I can't say yes and I can't say no.

Q. You can't say anything in regard to that? A. No, sir.

Q. Do you know where he boarded? A. No, sir, I do not.

Q. Do you know where any of your men boarded?

A. I knew where some of them, that had worked for me a number of years.

Q. Do you know where any of the men are living now that worked for you at that time? A. Yes, I know.

Q. You have stated one?
A. Mr. Opel was in Kansas City; I don't know whether he is there now.
Q. What is his first name? A. That I forget.
Q. Anybody else who was working at that time?
A. Mr. Kleinman.
Q. Where is he? A. In Kansas City.
Q. Working for you?
A. No, sir, I have no factory down there.
Q. Who else? A. Mr. Pfeiffer.
Q. Where does Mr. Pfeiffer live?
A. He lives in the city here.
Q. What is his first name?
A. I think C. Pfeiffer; they call him Cooney.
2331 Q. What is he doing? A. Manufacturing cigars.
Q. Manufacturing cigars here in this city?
A. Yes, sir.
Q. At what place?
A. On 4th street between Delaware and Cherokee.
Q. What other man who was working for you is in this country now, this neighborhood? A. Mr. Potter.
Q. What is his first name?
A. I don't know any more; we used to call him Pot.
Q. Where does he live? A. He lives in the city, sir.
Q. What business is he engaged in?
A. He is now working for the, or was working within a week or two or three, for the electric light company; electric car company.
Q. Do you know what his number is?
A. No sir, I don't know where he lives.
Q. Does he live here in the city
A. He lives in the city, sir.
Q. I cannot see very well; I wish you would take up the first name there that appears there, and tell me where that man lives now if you can, on this page?
A. Berthune is dead; died in this city.
Q. Take the next one?
A. Mr. Opel was in Kansas City the last I heard of him.
Q. What is his first name?
A. I don't know, sir, what his first name is. Potter, he lives in the city now.
Q. Working for the electric road? A. Yes, sir.
Q. Don't know his residence? A. No, sir.
Q. Don't know his name? A. No, sir.
Q. Cigar maker?
A. He was a cigar maker but owing to pains in his chest he had to quit sitting down.

Q. Mr. Kleinman? A. He is living in Kansas City.
Q. What is his number? A. I don't know.
Q. What is his first name? A. That I don't know.
Q. Is he a cigar maker?
A. He was a cigar maker; I don't know if he is now.
Q. Take the next one? A. Mr. Pfeiffer.
2332 Q. He lives in the city? A. Yes, sir.
Q. What is his first name?
A. Well, we used to call him Cooney.
Q. Where is his residence?
A. That I don't know, sir. I don't know his residence.
Q. Take the next one?
A. Brown; I don't know whatever became of him.
Q. Do you know where he is? A. No, sir.
Q. How long since you saw him?
A. Oh, I haven't seen him in years.
Q. Take the next one? A. Charley, he was apprentice.
Q. What is his other name?
A. We only knew him by the name of Charley.
Q. Where is he? A. He is dead; died in Wisconsin.
Q. Take the next one? A. Loman; was a German fellow.
Q. Where is he? A. I don't know, sir.
Q. The next one? A. Well, he is living in southern Kansas on a farm.
Q. Take the next one?
A. Bretsnyder, he is working in this town.
Q. What is his first name?
A. I don't know what is his first name.
Q. Cigar maker?
A. Yes, sir, all of these that you see here are cigar makers.
Q. Run through the rest of them? A. F. Walters.
Q. Never mind about him now. We will take care of that.
A. A man by the name of Fritch; I don't know what has become of him sir. Bayer.
Q. What is his first name?
A. I don't know what his name was; there was two brothers of them; I marked one.
Q. Where is he? A. Bayer is dead. Nick Herrick.
Q. Where does he live?
A. In Wichita, manufacturing cigars. Ellick, I don't know what has become of him. Here is that other Bayer, I told you there was two brothers of them.
Q. I want to know where he is now?
2333 A. I don't know, sir. List—
Q. Where is he?
A. He is dead, and the best boy I ever saw in my life, too. You want the next one?
Q. Yes. A. Trumm.

Q. Where is he?
A. Died in this city. Conrad, is working in Denver; was here last summer; he is not doing so much in the cigar business as he is in the bicycle business.
Q. What is the next one? A. Oliver, he is dead; Joe—
Q. What was his other name? A. I don't know.
Q. Where does he live?
A. I don't know what has become of him.
Q. What is the next there?
A. Albert, I don't know what has become of him.

And in answer to further direct interrogatories propounded to him by John H. Atwood, Esq., counsel for the plaintiff, the witness testified as follows, to wit:

Q. You were asked who showed you the pictures and you said Mr. Hutchings? A. Yes, sir.
Q. I will ask you whether or not these were the pictures that were shown you?

The defendants object to the question as not proper cross-examination. Objection overruled, each of the defendants duly excepting.

Q. Look them over and see if they are the ones?
A. Yes, sir.
Q. You need not answer this until the court tells you to; it may be objected to. I will ask you now— These were shown to you by Mr. Hutchings? A. Yes, sir.
Q. I will ask you if Walters' picture was picked out, or your attention called to it particularly, from that bunch of pictures, by Mr. Hutchings or by anybody, before you picked out the photograph.

The defendants object to the question as incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of them duly except.

2334 Q. Do you understand the question? A. Yes sir.
Q. Well, state? A. No sir.
Q. You say it was not?
A. It was picked out by me. When my—
By the Court: You have answered the question.
[—] How long after this bunch of pictures were handed to you, did you recognize the Walter picture that you have here recognized?

The defendants object to the question as incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of them at the time duly excepting.

A. It was not one minute before I recognized Mr. Walters' picture. If the gentlemen will allow me, just as quick as—

Objection.

Q. My associate asks the question as to how he picked it out; the maner in which it was done.

The defendants object to the question as last above set forth.

By the Court: I think that is immaterial.

To which ruling, the plaintiff at the time duly excepted.

And in answer to further cross-interrogatories propounded to him by Mr. Barker, counsel for the defendants, the witness testified as follows, to wit:

Q. I understood you to say—that is maybe repetition—that you hadn't seen this man, whoever he was, since 1879?

A. No sir, I had not to my knowledge.

Q. To your knowledge, you had never seen him since that time? A. No sir.

Q. I understand you to say that since this trial has been going on in this court, that picture was submitted to you and you immediately recognized it as the picture of that man?

A. I picked it out.

Q. You picked it out? A. Yes sir.

2335 Q. A man you hadn't seen in 20 years? A. Yes sir.

Q. Since 1879 up to the present session of this court; the picture was submitted to you, and you immediately picked it out? A. Yes sir.

Q. That is all, sir.

By Mr. Atwood:

Q. What, if anything, was there about this man that tended to fix him in your memory; what peculiarities did he have, if any, of manner or anything else?

A. Well, sir, the man was all the time talking about the towns, the different towns he had been in, and the love scrapes that he had gotten into, so that—he talked of it so much that the men in the shop called him the masher.

The defendants object to all this class of testimony as incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of them at the time duly excepting.

By Mr. Barker:

Q. How did you say that you remembered him?

A. By his talking so much of his travels in the different towns he had been at, and the love scrapes he had gotten into, and how he got out of them, and all this; he would keep the shop in a perfect roar of laughter on his match-making as he called it or something to that effect.

Q. You remember that?

A. Well, you couldn't help doing it.

Q. You could detail the conversation, couldn't you?
A. I don't know as I could detail the conversation, no sir.
Q. You could tell what place he was from?
A. I don't know exactly; he was from so many.
Q. You say he was from so many different places?
A. Different towns, yes sir.
Q. But you couldn't remember where he was from.
2336 And you stayed in there and listened to this talk, did you? A. I had to be in there, sir.
Q. What was your business; were you working at making cigars?
A. I was looking over the stock, taking the cigars and looking at the men.
Q. You were looking and you remember after this lapse of time, the conversation? A. Yes sir.
Q. You can remember that fact? A. Yes sir.
Q. You could remember with whom he talked?
A. With the men in general.
Q. You could remember the very men with whom he talked could you? A. No, he was talking to the shop.
Q. You remember this conversation?
A. I remember them well.
Q. You never heard a cigarmaker talk in that way before, did you? A. Not as much as he done.
Q. You never heard a cigarmaker tell of the various places he had been? A. Oh, yes, I have.
Q. You never heard any cigarmaker in your life tell about the mashes or anything of that kind?
A. Not as many as he had.
Q. You thought his number was a little larger, did you?
A. It was exceedingly large.
Q. But you have heard them talk on that subject that you heard then? A. Some little, yes.
Q. It is not infrequent for cigarmakers to talk about where they have been, and the love matches they have had?
A. No sir, have heard seldom talk on that subject, on love mashes. The men in the shop called him the masher.

Witness excused.

And thereafter, the witness was recalled for further cross-examination by Mr. Barker, whereupon he testified as follows, to wit:

Q. You have been living here since 1879? A. Yes sir.
Q. Are you acquainted with one William H. Dill?
A. Yes sir.
2337 Q. Is he an attorney?
A. He has that reputation, yes sir.
Q. Is he a practicing attorney here? A. Yes sir.

Q. How long have you known him?
A. I have known him for a long time, sir.
Q. About how long?
A. I can't say how long; I have known him for a good many years.
Q. During that time has he been engaged in the practice of the law? A. I believe so.
Q. Was he at one time assistant attorney general of the state?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, the plaintiff duly excepts.

A. I don't know, sir, whether he was or not.
Q. Was he acting in that capacity?
A. I could not answer because I don't know.
Q. Was he engaged in the prosecution of cases here?
A. Yes sir, as county attorney.
Q. As county attorney? A. Yes sir.
Q. He was county attorney of this county? A. Yes sir.
Q. Do you remember what year? A. No sir.
Q. Can you tell about what year? A. No sir.
Q. Now, I will ask you if it is not a fact that during the time that he was county attorney you paid him five hundred dollars or some other amount to influence his action as county attorney?

The plaintiff objects to the question as incompetent, irrelevant and immaterial.

By the Court: You know that is the height of impropriety. The objection is sustained.

By Barker offered to speak.

By the Court: I won't listen to it.

The defendants then and there excepted to the ruling of the court.

By Mr. Barker: I will submit to the court in writing what I propose to prove.

2338 By the Court: Nothing along that line will be entertained.

By Mr. Barker: I will submit in witing, under the rule of the Court at the proper time, what we propose to prove by this witness.

By the Court: If you have anything further in the line of proper cross-examination, proceed.

Witness excused.

By the Court: That is so much out of the way of propriety, so much aside from the well recognized principles of law, that I cannot conceive the counsel is acting in good faith in suggesting it.

By Mr. Barker: I want to say to the Court that I am acting in absolutely good faith. I think we have the right to ask him if he has ever been in jail or indicted or anything of that sort. I have in mind a line of cases where a court in New York had held that you had the right to ask a man if he had been in jail.

By the Court: There is no line of cases reported in the English language that will justify a question of that character, and the counsel ought to know it.

And thereupon, the defendants offered, in writing, to prove on the cross-examination of Arthur Simmons, that in Leavenworth county, he either testified, stated or made an affidavit that he either had or attempted to influence the official conduct of a public officer of the State of Kansas, by the use or offer to use money.

The Court denied the offer, to which action of the Court the defendants and each of them at the time duly excepted

2339 By Mr. Hutchings: We now offer in evidence certain questions and answers in the tstimony of W. W. Nichols in the trial of 1895 upon one point for which the foundation was laid by questions put to him at this trial. I suppose it is conceded this is a correct transcript.

By Mr. Barker: We make no objection to the transcript, but we object to the testimony being read because it does not tend to impeach the witness.

Objection overruled, the defendants and each of them duly except.

Mr. Hutchings reads:

"Q. When you were camped with him on Pease river in Texas, did you notice this black tooth? A. Yes sir.

Q. He still had the black tooth? A. Yes sir.

"Q. That would be along in the fall of 1876?

A. When he was camping on Pease River?

"[—] Yes. A. August.

"Q. August 1876? A. Yes sir.

"Q. You have a distinct recollection at that time he still had this black tooth? A. Yes sir.

"Q. How long did you stay down there in that business?

A. I think I came home in September, 1876.

"Q. You didn't go back any more? A. I did not.

"Q. The next time you saw Hillmon was in 1877?

A. Yes sir.

"Q. Where? A. In Jefferson county.

"Q. Did you ever see him again? A. No sir.

"Q. How long and under what circumstances did you see him in 1877? A. He was on a visit there.

"Q. How long were you in company with him?

A. About two hours or maybe three.

"Q. Did you still notice that black tooth? A. Yes sir.
"Q. You never saw him any more? A. I did not."

2340 C. H. Nettels, recalled by the plaintiff in rebuttal, testified as follows, to wit:

Direct Examination

By Mr. Wheat:

Q. You are the stenographer who reported the evidence upon the trial in 1895? A. Yes sir.

Q. Did you take down the evidence of A. L. Selig given upon that trial? A. Yes sir.

Q. Did you take it down correctly? A. Yes sir.

Q. On that trial who testified first, Doctor Stuart or Mr. Selig? A. Mr. Selig testified first.

Q. You may state whether or not upon that trial in 1895 in direct examination by Mr. Green, attorney for the defendants, Mr. Selig was asked the following question: "Now, another point, you may state if you know the height of John W. Hillmon?"

A. As I have already said, Mr. Wheat, I have no independent recollection of these matters, but I have before me my original shorthand notes of Mr. Selig's testimony at that trial and I see that that question was asked him by Mr. Green on direct examination.

Q. I will ask you if in answer to that question, he said, "Yes sir." A. He did.

Q. And was he asked this further question, at that time, "How tall was he?" and did the Court then say, "This is of your own personal knowledge?" and did the witness then answer, "Yes sir." A. He did.

Q. And did Mr. Green then ask him the following question: "You may answer if you know" to which he answered, "I do." A. Yes sir.

Q. And then was this question asked him, "How tall was he?" and to that did he answer "Five feet nine inches."

A. Yes sir.

Q. And was this question then asked him and did he make the following answer: "You may state if you ever saw him measured?" "A. I did." A. Yes sir.

Q. And was this question asked him and did he make this answer, "Where? A. At the office of Doctor Stuart."

A. Yes sir.

2341 Q. And was this question then asked him and did he make the following answer thereto: "Who by?

A. Doctor Stuart." A. Yes sir.

Q. And was this question then asked him and did he make the following answer thereto: "When was this?

A. On the 26th or 27th of February, 1879." A. Yes sir.

Q. Did he say that it was on th 26th or 27th or that it was about the 26th or 27th?

A. He said it was on the 26th or 27th. It is very plain here.

Q. And was he then asked the following question and did he make the following answer thereto: "Who was present at this time? A. The three of us." A. Yes sir.

Q. And was this question then put to him and did he make the following answer thereto: "How did it come about that he was measured at that time?" That question was objected to, was it not, and not answered? A. Yes sir.

Q. And was the following question then put to him, "State what was said at that time in regard to his height?" That question was also objected to, was it not, and the objection sustained? A. Yes sir.

Q. And was the following question then put to him: "State what was said in regard to having him measured?" And did the Court then say, "He may state what was said, but the circumstance that brought about the measurement, it is not necessary to give the conversation?" A. Yes sir.

Q. And did Mr. Green then say "I am now after the circumstances as to how it came about that he was measured?"

A. Yes sir:

Q. And did the Court then say, "He may testify as to the circumstances or occasion how he came to be measured?"

A. Yes sir.

Q. And was the following question then put to him by Mr. Green: "You may state what Mr. Hillmon said at that time in regard to his height?"

And was not that question objected to and did not
2342 the Court then say, "I do not see how that cuts any figure in this case, in that connection what he said about his height. The question now before the jury is as to whether he was measured there and the circumstances how he came to be measured. Does this question throw light upon that subject?" A. Yes sir.

Q. And did not Mr: Green then say, "I think so, yes sir?"

A. He did.

Q. And was not the following question then put to the witness by Mr. Green: "State what Mr. Hillmon said?"

A. Yes sir.

Q. And to that question did he not make the following answer: "He said that a mistake had been made in his height as given in the application and that Doctor Miller had measured him and that he was not as tall as given in the application?" A. He did.

Witness excused.

2343 H. Feagans, a witness produced by the plaintiff in rebuttal, being duly sworn, testified as follows:

Direct Examination by Mr. Atwood.

Q. What official position do you hold at this time?
A. I am Deputy United States Collector.
Q. Of Internal Revenue? A. Yes, sir.
Q. Under Mr. Sutton? A. Yes, sir.
Q. I will ask you whether or not you are the custodian of the books that show who are authorized manufacturers of cigars in this district, including the City of Leavenworth?
A. Yes, sir.
Q. I will ask you if you have examined those records for the years 1878 and 1879 so that you are able to say whether or not there were any Staigers who were authorized to manufacture cigars in this city in 1878 and 1879 other than the Staiger who was a partner in the firm of Simmons & Staiger?

The defendants object to the question as being incompetent, irrelevant and immaterial and calling for secondary evidence, and because the question is leading.

Objection overruled. The defendants, and each of them, duly excepted.

Q. What does it disclose, as to whether or not there is any other cigar maker than the one I have mentioned in my last question?
A. The only one I find is the firm of Simmons & Staigers.
Q. During those years? A. Yes, sir.
Q. Other than this firm of Simmons & Staiger, authorizing Staiger to manufacture cigars? A. I find none.

2344 Cross-Examination by Mr. Barker.

Q. How is this Staiger spelled?
A. I don't remember that Mr. Barker.
Q. Do you know what his initials were?
A. No initials given on the record.
Q. Then if you do not know how the name is spelled, how do you know but what there is some other Staiger on the records there?
A. The record would show if there was any other authorized to manufacture cigars.
Q. I know, but others by that name is what they inquire for, no other person by that name, I don't understand. You know what the name was, or how it was spelled, or what the initials were?
A. No, sir, I don't remember how the name is spelled on the record, but I know there were no initials given.
Q. Then you can't say that there was no other person by that same name?

A. Yes, sir, to whom a license had been issued. No other person by the name of Staiger or Stiger was authorized to manufacture cigars in those years, according to the record.

Q. That is, no person whose first name was unknown to you, and you don't know how to spell it?

A. There was no other person.

By the Court: [Q.] That is what it shows? Simmons & Staiger? A. Yes, sir.

By the Court: That would not give the initials of either person.

By Mr. Barker:

2345 Q. That is what I want to get at; whether there might not have been several parties manufacturing

Redirect Examiantion by Mr. Atwood.

cigars by the name of Staiger, and doing business as cigar manufacturers? A. No, sir.

Q. I want to get this straight. State whether or not the records of the years of which we have been speaking disclosed the name as the name of a person authorized to manufacture cigars in this city, of Staiger or Stiger, except the one who is coupled with Mr. Simmons in the partnership?

A. That is the only one I find.

By Mr. Barker:

Q. There were other licensed cigar manufacturers in the city of Lawrence were there not at the same time?

A. Yes, sir.

Q. Do you remember how many there were?

A. I don't know.

Q. Several were there not? A. Yes, sir.

Q. Would you say half a dozen? A. Yes, sir.

Q. Perhaps more than that? A. I can't say positively.

Witness excused.

2346 Sallie E. Smith, the plaintiff, already duly sworn in the cause, testified in her own behalf, in rebutial, as follows, to wit:

Direct Examination by Mr Hutchings.

Q. State to the jury if you have the bill which was rendered by Bailey & Smith to you for services in relation to the dead body of your husband? A. Yes, sir, I have.

Q. Produce it. (Witness does so.)

By Mr. Hutchings: We will have it marked and offer it in evidence.

Q. Were you present during the time that W. W. Nichols testified? A. I was.

Q. I will get you to state the facts with reference to a conversation with him at his house in Jefferson county, concerning which he testified. If you had such a conversation state what it was?

[Q.] Well, part of the conversation that he related on the stand.

Q. What was it?

The defendants and each of them object to the question as incompetent, irrelevant and immaterial, and because the question does not include the question which was put to the witness whose testimony is sought to be impeached. Objection overruled. The defendants and each of [—] duly except.

A. One part of the conversation.

Q. Go on and state what conversation was had at that time?

A. I asked him to give me a description of my husband, and he went on to state. He stated he knew him and told me near his height. He did not know his height exactly. I asked him about his eyes, and he told me that he had dark eyes and dark hair, but he did not know the exact height, but he was a taller man than he was. I asked him about his teeth, and he said he didn't know anything about his teeth. I asked him if he could not give any description of his teeth. No, he said, he never noticed anything about his teeth.

Q. Now, you may state why you were making these
2347 inquries of him. What were you doing at that time?

The defendants and each of them object to the question as incompetent, irrelevant and immaterial, and because the question does not include the question which was put to the witness whose testimony is sought to[—]impeach-. Objection overruled. The defendants and each of them duly except.

A. To get him as a witness for me in this case.

Q. You may state whether you had any such conversation with him as he testifies to?

The defendants and each of them object to the question as incompetent, irrelevant and immaterial, and because the question does not include the question which was put to the witness whose testimony is sought to[—]impeach-. Objection overruled. The defendants and each of them duly except.

A. I did not.

Q. Did you hear the testimony of W. W. Nichols, concerning the conversation which he claimed to have had with you in Leavenworth at the time of the first trial of this case?

A. Yes, sir.

Q. You may state whether you had such conversation with him or not?

The defendants and each of them object to the question as incompetent, irrelevant and immaterial, and because the question does not include the question which was put to the witness whose testimony is sought to be impeached. Objection overruled. The defendants and each of them duly except.

A. A part of it. I met him.

Q. Did you have any such conversation with him—when he testified you said you heard it?

A. Yes, sir, I did not have any such conversation with him.

Q. Now then, I will get you to state what conversation if any you had with W. W. Nichols at the first trial of this case here in Leavenworth?

A. He came to the court-house, the west entrance to the court-house, and I met him there as he was going up the steps. I spoke to him, and he said that his brother and his
2348 brother's wife and his sister and himself had all come down to testify in this case. He said, we cannot be your witnesses. We are subpoenaed for the other side. I said, I would like to see your folks. Will you introduce me. He says yes, come and go to the hotel I went with him to the hotel, and he introduced me to his brother and to his sister and sister-in-law, Mrs. Nichols, and then I asked if they had come to testify, and they said they had.

Q. Now, before you go into that, I will get you to state whether or not at that time you requested W. W. Nichols not to testify against you, or not to testify to anything in the case? A. No, sir, I did not.

Q. Now, you may go on and state what conversation, if any, you had with George A. Nichols and his wife or the other parties that were there that you were introduced to at the hotel?

A. I asked Mrs. Nichols, I think her husband stood close to her, I asked her if she would give a description of her brother. She said she would, and she went on. She said he had light brown hair; she didn't know just how tall he was; she didn't know the exact height; that he had defective teeth, defective or some missing. I said, no, my husband had good teeth. You have either forgotten how your brother looked, or you are in the employ of the insurance companies, and you are no friend of mine, and I turned around and walked out.

Q. Were you present at the time Mr. Griffith testified?

A. Yes, sir.

Q. Did you hear him testify in relation to a conversation had with you at his bank when Mr. Selig was present?

A. Yes, sir.

Q. I will get you to state to the jury your version of that conversation. State briefly and concisely what was said and done there on that occasion?

A. I went down to the bank at his request. I had received a letter from the postoffice requesting me to go to his office. I went to his office, and I met Mr. Griffith and Mr. Selig both there in the office, and Mr. Griffith asked me if I had brought my papers. He asked me first if I had re-
2349 ceived the letter. I said I had. He asked me if I brought my papers. I said no, that I had come right from the office; then asked me if I had heard from Mr. Baldwin; I told him no, I was expecting word from him at any time. He then asked me if I would not give him a description of my husband, and then they would make out the papers, the application, and have them all ready to send off to the company, and have the money there in a short time for me. Then he asked me if I would give him a description of him. I told him yes. He asked me to give his height and I gave him his height, then he asked me the color of his hair; when I stated his height, Mr. Selig said, "No, Mrs. Hillmon, he is not so high as that, he is not as tall a man as I am." I said, "Yes, Mr. Selig, you have walked with him, and he is as tall as you are. I have seen him and you together." Then Mr. Griffith asked me to give the color of his hair, and I told him his hair was dark brown. Selig said no, his hair was light, "almost as light as mine." He had light hair. Mr. Griffith looked at him and smiled. "Mrs. Hilmon" he says, "your husband had false teeth, because I noticed they were too even." I said no; but before I could finish, Mr. Selig said "Why no Griffith, don't you know his teeth were all jagged in front?" I said, you are both mistaken, my husband had good teeth; then I got up and started to go home, and Mr. Griffith told me to wait, and he would take me home. I said "As soon as I hear from my cousin, I will let you know, and you can go and see for yourselves." Selig says, "I wouldn't know my brother," and Griffith said " I wouldn't look at a dead body," and Mr. Griffith took me home in a carriage.

Q. Now, you may state whether at that time and place you said you did not know the height of your husband, or his description? A. No; I did not, because I did know it.

Defendants move to strike out the answer that she did know, as not responsive to the question. Motion sustained, plaintiff excepts.

Q. I call your attention to the coroner's inquest held at Lawrence. I will get you to state what was done there at that time,—what was said by you, and what took place
2350 there in reference to your giving a description of your husband?

A. Mr. Barker, I think, asked me to give a description of my husband. It was almost identically the same as Mr. Selig and Mr. Griffith. Almost the same thing, except Mr. Green wanted me—he wanted to know more about the thickness of his hair and all, but it was very nearly the same.

Q. What do you mean by that?

A. When I would tell the color of his hair, they would contradict me; when I would tell his height, they would contradict me; but they didn't ask me anything regarding his teeth at the inquest, so they did not dispute me on that. They didn't ask me.

Q. If anything was said about his hair, in comparison with that of Mr. Green, you may state it?

A. Yes, sir, Mr. Green asked me the heft of his hair; how heavy it was, and I couldn't tell him how heavy it was. It was just nice and thick, and I couldn't tell how heavy it was. He insisted that I should tell just how heavy it was, and he wanted to know if it was as heavy as his. He was pretty near bald-headed then, and I told him it was heavier than his, and he laughed, and that was all that was said on that subject.

Q. How long were you there? A. Just a short time.

Q. You may state whether you had any attorney there, or anybody representing you at that time?

A. No, sir, I did not.

Q. You may state whether there was a stenographer there during the time you were testifying?

A. Yes, sir, Mr. Baldridge, George Baldridge.

Q. Now, at the time you were testifying at the coroner's inquest, you may state whether you had seen the dead body of your husband at Bailey & Smith's? A. Yes, sir, I had.

Q. Were you present at the time Isaac Johnson testified as a witness here? A. No, sir.

Q. I will get you to state whether at any time you lived on Massachusetts street, over Hart's grocery store,
2351 after you were married to Mr. Hillmon?

A. No, sir, we lived at Mrs. Judson's.

The defendants object to the evidence as not proper rebuttal.

By Mr. Hutchings: Johnson said that Mr. Hillmon was living there, and that he delivered groceries over Hart's grocery.

By the Witness: He may have meant some other Hillmon; there is another Hillmon, and he may have meant him.

Q. You may state whether you at any time lived over Hart's grocery store in Lawrence?

A. No. We never lived on Massachusetts street.

Q. Where did you and your husband live during the time you lived together after you were married?

A. We lived at Mrs. Judson's on the corner of Henry and Alabama streets.

Q. What kind of a house is that there?

A. It was a two-story—story and a half frame house.

Q. A dwelling house? A. Yes, sir.

Q. You may state whether any groceries of any kind were ever delivered to you on Massachusetts street, over Hart's grocery store, or at any other place?

A. I never lived on Massachusetts street.

Q. You may state whether any member of your family lived there? A. In what year?

Q. In the year 1878 or '9?

A. No, we didn't any of us live there. Mother had moved to the country in the spring of '79 or '78. Mamma moved to the country, and we didn't live there any more.

Q. Did you ever live there? A. No, I never lived there.

Q. Did your mother ever live there?

A. No, sir, she didn't.

By Mr. Hutchings: We now offer in evidence the bill of Bailey & Smith, identified by the witness.

The defendants object to the admission in evidence of said paper as incompetent, irrelevant and immaterial, and not proper rebuttal. Objection overruled. The defendants and each of them duly except.

Said paper was marked Exhibit 43, and was read to the jury. It is in words and figures as follows, to wit:

2352 "Lawrence, Kansas, April 11th, 1879.

Mrs. J. W. Hillmon, to Bailey & Smith Company,
Furniture Dealers, Upholsterers and Undertakers,
106 Massachusetts St.

To permit and opening and closing grave	$ 7.00
Trip to depot to meet body.....	2.00
Burying	5.00
Total	$14.00

Paid,
BAILEY & SMITH COMPANY,
Per C. W. Smith."

Q. I will show you a letter marked Exhibit 31, which has already been introduced in evidence. I will get you to state whether the two papers I now hand you to be marked 44 and 45, respectively—

A. Yes, sir, those were enclosed in that letter.

Q. Those are the notes referred to in that letter?

A. Yes, sir.

Q. I will get you to state if you know the signature to these papers? A. Yes, sir, I do.

Q. Whose signature is that? A. Levi Baldwin's.
Q. I will get you to state whether those notes have been paid; if they have been paid?

Defendants object to the question because incompetent, irrelevant and immaterial. Objection overruled. The defendants and each of them duly except.

Q. You may state when they came into your possession?
A. I do not know just when. I have always had them, all these years. I got them with other papers. I suppose they were left with me.
[—] You may state whether these were the notes you left with Mr. Buchan for collection? A. Yes, sir.

By Mr. Hutchings: We offer the notes in evidence.
Said notes were read to the jury in evidence, and are in words and figures as follows, to wit:

2353 "Tonganoxie, Kansas, September 2, 1878.
On or before the first day of January, 1879, I promise to pay to J. W. Hillmon or order the sum of thirty-one hundred dollars, for value received of him, without interest.
LEVI BALDWIN."

Lawrence, Kansas, October 2nd, 1878.
Due John W. Hillmon, any time called for, the sum of $1700, the amount left by him for safe keeping.
LEVI BALDWIN."

2354 Cross-examination

By Mr. Barker:
Q. Mrs. Hillmon, when did you see W. W. Nicholls?
A. Some time before the trial of this case.
Q. Can you state about what time in the year?
A. No, I can't. The case was called here in June.
Q. How long was it before that?
A. I don't know, was sometime.
Q. A month or six weeks?
A. I can't tell exactly; it was some time. I know we were looking around for witnesses.
Q. Had you ever been there before?
A. No, that was the first time.
Q. Talked with him there? A. Yes, sir.
Q. About a description of your husband? A. Yes, sir.
Q. Didn't he tell you, on that occasion, that your husband had a scar on his hands? No answer.

Q. Did he have a conversation there in regard to a scar upon his hand, and did you not tell him that he might have had a scar but it was nearly gone?

A. No, sir. He never had any scar on his hand.

By Mr. Barker. I ask to have that stricken out. I only asked you what was said.

Q. I will ask you if Mr. Nicholls didn't tell you that he had a scar upon his hand, and if he didn't explain to you where that scar was? A. I think not.

Q. And if you didn't tell him in answer thereto, that he might have had a scar, or did have a scar but it was nearly gone, didn't you state that to him?

2355 A. I didn't say nearly gone. Of course I never saw a scar and I could not have said that because I never saw a scar.

Q. Didn't he tell you he had a scar; that your husband had a scar upon his hand, and showed you where it was?

A. I think the first he mentioned the scar was here on the stand.

Q. I wish you would answer my questions?

A. I have no remembrance of it.

Q. You have no recollection of his talking about any scar?

A. No, sir, I don't remember now, I think the first time—

Q. All I am asking for is, what took place up there at Mr. Nicholls the first time you were there. Then you had him subpoenaed as a witness, did you not? A. I think—

Q. He was here at all events, in Leavenworth?

A. Yes, sir, he told me he could not be a witness for us.

Q. I didn't ask you for that. Now I will ask you if you did not go from the court house down to the Continental Hotel with him? A. Yes, sir.

Q. I will ask you if you did not tell him, ask him on that occasion to not say anything in the testimony in regard to that scar? A. No, sir, I did not.

Q. Didn't you tell him you wished that he would not?

A. No, sir. I didn't say anything because I didn't know until he came on the stand—

Q. Was there anything of that kind said?

A. There was not.

Q. If he said anything of that kind he is mistaken?

2356 A. Yes, sir, he is mistaken.

Q. After that you went down to the Continental Hotel with him? A. Yes sir.

Q. And you found Mrs. Nicholls there, Mrs. George A. Nicholls? A. Yes sir.

Q. She is a sister of John W. Hillmon, is she not?

A. Yes sir.

Q. Had you ever met her before? A. I had not.
Q. Did you meet Mr. George A. Nicholls? A. Yes sir.
Q. Had you ever met him before? A. No sir.
Q. What other parties did you meet there?
A. There was another lady. I believe it was Mrs. Nixon. I was introduced to her.
Q. You met two other parties did you, a lady and a gentleman, and Mrs. Nixon?
A. Two ladies; Mr. Hillmon's sister, Mrs. Nixon.
Q. That conversation took place in the Continental Hotel?
A. Yes sir.
Q. In their room? A. Yes sir.
Q. You were all present.
A. Mr. Nicholls and Mrs. Nicholls sat close together, and I was talking to them.
Q. You say you think the conversation was directed to Mrs. Nicholls? A. Mrs. Nicholls and Mr. Nicholls.
Q. State what was the first thing you say you said to them?
2357 A. W. W. Nicholls introduced me to them. I don't know where he went. He went out. I don't remember anything about him any more. I asked them, I told them I came down to see them, and they told me they could not be my witness; they was subpoenaed for the defense. Then I asked them if she would give a description of her brother, and Nicholls was there standing and he stepped to the side of her and she said yes. She said that—The first thing she said he had defective teeth, and that he was light complexioned, that he had light brown hair. She said he had defective teeth, and then I said, if he had defective teeth, I said you have either forgotten how your brother looked or else you are in the employ of the insurance companies, and you are no friends of mine, and I turned and walked out. I had no conversation with any one else there, and none of the rest of them spoke to me.
Q. That is, the first thing that Mrs. Nicholls said to you in regard to the description of her brother was—the first thing she told you was, he had defective teeth?
A. She told me, or asked me for a description.
Q. Did she tell you he had defective teeth?
A. Yes sir, when I asked her, and then I told her that my husband had good teeth.
Q. Didn't you have a conversation with Mr. George A. Nicholls there?
A. They were right there both together.
Q. Didn't he tell you also that Mr. Hillmon had defective teeth? A. I don't remember about that.

Q. Now didn't you, in that conversation, say to them that if they were going to testify in that way you might as well dismiss your case and turn him over to the authorities?

A. No, Mr. Barker, I did not say that?

2358 Q. Did you not say that in substance? A. No.

Q. There in that room?

A. I never did such a thing. I never said anything of the kind. No sir.

Q. Then all of these parties are mistaken in regard to that?

A. Yes sir, they are mistaken. I never said such words.

Q. Now I want to call your attention to a conversation which you had down there at Mr. Griffith's office. You knew Mr. Griffith at that time well, did you? A. No, not well.

Q. Did you know Mr. Griffith well?

A. I had seen Mr. Selig a good many more times than I had Mr. Griffith. I had seen Selig with my husband walking on the streets. I was introduced to him by my husband.

Q. Pretty well acquainted with Selig?

A. Not very well acquainted; only met him and being introduced to him.

2359 Q. You went down there at that time?

A. Yes sir. He sent me a card.

Q. I don't care what he sent you. I will ask you if you went down there, Mrs. Hillmon?

A. Yes sir, I went to his office.

Q. That office was in the bank?

A. Mr. Selig's office was not there.

Q. Where you went to Mr. Griffith's office in the bank?

A. I thought you went to Selig's office.

Q. I am asking about a conversation between you and Griffith and Selig at the bank? A. Yes sir.

Q. Do you remember the day on which you went down there?

A. Yes sir, I do know the day. It was the 2nd day of April.

Q. You went down there to make proof of death, did you?

A. Well, he wrote me a letter.

Q. I say, did you go down there to make proofs of death?

A. He told me so when I went in.

Q. Then you had a conversation there with them, did you?

A. Yes sir.

Q. And you say you told them your husband's height?

A. Yes sir.

Q. You told them, did you, in that occasion, that he was 5 feet 11½ inches high?

A. I told them that he was 5 feet 11, I might not have said half.

Q. Did you tell him at that time his height? A. I did.
Q. What height did you give?
A. 5 feet 11, because I told them he was taller than Mr. Selig.
Q. Did you tell him in feet and inches?
A. Yes, I think I did.
Q. Did you tell them in regard to the color of his eyes?
A. Yes sir.
Q. And told them in regard to his teeth, did you?
A. Yes sir. I told them all about that.
Q. You are positive in regard to that? A. Yes sir, I am.
Q. Mr. Griffith took it down, didn't he?
A. He wrote something.
Q. While you were talking? A. Yes sir.
Q. Did you say they interrupted you?
A. Yes, every time I would [would] contradict me.
2360 Mr. Griffith was writing there?
A. Yes, sir, part of the time was writing.
Q. You say that Mr. Selig interrupted you? A. Yes, sir.
Q. Now, after he had written this down, did you sign it?
A. No, I did not sign it. No, I did not sign it, because I told them to wait until my husband was brought home, and they could see for themselves.
Q. But did you sign that statement? A. I did not.
Q. Is it not a fact you signed that statement, and that Mr. Griffith turned that statement over to the insurance companies?
A. I heard he delivered it over to the insurance companies here, but I do not know of my own knowledge that he did.
Q. Do you remember in regard to that?
A. I think he said on every trial, he said he turned it over to the insurance companies.
Q. I am not asking you in regard to that at all. You say now you did not sign it?
A. No, sir, I am sure I did not sign it, because they contradicted me so much I told them to wait until he came, and they could go and see for themselves.
Q. You say that Mr. Griffith took you home? A. Yes, sir.
Q. Is it not a fact that Mr. Selig took you home?
A. No, sir, Mr. Griffith took me home.
Q. That is the last time you talked with them in regard to it? A. Yes, sir.
Q. Now, I understood you to say that you did testify at the coroner's inquest? A. Yes, sir.
Q. You say that I examined you?
A. You and Mr. Green, together.
Q. Who asked you the questions?
A. You asked for a description.
Q. You say I asked the question?

A. Yes, sir, I think you asked most of the questions.

Q. Now, you say on that occasion you stated how tall your husband was? A. Yes, sir.

2361 Q. You said he was five feet, 11½ inches high?

A. I think I did. Yes, sir, I knew his height.

Q. Did you testify in regard to the color of his hair?

A. Yes, sir.

Q. And did you testify in regard to the condition of his teeth? A. They didn't ask me anything about his teeth.

Q. You were not asked in regard to the teeth?

A. No, sir.

Q. Those were all the questions you were asked?

A. No, sir, there were other questions.

Q. But you stated all those things right there in the presence of the jury? A. Yes, sir.

Q. You remember Mr. Good and Mr. Adams being members of the jury? A. I didn't know them at the time.

Q. Didn't know Mr. Adams?

A. I knew Mr. Adams, yes, I knew him.

Q. I will ask you if you had not been trading with him, buying groceries? A. I do not think so.

Q. I will ask you if Mr. Adams is not a relative by marriage? A. No.

Q. Is he a relative of the Baldwins by marriage?

A. His wife, I believe, was married to one of my cousins.

Q. You need not go into the relationship, I simply want to know the fact; now, in regard to this bill, will you let me see the bill, dated April 11th? A. Yes, sir.

Q. Was that bill presented to you?

A. Mr. Smith brought this bill to me on the day of the date, I suppose.

Q. It is a bill for fourteen dollars? A. Yes, sir.

Q. I will ask you if it is not the second bill that he presented?

A. That is the only bill he ever presented to me, and I never heard him claim that I owed him any other bill until the other day; and he said I refused to pay my bill. I never did. That is the only bill he ever presented to me.

Q. About these notes? You state that these notes have never been paid but partially? A. Not fully.

Q. I notice there is no indorsements?

A. No, I kept account of it in a book.

2362 Q. Have you got the book in which you kept the account? I understand you kept it in a book?

A. Yes, an account book. Just as he would pay a date, I would put it down.

Q. Where is the account book?

A. I expect it is burned up with other papers.

Q. You recollect seeing it with other papers?

A. Yes, sir, during the time, that long time those notes were in the possession of my attorneys, they had those notes.
Q. Did they have the notes when these payments were made? A. No.
Q. Will you tell when one payment was made?
A. I gave them to Mr. Hutchings, and when Mr. Baldwin would pay me money, I just made a memorandum of it, and did not go to the trouble of getting the notes.
Q. That memorandum was kept in a book? A. Yes, sir.
Q. And that memorandum was burned? A. Yes, sir.
Q. When was it that took place? A. On the 17th of March.
A. In what year?
A. I cannot remember just the year, but we had just come back from Topeka on one of these cases.
Q. Where was it burned? A. At Ottawa, Kansas.
Q. What kind of a book was this account kept in?
A. Oh, just a little memorandum book.
Q. One of these diaries that people carry in their pockets?
A. Just a little memorandum book.
Q. Has there been any payment made since that time?
A. Not since I have been married, he has never paid me anything.
Q. When did Mr. Baldwin leave the country—when did he go to New Mexico? Didn't he go to New Mexico in 1880?
A. I don't know positively.
Q. You do not know in regard to that?
A. Not positively. He was here, it seems to me his family was here for some time.
Q. Is it not a fact he went to New Mexico in '80 or '81?
A. No, sir, he was here several years afterwards, because I used to visit the family. He was gone part of the time, and came back.
2363 Q. Did he make any payment after he went to New Mexico?
A. He made some payments, yes, sir.
Q. Did he ever make any remittances through the bank, or anything of that sort—checks or postoffice orders?
A. Postoffice orders.
Q. He paid by postoffice orders, did he?
A. I do not know. Sometimes at the trial of this case he would give me money.
Q. I understood you to say he paid by postoffice order?
A. Oh, I didn't mean to say,—I do not know just how I received it. But he gave me money, and I always gave him an account of it.
Q. He was out of the country?
A. Not all the time. He was here for several years, Mr. Barker, after my husband's death.

Q. Did he ever pay you any money by check, or draft, or postoffice order?

The plaintiff objects to the question as not proper cross-examination. Objection overruled. The plaintiff excepts.

A. I won't say whether he did or not, but he paid me money for several years afterwards. He would give me money along as I needed it, and I just put it in the book.

Q. Well, since that fire has he paid you any money? You state your book was burned in the fire.

A. I can't remember just when the fire was. I cannot remember. I know when the case would be tried that he would sometimes give me some money, and I think he gave my attorneys some for me.

Q. Do you know in regard to his giving them any?

A. Yes. I think Mr. Riggs. He gave him forty or fifty dollars.

Q. Mr. Riggs gave you—

A. Mr. Baldwin gave it for me. I think he gave it to Mr. Riggs, and he kept part of it.

Q. When was that? A. I don't know.

Q. Where was it?

A. In Leavenworth at one time, and I think at Topeka.

Q. Leavenworth and Topeka?

A. Yes, sir. He would pay me money.

Q. At those places? A. Yes, sir.

2364 Q. That was after '79? Well, after that—did you give him any receipts?

A. No, I posted it. He told me to keep an account of it.

Q. Has he paid you any money since '96?

A. No, I think not; no.

Q. I will ask you if in '96 you did not testify that he had paid no money on those notes? A. No.

Q. I will ask you if you did not testify to that in '95?

A. No, sir; I do not think so.

Q. You did not testify to that before Judge Brewer in '85 that he had never paid you any money on those notes?

A. No, I don't think so, at least I didn't mean to have it understood that way, for he did pay me some money.

Q. Did your husband leave a will?

The plaintiff objects to the question as incompetent, irrelevant and immaterial. Objection overruled, plaintiff excepts.

Q. Did you ever take out letters of administration?

Plaintiff objects as incompetent, irrelevant and immaterial, and secondly not proper cross-examination. Objection overruled. The plaintiff excepts.

Q. Now, there is a matter that is not strictly cross-examination, that I omitted to interrogate you in regard to, and

that is this. You have already stated that you were at Leavenworth on the 15th day of September? A. Yes, sir.

Q. That is the day these releases were signed?

A. Yes, sir.

Q. And that you went to Levi Baldwin's on Friday before that?

The plaintiff objects to the question as not proper cross-examination. Objection overruled. Plaintiff excepts.

Q. And you found John Brown at Levi Baldwin's

A. Yes, sir.

Q. That you rode out in a wagon, and that Levi Baldwin went along beside, did you not?

A. Yes, sir; until we got to this man's house.

Q. That is the very point?

By Mr. Hutchings: That is not new matter, but mat-
2365 ters that were gone over on the cross-examination at length.

By Mr. Barker: It is only to lead up to this point.

(The court allows counsel to proceed.)

Q. You said that he left you at a house about three miles from where he lived, and that he went home and got a buggy and came back for you?

The plaintiff objects to the question as a repetition, and not proper cross-examination. Objection overruled. The plaintiff excepts.

A. I do not know the exact distance. It was some little distance though.

Q. You said three or four miles?

A. No, I do not say three or four miles. I did not say. It was not very far, but it was too far to walk.

Q. About how far?

A. I don't know the distance between Baldwin's and that place.

Q. You said you didn't know the man's name where you stopped? A. No.

Q. And you couldn't describe the man?

A. He was a lame man.

Q. Now, will you tell what kind of a house it was at which you stopped?

Same objection as above set forth. Objection overruled. The plaintiff excepts.

A. It was a low house, but I cannot describe it.

Q. Could you tell whether it was a stone house, a frame house or a brick house?

Same objection as above? Objection overruled. The plaintiff excepts.

A. I am inclined to think it was a frame house, but I was never to it but the one time, and then it was in the twilight.

Q. You had lived in that neighborhood for a good many years?

A. That would not be in our neighborhood.

2366 Q. I will ask you if you can state whether that was a brick house, a stone house or a frame house?

Same objection as above. Objection overruled. Plaintiff excepts.

A. I think it was a frame house, but I would not swear positively to it.

Q. I will ask you if you did not testify at the former trial of this case in '96, that you could not tell whether it was a stone house, a frame house or a brick house?

A. I do not think I testified that way.

Same objection as above. Objection sustained. The defendants and each of them duly excepted.

A. I am inclined to think it was a frame house. I think I have always testified to that, because I have a very vague recollection of that. I can just imagine that it was a low house.

Q. Now, about what time of night was it when you got to Levi Baldwin's?

The plaintiff objects to the question as not proper cross-examination and a repetition. Objection overruled. Plaintiff excepts.

A. It was after nine o'clock; perhaps between nine and ten o'clock; perhaps might have been a little later.

Q. Levi Baldwin's family was there, and Levi Baldwin was there, and you found John H. Brown. I want to draw your attention to the first conversation that you had with John Brown. I will ask you now the conversation that you had with John Brown that night in regard to this insurance matter?

Same objection as above. Objection overruled. The plaintiff excepts.

A. There wasn't very much said that evening. He told me he had come up.

Q. Will you kindly state what was said in regard to this insurance matter?

2367 Same objection as above. Objection overruled. The plaintiff excepts.

A. I can tell the substance. I cannot tell the exact words.
Q. That is what I want?
A. It was something he said that Mr. Buchan had sent him up there to see me and ask me if I would meet him somewheres; that he wanted to talk with me; I asked him what Mr. Buchan wanted to see me for, and he said there was a warrant out for him, and that Mr. Buchan wanted to see me, and said he would meet me wherever I would say. I tried to get him to explain what he wanted, and he said he couldn't explain to me but Mr. Buchan would explain if I would see Mr. Buchan. Now, I think that was about all that was said that evening.

Q. Now, I want to ask you the question if on that occasion at Levi Baldwin's house on that night, he didn't tell you he and Buchan had made out a statement that that was not the body of your husband, but was the body of a man whom your husband had murdered?

Same objection as last above stated. Objection overruled. The plaintiff excepts.

A. I do not know whether he said it that night or the next morning but in either one of the conversations he said that he and Buchan had made a contrary statement.
Q. But the question is, whether he stated that night?
A. I cannot tell you, Mr. Barker.
Q. I will ask you if he did not state to you that night that they had made out a statement that that was not the body of your husband, but the body of a man your husband had murdered?

Same objection as above stated. Objection overuled. The plaintiff excepts.

A. No, sir.
Q. He stayed over night, did he not?

By the Court: This is purely a repetition of what was said before.

By Mr. Barker: Counsel said I did not ask these questions. The point was, I omitted the question whether she testified whether John Brown told her there that night or the
2368 next morning that that was not the body of her husband, but a man her husband had murdered?

By the witness: No, he never told me such a thing in his life.

Q. I will ask you if the next morning he did not tell you that he and Buchan had made a statement that that was not

the body of your husband, but a person whom your husband had murdered, and if he was called upon as a witness, he would stick to that?

The plaintiff makes the same objection as above set forth. Objection overruled. The plaintiff excepts.

A. He might have the next morning when I asked him to explain himself, and what Buchan wanted of me, and why he wanted to see me. It might have been the next morning when he said that he and Buchan had made a contrary statement from the one he had sworn to at Lawrence and Medicine Lodge, that that was not the body of my husband, but was the body of a man that my husband had murdered. I said "what do you mean?" and he says they were going to arrest me, and I am going to get out of it the best way I can, and if you want to know more about it, Buchan will tell you all about it. If you will tell me where you will meet him he will explain it all to you.

Q. Was Mr. Baldwin in the house at that time?

A. Mr. Baldwin was not there.

Witness excused.

2369 James W. Green, recalled by the plaintiff testified in rebuttal as follows, to wit:

Direct Examination

By Mr. Hutchings:

Q. Mr. Green, I believe you said that you were present at all the previous trials of the case? A. Yes, sir.

Q. Were you acquainted with Richard Morris, formerly coroner of Douglas county? A. Yes, sir.

Q. Is he dead? A. He is dead.

Q. You may state whether he testified at every trial of this case? A. He has testified at some of the trials.

Q. Did he testify at the last trial of the case?

A. Yes, sir.

Q. As a witness for the defendants?

A. As a witness for the defendants.

Q. Have you his testimony written out? A. Yes, sir.

Cross-examination

By Mr. Barker:

Q. His testimony referred simply to the coroner's inquest did it not, Mr. Green?

Objection as calling for secondary evidence. Objection overruled, the plaintiffs excepts.

A. I would say that his testimony all goes on the subject of the coroner's inquest; that is my best recollection. I have read it over during this term.

By Mr. Hutchings:

Q. Didn't he testify upon the subject of the exhibiting a tin type with two figures on it, one of them taller than the other, to Dr. Patterson?

The defendants object to the question as incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of [—] duly except.

2370 A. I can't say whether he did or not; I have looked his testimony over once or twice; ran it over.

Q. Is it not a fact?

A. I would want to look that testimony over again.

Q. Did he testify he issued a warrant for John Brown and that you prepared the warrant and it was delivered to Colonel Walker?

The defendants and each of them object to the question as incompetent, irrelevant and immaterial. Objection overruled, the defendants and each of them duly except.

A. I don't remember that he did.

Q. Now, state what he did testify in relation to?

A. I remember he testified in relation to the subject-matter of the coroner's inquest, but I didn't run it over enough to see whether he did in regard to that matter or not; I wouldn't want to say without looking.

Q. At every trial of the case you have used him as a witness, have you not?

A. No, I think not; that would be my recollection.

Q. You used him at the trial in 1895 and the trial of 1896, anyway?

A. I used him at those trials where the subject-matter of the coroner's inquest was allowed to be investigated.

Q. Now, don't you remember that Dr. Morris testified distinctly that a warrant was issued for John H. Brown, that the warrant was prepared by you and that it was delivered to Colonel Walker to execute?

Objected to as incompetent, irrelevant and immaterial, not the best evidence, and not proper rebuttal. Objection sustained, the plaintiff duly excepts.

Interrogatories by Mr. Wheat:

Q. This copy of the statement signed by John H. Brown, dated the 4th of September, 1879, this has been offered in evidence and mentioned in your testimony when you were on the stand before?

A. I presume so. It is the only one I know of.

2371 Q. Now, I will ask you when that paper was given to you? That copy of that statement?

A. I don't remember when it was given to me.

Q. Is there not a certificate on it in these words: "We certify that we have this day compared the above with the original and that the same is a true and correct copy of said original. Lawrence, September 13, 1879. W. J. Buchan, J. W. Green." Are those the genuine signatures of W. J. Buchan and yourself? A. Yes, sir.

Q. I will ask you if that certificate was made on that day?

A. The certificate was made on that day, undoubtedly, although I may say as to that Mr. Wheat, I would say that from the fact that I find, Lawrence, September 13th, 1879, there. I have no independent recollection that the certificate was made on that day, but I think that is correct.

Q. I will ask you if that paper, with that certificate on it, has not remained in your possession ever since the time when it was certified? A. I don't recollect as to that.

Q. Well, if it has not remained in your possession ever since then to whom did you ever give it. Of course, I do not mean to say when it was out of your possession a few minutes during the trial of the case?

A. Oh, no, I don't mean that either. I haven't a recollection as to whether it has been in my possession ever since or not. I would say that it had not possibly; I can't remember whether this was given to Mr. Munn, or whether it was given to me; I haven't any distinct recollection as to that fact; I have a distinct recollection of making this certificate, but as to what was done with the paper then I must say I have [—] a distinct recollection, nor I don't recollect when I next saw it.

Q. Have you any recollection after it came into your possession, of ever having delivered it to any other person; of course, I don't mean when you handed it around to the attorneys in the court rooms.

2372 A. I understand what you mean, but I don't recollect at the time this certificate was made what was done with the paper, whether it was given to Mr. Munn, whether Mr. Buchan took it, or whether I took it; I don't have any recollection.

Q. Now, to refresh your memory, I will ask you if there wasn't an object in your having a copy, and how that could be subserved by giving it back to Buchan?

A. There was no object in my having a copy.

Q. Why did you take that copy on the 13th of September, can you tell? A. I say I don't remember that I took it.

Q. Why did you make that copy?

A. So as to certify that it was a true copy.

Q. But what object was there in having the copy?

A. The probabilities are—

Q. I am not speaking about probabilities?

A. The probabilities are that this was handed to Mr. Munn.
Q. And that he kept it until he gave it to you?
A. Now, Mr. Wheat I have answered you fairly in regard to the matter; I do not have any independent recollection as to what was done with the paper at that time.
Q. Who wrote the copy; in whose handwriting is it?
A. The copy is in Mr. Buchan's handwriting and the handwriting of the certificate is in Mr. Munn's. The handwriting of the two signatures are Mr. Buchan's handwriting and my handwriting. I say I don't have any recollection of what was done.
Q. You can't be sure whether Mr. Munn took it or you?
A. No.
Q. What can you say about whether Buchan took it or not?
A. I say as I have said repeatedly that I have no recollection of what was done.
Q. He had the original, didn't he? The original was torn paper, was it not?
A. I don't know; the first I saw of that original was down there in 1880.
Q. It was not torn at the time you made the copy?
A. No, sir.
2373 Q. Buchan kept the original didn't he?
A. I presume he did; that is why I presume this went into Munn's hands.

Cross-Examination,

By Mr. Barker:
Q. To refresh your memory do you remember the time the John Brown deposition was being taken?
A. Yes, sir, I was there.
Q. I will ask you if about that time, Mr. Buchan didn't furnish to you and to Mr. Riggs, these copies, and if you did not get this copy, or the one that they have from Mr. Buchan at the time that John Brown deposition was being taken at the same time you got some other papers?
A. I don't remember that.
Q. Do you remember having that paper at the time we cross-examined John Brown?
A. Yes, I remember we had a copy at that time, but where we got it from is what I cannot remember.
Q. Do you remember of having that and taking it to Wyandotte at the time that we were cross-examining John Brown?
A. No, I don't remember that; the first I can remember seeing that copy of that paper from the time we certified it up until the taking of the deposition was at the taking of the deposition.

Q. You say you have no recollection of taking it down there, and have no recollection of getting it from Mr. Buchan?

A. No sir.

Q. Have you any recollection of Mr. Munn ever sending that paper to you?

A. As I say I have no recollection of seeing this copy or any other copy from the time that we made this certificate up until the time we were taking that deposition; where we got it I have no recollection; that is what I desire to say.

Q. At the time the cross-examination of John Brown commenced there, you had that paper there—whether you had a copy of this statement there at that time?

2374 A. I don't recollect.

Witness excused.

And here, the plaintiff having concluded her evidence in rebuttal finally rested her causes.

And thereupon, the defendants, having no further evidence to offer each rested its defense.

And the above and foregoing is all the evidence offered and admitted upon the trial of the causes, and all written evidence offered by the defendants and each of them and excluded by the Court upon said trial, except certain original exhibits offered and admitted in evidence during said trial, which, by order of the Court will be transmitted by the Clerk to the Circuit Court of Appeals.

2375 And thereupon, the cause was argued to the jury by counsel for the parties, respectively.

2376 And thereupon at the conclusion of the arguments and before the court had charged the jury, the defendants requested the court in writing, to give to the jury the following instruction, to wit:

"No. 1. In this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon. Proof has been offered, which has not been disputed, that the corpse had a perfect set of teeth, without decay or imperfections. If it appear by a preponderance of the evidence that John W. Hillmon in his lifetime had lost a tooth or that any of his teeth were imperfect, then it follows that the body at Lawrence was not the body of John W. Hillmon but the body of some other person, and if you find from a preponderance of the evidence that John W. Hillmon in his lifetime had lost a tooth or had imperfect teeth, then you will return a verdict for the defendants. In determining the preponderance of the evidence on this question, if the number of the witnesses testifying on this ques-

tion are persons of equal credibility and standing and with equal means of knowledge, then the party producing the greatest number of witnesses on that question must prevail in this case."

The court refused to give said instruction to the jury, to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 7. The preponderance of testimony in this case is that the body was not the body of Hillmon."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

2377 "No. 9. That it is undisputed in this case that two men, Hillmon and Walters, disappeared during the month of March 1879. That one of them, namely Hillmon, if alive, had every reason for concealment, while with regard to Walters, no reason for his disappearance is shown to exist. That Hillmon, if alive, after that month, was guilty of murder, and at attempt to swindle the insurance companies, while Walters was guilty of no offense which would induce him to conceal himself."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instructions, to wit:

"No. 10. That the evidence tending to identify the body as that of F. A. Walters of Fort Madison, Iowa, is not contradicted by any direct evidence in this case."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 11. That every witness who identifies the body as that of F. A. Walters in effect denies the identity of the body as that of Hillmon."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 12. The releases signed by the plaintiff, Mrs. Hillmon discharging and releasing the defendant companies
2378 from all claim under and liability upon the policies sued on are such written instruments as, under the law, import a consideration, and the execution of said releases being admitted, they are admissable on the part of the defendants as evidence as admissions on the part of the plaintiff that no lawful claim could be made under said policies, or that no right of action thereon existed when said releases were made; and in considering her act in executing these releases, and in ordering the policies to be surrendered and delivered up to the defendants the jury should ascribe to her only the ordinary and usual motives which ordinarily influence persons, and not ascribe to her unusual and fanciful motives, inducements or controlling influences."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 13. The execution of an order for the policies and releases of the policies by Mrs. Hillmon would justify the jury in finding that Mrs. Hillmon knew at the time of the execution of the aforesaid papers, that her husband was alive."

The court refused to give said instruction to the jury, to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had chargerd the jury, the defendants requestd th court in writing to give to the jury the following instruction, to wit:

"No. 14. That the jury are at liberty to find that the reason why the plaintiff executed the order for the policies and also executed the releases of the policies was the fact that she was aware that John H. Brown had made a statement and that her executing this paper was an acquiescence on her part in the fact that her husband was not killed in Barber county, but was still alive."

The court refused to give said instruction to the jury;
2379 to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 18. If it is a fact that the relatives and parents of Frederick A. Walters at once recognized the picture of the dead body immediately on seeing it as the body of their son, such fact is entitled to great weight, on the question of the identity of the body at Lawrence. This identification in connection with the letter of Frederick A. Walter to his sister, from Wichita, stating that he would start from Wichita west on March 5th with a man named Hillmon; and in connection with the confession of John H. Brown, as to the killing by Hillmon of a man near Medicine Lodge on March 17th, 1879, constitute evidence of great weight in determining the identity of the body brought to Lawrence."

The Court refused to give said instruction to the jury; to which action and ruling of the Court the defendants and each of them and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury, the following instruction, to wit:

"No. 20. There is no evidence in this case showing or tending to show that the coroner's inquest held at Lawrence in 1879 was not a properly and legally constituted tribunal, engaged in a proper and legal inquiry. The law of Kansas provides that "when the coroner has notice of a dead body of a person supposed to have died by unlawful means, the cause of whose death is unknown, found or being in the county, it shall be his duty to summons forthwith six citizens of the county, to appear before him at the time and place named by him," and under this provision of the law of Kansas, the coroner had jurisdiction to hold an inquest over the body that was brought to Lawrence."

The Court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the
2380 jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 21. Under the facts and circumstances developed in this case, I instruct you as a matter of law that it was not only legal but it was the duty of the coroner of Douglas county to hold an inquest over the body brought there on or about the second day of April, 1879."

The Court refused to give said instruction to the jury, to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 22. Flight by a party is legitimate evidence tending to show his consciousness of guilt, and in this case, you can take into consideration the fact for the purpose of determining whether or not there was not a crime committed in Barber county with which he, Brown was connected, the fact that he, Brown, fled from the state of Kansas."

The Court refused to give said instruction to the jury; to which action and ruling of the Court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the Court had charged the jury, the defendants requested the Court in writing to give to the jury the following instruction, to wit:

"No. 23. There is no evidence in this case proving or tending to prove that Wm. J. Buchan has been guilty of any illegal or unprofessional acts or conduct in connection with this case, or that he was not duly and properly authorized by John H. Brown to deal with the insurance companies and receive his compensation from them. Members of the bar are officers of the court, and are engaged with the court in the administration of justice, and it is the duty of the court to state its opinion to the jury, if the court sees that an unjust or unfounded charge has been made against any member of the bar in connection with any suit then pending before the court."

The Court refused to give said instruction to the jury,
2381 to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 25. Exhibit number "26" which has been called in this case the "Munn paper" is not, under the laws of Kansas the compounding of a felony, nor is it possible as a matter of law for any agent of a corporation to bind its principal or agree for them to compound a felony."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 26. If you find that W. J. Buchan as the attorney of John H. Brown was given by him authority to get the compensation for his Buchan's services from the insurance companies and did with his client's consent so obtain his compensation the court instructs you that obtaining of his compensation in such manner was in no wise illegal, improper or unprofessional."

The court refused to give said instruction to the jury, to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon and before the court had charged the jury, the defendants requested the court in writing to give to the jury, the following instruction, to wit:

"No. 27. The coroner in the exercise of his functions would have a right during the progress of an inquest, if in his judgment the condition demanded it, to order an exhumation of the buried body over which the inquest was being held, in order to make further examinations thereof."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, the defendants, before the court had
2382 charged the jury, requested the court in writing to give to the jury the following instruction, to wit:

"No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case for the reason that the real question in this case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is from a gun-shot wound at the hands of one John H. Brown at Barber county on the 17th day of March, 1879."

The court refused to give said instruction to the jury, to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 31. The statements by John W. Hillmon to the agents of the life insurance company when he made out applications for policies that he was 5′ 11″ in height is not to be taken by you as evidence that such was his height."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 33. There is no proof in this case that the plaintiff has married since the commencement of the action, and it would not be competent for the plaintiff to make such proof because she could not by her own acts make evidence for herself or attempt to strengthen the presumption of the death of the said John W. Hillmon on March 17th, 1879, by her subsequent re-marriage."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged
2383 the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 34. The Supreme Court of the United States in the case of Greggs vs. Houston, 104 U. S. 553, speaking through Chief Justice Waite, said, 'If upon the evidence the jury had brought in a verdict against the defendants, it would have been the duty of the court to set aside and grant a new trial. It is right, therefore to direct a verdict for the defendants.'

In accordance with the rule of law which is again enunciated by the same court in the case of Randall vs. The B. & O. Rd. Co., 109 U. S. 479, being of the opinion that it would be my duty in the event of a verdict for the plaintiff, to set the same aside, I charge you that you must find a verdict for the defendants."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 36. The jury are instructed that if they believe from the evidence that before the institution of this suit, the plaintiff had been told and was informed and was thereby notified that Levi Baldwin, John H. Brown and John W. Hillmon had confederated and conspired together to procure from the defendant insurance companies the policies sued upon in these cases, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured, and of thereby falsely representing the said insured to be dead; and that they had accordingly in fact produced, received and accepted said policies in execution to that extent of the design and purpose aforesaid; and that the dead body presented to the defendants was one procured and presented by said persons conspiring together as aforesaid and was falsely represented by them to be the body of the insured; then by the institution of this suit and by claiming therein the body so presented to be the body of the insured she thereby
2384 availed herself of and adopted and made, in legal effect, her own, all the acts done by the said persons and each of them so confederating and conspiring in aid and furtherance of the matter of said unlawful combination and conspiracy with like legal effect as to her as if she had been one of the parties originally conspiring."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 37. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued on in this case for the purpose and with the intent to defraud the said defendants by procuring and presenting to the said defendants a dead body of another person than the insured, representing the same to be that of the said John W. Hillmon, thereby pretending to the defendants that said insured was dead, though still living; and that they procured and accepted the said policies in pursuance and in furtherance of said unlawful scheme and that thereafter while engaged in the prosecution of said unlawful scheme, the said John W. Hillmon actually came to his death; then the jury are instructed that

no right of action against the defendants accrued and that no action can lie on the said policies even though the dead body actually presented to the defendants was really that of the said John W. Hillmon."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 38. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John
2385 W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured, and thereby falsely representing said insured to be dead; and that, they did accordingly, in fact procure, receive and accept said policies in execution to that extent of the design and purpose aforesaid; then and in such case the said contracts of insurance, so fraudulently and with such fraudulent intent procured and received, were never valid, but were void, and never attached to the life of said John W. Hillmon, and no right of action can be founded thereon in this case, and the jury must find for the defendants."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

No. 39. The jury are instructed that where there are a number of witnesses upon any general subject, combination among them is rendered more difficult and opportunities and facilities of contradictory alleged facts, if they be not true, are increased in proportion to the number of such witnesses or circumstances. The general accordance of all material circumstances and the general credit of the whole are confirmed by subordinate and slight diversities which show that the general agreement and concord have not been produced by meditation or fraudulent contrivance but must necessarily be true. Differences between witnesses or between statements of the same witness upon such matters as dates, localities or other subordinate matters may often confirm the substantial truth of the testimony. In all such cases the jury may con-

sider and determine whether such diversities arise from a purpose of the witness to deceive or whether they illustrate merely, the general uncertainty of human memory in matters of minute and subordinate detail."

The court refused to give said instruction to the jury;
2386 to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury the defendants requested the court in writing to give to the jury the following instruction, to wit:

No. 40. There has been some allusion in the course of the trial to the compounding of a felony. The court during the progress of the trial instructed you that you were to pay no attention to the insinuation of counsel, and the court now further instructs you that there has been no proof introduced of the compounding of any felony nor is there any issue of that kind in this case, and you are to wholly disregard any allusions of counsel on that subject."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 41. If you believe that John W. Hillmon sold or disposed of mortgaged chattel property in such a manner, in 1878, as to be guilty of a crime in Texas, punishable with imprisonment in the penitentiary, you are then at liberty to consider the probability that such crime would tend to induce him to disappear or to go to unknown parts or conceal himself, and this tendency you may further consider in your deliberations as to whether the body found at Crooked Creek was the body of Hillmon."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 42. You are instructed that by the laws of the State of Texas in the year 1878, it was provided that if any person had given a mortgage in writing upon any personal or mov-

able property and should, during the existence of such
2387 chattel mortgage, remove the said property out of the state or dispose of the same with intent to defraud the person having such lien; such act or acts would be criminal and the person found guilty thereof would be subject to imprisonment in the penitentiary of Texas for a term of not less than two nor more than five years."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 43. You are instructed that Exhibit 26, called the "Munn" paper, had nothing to do with the obtaining of the insurance, or with the alleged death, or with the proof of death, or with the making of the alleged releases, and had no influence upon the plaintiff or any of her acts, and in nowise affected her interests or her rights, and the said paper may be wholly disregarded by you, and you are not to consider it in arriving at a verdict."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

2388 "No. 44. The jury are instructed that the statement signed and sworn to by John Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 46. The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, The Mutual Life Insurance Company of New

York, upon the life of John H. Hillmon was procured through fraud or through any attempt at fraud by said Hillmon alone or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then said policy is absolutely null and void and they are to find for the defendant."

The court refused to give said instruction to the jury; to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

And thereupon and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

"No. 47. The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, upon the life of John W. Hillmon was fraudulently procured by said Hillmon alone or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then such policy is absolutely null and void and they are to find for the defendant."

The court refused to give said instruction to the jury, to which action and ruling of the court the defendants and each of them then and there duly excepted. Exception allowed.

2389 And thereupon, and before the court had charged the jury, the defendants requested the court in writing to give to the jury the following instruction, to wit:

No. 48. There has been testimony offered that the defendant companies paid a part of the expenses of the coroner's inquest and for the transcribing of the notes of evidence and for the postmorten examination and the exhuming of the body, and the taking of photographs and plaster cast of the teeth of the corpse. You are instructed that the defendants had a perfect right to make such payments if they so desired; and by so doing they wronged nobody, and that such acts in nowise injured the plaintiff, and she has no right to complain that such payments were made; and I instruct you that in arriving at a verdict, you are to wholly disregard the fact of such payments.

The court refused to give said instruction to the jury, to which action and ruling of the court the defendants and each of them then and there duly excepted.

2390 And thereupon the court charged the jury upon the law of the case in the following language, which charge to the jury is by direction of the court incorporated into and made a part of this bill of exceptions.

Gentlemen of the Jury:

The cases which have been tried and which are submitted to you with the conclusion of this charge are two in number.

Sallie E. Hillmon is the plaintiff in both cases. One of them is against the Mutual Life Insurance Company of New York and the other against the Connecticut Mutual Life Insurance Company. They were commenced in this court on the 13th day of July, 1880. The issues in the case being substantially identical they were by order of the court consolidated for purposes of trial in order to effect a saving of time and expense. Each of the actions is brought upon a policy of life insurance issued upon the life of John W. Hillmon for the benefit of Sallie E. Hillmon, his wife. The policy issued by the Mutual Life is for the sum of ten thousand dollars and that issued by the Connecticut Mutual is for the sum of five thousand dollars. It is conceded that the policies sued upon were duly issued and delivered and would constitute valid and binding obligations of the insurance companies respectively, except for the defenses set up and maintained by them and to which your attention will be called. It is also admitted that if the plaintiff is entitled to recover the verdicts should be for the amounts of the policies respectively with interest thereon at the rate of 6 per cent per annum from October 1, 1879, until the date of your verdict, that is to say, in the case against the Mutual Life for the sum of ten thousand dollars and in the case against the Connecticut Mutual Life for five thou-
2391 sand dollars, both with interest as stated. The policies are what is konwn as ordinary life policies and in order that plaintiff may recover thereon it must appear that John W. Hillmon died whilst the policies were still in force. It is not denied that the premiums on the policies were paid to a period later than March, 1879.

It is claimed in the plaintiff's pleadings that John W. Hillmon was accidentally killed near Medicine Lodge, Kansas, on or about the 17th day of March, 1879. It is admitted that proper proofs of death were furnished the companies by or on behalf of Mrs. Hillmon.

Each of the defendant companies as matter of defense denies that John W. Hillmon died as alleged by the plaintiff but claims on the contrary that he is still living; that on and before November 30, 1878, John W. Hillmon, John H. Brown, Levi Baldwin and divers other persons unknown to the defendants conspired together for the purpose of defrauding the insurance companies and with such purpose in view procured the two policies of insurance mentioned, amounting to the sum of fifteen thousand dollars and an additional policy in the New York Life Insurance Company for

the sum of ten thousand dollars and that thereafter in pursuance of the conspiracy and with the said purpose in mind Hillmon, Brown and Baldwin falsely and fraudulently pretended and represented unto the companies and others that Hillmon was dead and that in the months of March, and April, 1879, and thereafter, for the purpose of securing the payment of the policies and obtaining the money thereon, falsely and fraudulently claimed and represented to the companies that Hillmon was dead and that a certain dead body which they had procured and had was the body of Hillmon, whereas Hillmon was not dead; and that since said time Hillmon has kept himself concealed and is keeping himself concealed under assumed names for the purpose of consummating the alleged conspiracy. The companies for another defense allege that Mrs. Hillmon, the plaintiff, for valuable consideration, executed and delivered to the companies her release and satisfaction of the policies.

In reply to these claims on the part of the companies the plaintiff denies that her husband is living, avers that on or about March 17, 1879, he was accidentally killed by the discharge of a gun, denies the charge of fraud and fraudu-
2392 lent conspiracy and claims that the written releases set forth in the answers of the companies were procured from her by them, their authorized agents and other persons acting by their procurement, through false and fraudulent statements and by unfair means and at a time when she was in ill health and unable to resist the improper and unfair influences brought to bear on her, and that no consideration was paid for such releases and that the same are therefore void and of no effect.

These are substantially the issues presented by the pleadings in the cases.

We are now near the end of the fifth week of this trial and such an enormous amount of evidence has been introduced of such a varied, complex and contradictory character that even were I desirous of doing so it would be impossible for me to give you an intelligible and comprehensive resume thereof without the attendant danger of omitting the mention of evidence and matters of importance. While it is within my province to indicate to you my own opinions gathered from the evidence without encroaching upon your exclusive right as the final judges of the evidence, I shall not avail myself of it but shall confine myself as closely as possible to the declaration of legal principles that are to control and govern you in your consideration of your verdicts.

The principal question for your determination and it may be said to be the crucial question in the cases, is whether

John W. Hillmon died as claimed by the plaintiff in March, 1879, and whether it was his body that was brought to Lawrence, Kansas, in April of that year. I will explain to you at this time the meaning of certain expressions which will be used in the delivery of this charge to you, so that you may fully understand their purport and signification at the time they were used.

Preponderance of the evidence means the greater weight or value of the entire evidence adduced at the trial, considering each part thereof in connection with everything appearing in the cases that goes to make for or against its credi-
2393 bility and value. It does not mean that a greater number of witnesses have testified on the one side or on the other although that fact, if it be one, is to be taken into consideration. A party who is required to prove a fact or an issue by a preponderance of the evidence is not required to prove it beyond a reasonable doubt. The requirement that an issue or fact be proven beyond a reasonable doubt exists in criminal cases but does not generally apply in civil cases, and it does not apply to the cases on trial.

In determining the weight and value of the evidence the credibility of the witnesses must necessarily be passed upon by you. You are the exclusive judges of the evidence and of the credibility of the witnesses. If any witness has wilfully testified falsely regarding any material matter you are at liberty to disregard his entire testimony but you are not bound to do so. You may accept that portion of his testimony which you deem consistent with truth or probability and reject the remainder, or as I have told you, you may entirely disregard the evidence of the witness so falsely testifying.

You should not arbitrarily and capriciously reject or disregard the credible testimony of any uncontradicted witness, but it is your duty to so reconcile all of the evidence in the case as to give effect to the testimony of such witness if the same is possible. A person is not disqualified as a witness in a civil action by reason of his interest in the event of the suit as a party or otherwise, yet such interest should be taken into consideration in estimating the weight or value to be given to his testimony. You should also take into consideration the conduct, demeanor, and appearance of the witnesses upon the witness stand, the probability or improbability of their testimony, the bias or prejudice that they may have shown, if any, in favor of or against the one side or the other; the means and sources of knowledge they may show themselves to be possessed of; the length of time that elapsed between the happening of a fact or circumstance and the date

they first testified thereto, giving due consideration to anything that might serve to cause a remembrance thereof.

A witness who testifies to an affirmative is ordinarily
2394 entitled to credit in preference to one who testifies to a negative, but you are not required to believe a witness whose testimony appears to you to be improbable and unreasonable.

In considering of your verdicts and the weight and value of the evidence and of the credibility of the witnesses you are entitled to use and exercise your common knowledge such as is possessed by men generally, regarding the ordinary affairs of life, not however any particular facts resting in your private knowledge, nor any special knowledge not possessed by men generally, for you should be governed by the evidence. You may apply such common general knowledge as you may possess of the subject of inquiry to the testimony of any witness and you are entitled to disregard such as is believed by you to be unnatural and contrary to the laws of probability. In other words you should apply the same rules of good sense and sound judgment to the facts in evidence that you would apply to any other subject that comes under your consideration.

In order that the plaintiff may recover in these cases it is her duty to prove by a preponderance of the evidence that her husband died as claimed by her in March, 1879, that is to say, whether it was his corpse that was brought to Lawrence in April of that year. If she should fail in so proving your verdicts should be for the defendants, but if she should succeed in so proving your verdicts should be in her favor. The plaintiff is not required to prove that the corpse was that of John W. Hillmon by evidence that removes all possible doubt, nor beyond a reasonable doubt, but simply by a preponderance of the evidence. Such preponderance need not be great, for it is sufficient if in the estimation of the jury it fairly and reasonably outweighs the contrary proof and renders it more probable that what she claims with reference thereto is true, than the opposite.

Plaintiff's right to recover does not turn upon your determination whether John H. Brown is a truthful witness or not, that is to say, if you should disbelieve the testimony of John H. Brown and still find from the evidence that the corpse in question was that of John W. Hillmon the
2395 plaintiff in such case would be entitled to recover. It is not incumbent upon the plaintiff to account for the whereabouts or absence of F. A. Walters, nor is it incumbent

on the defendants to prove that the corpse was that of Walters or to account for the absence or whereabouts of Hillmon.

As bearing upon the question whether John W. Hillmon died as claimed by the plaintiff and whether it was his corpse that was brought to Lawrence, you are entitled to consider the fact, if it be one, that he has not been seen or heard from alive since the 17th or 18th day of March, 1879, at which time it is claimed he was killed. The unexplained absence of a person from his home and friends without being heard from, if continued for a sufficient length of time, may become evidence tending to show that he is dead and it may be taken in connection with other evidence tending to show that he died at a certain time and place. For some purposes, such as the settlement of estates and the like, the law adopts the presumption that an unexplained absence of seven years without tidings being received from the absent one is evidence of his death. The weight to be given to such continued absence depends upon circumstances. If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death.

As to the alleged conspiracy; a conspiracy is a combination or confederation between two or more persons to do an unlawful act or to do a lawful act by unlawful means. In these cases the defendants allege that John W Hillmon, John H. Brown and Levi Baldwin and divers other persons to the defendants unknown, unlawfully conspired together to cheat and defraud the defendants by procuring the insurance policies by substituting the body of another person, claiming it to be the body of Hillmon, and by thereby obtaining the money upon the policies. The objects of the conspiracy alleged to have been formed contemplated the commission of a crime, that of obtaining money by false and fraudulent pretenses, and it is claimed by the defendants that during
2396 the progress of the conspiracy it resulted in the commission of murder. Whoever alleges a conspiracy or a fraud, whether as a cause of action or as a defense against the cause of action of another, is required to be definite and precise not only in the description of the conspiracy or fraud charged but also in respect of the persons sought to be held as conspirators or participators in the fraud, especially if they are parties to the suit in which the charge is made. In these cases, although it was known, that the policies of insurance were made payable to Sallie E. Hillmon and that no one else could obtain the money thereon without her act and assent, there is no allegation in the answers of the defendants

that she was either a party to the alleged conspiracy or participated therein at any time or had any knowledge thereof. Consequently it cannot be claimed in this case that she was a party to any alleged conspiracy or had any guilty participation therein or knowledge thereof.

If the acts done by the three parties who are claimed to have engaged in the conspiracy are consistent equally with an honest and lawful intent as with a fraudulent or criminal purpose, your finding should be in their favor in that respect, because there is always a presumption of honesty and innocence until the contrary is shown, and in order to overthrow such presumption of honesty and innocence there must be at least a preponderance of the evidence showing the existence of the contrary and of the alleged conspiracy. If you believe from the evidence that John W. Hillmon, Brown and Baldwin did conspire as charged by the defendants and pursuant to such combination the policies of insurance were obtained and that Hillmon did not die in March, 1879, that is to say, that it was not the body of Hillmon that was brought to Lawrence in the early days of April 1879, then your verdicts should be for the defendants. Even if you should find that there was no lawful conspiracy or fraud or fraudulent intent as charged by the defendants but should further find that the body brought to Lawrence as aforesaid was not the body of Hillmon, your verdicts in such event should be for the defendants.

2397 In other words it is not necessary for defendants to prove a conspiracy or fraud or fraudulent intent in order to defeat a recovery. On the other hand even if you should find that there was a conspiracy between the three men as charged by the defendants but should also find that Hillmon died in March 1879 and that it was his body that was brought to Lawrence as I have stated, your verdicts in such event should be for the plaintiff and against the defendants. In other words, the existence or nonexistence of the conspiracy is not the controlling question in the case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, then it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse.

As to the releases executed by the plaintiff and set up in the answers of the defendants. While under the law the execution of the written instruments of release by the plaintiff imports a consideration therefor, nevertheless the undis-

puted evidence in this case shows that the said releases were wholly without consideration and therefore they are inoperative as releases and do not constitute a valid defense, and the plaintiff did not by any of them release or discharge any cause of action or any other right that she may have had. Although they may be inoperative and void as releases and insufficient to constitute a defense you may nevertheless consider them and the fact that she executed them as acts and declarations of the plaintiff and give such weight thereto against the plaintiff in determining the other questions in the cases as you may deem just and proper. In doing so however you should consider all of the facts and circumstances surrounding the giving of such releases, when, to whom and under what circumstances they were given, all as shown by the evidence.

Do not take into consideration the financial condition of the defendants but confine yourselves to the evidence adduced at this trial as weighed in the scale of your judgment and interpreted in the light of your common knowledge as I have defined it. Evidence has been introduced in relation to some promissory notes and a chattel mortgage executed by
2398 John W. Hillmon and which it is claimed have not been paid. This testimony was admitted and is to be considered by you solely as bearing upon the question of Hillmon's financial condition and as to whether the amount of insurance taken out by him was in excess of his ability or was unreasonably large, and it is to be considered by you for no other purpose. The fact that Hillmon did not pay said notes or some of them, if it be a fact, is not to be considered by you as affecting his character or as affecting the right of the plaintiff to recover in those cases if you believe that it was Hillmon who was killed near Medicine Lodge in March 1879. In other words, if it was Hillmon who was killed and whose corpse was brought to Lawrence it is immaterial what his financial condition was at the time the policies were issued and whether the amount of insurance taken by him was unreasonably large or not.

Various statements and declartions of various parties have been offered in evidence not as affirmative proof of the truth of such declaration and statements but for the purpose of contradicting and impeaching the testimony of the parties making them. It is proper when a witness has given his testimony at a trial to contradict him and affect the weight and value of his testimony by showing that at some other time he has made statements or declarations contrary to what he has testified to. The unsworn statements of any person which have been admitted in evidence are not evidence as to the

truth of such statements; but if the statements are made by a party to the suits and are contrary to the interest of such party they may be considered against him.

The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan and showing that he also signed and swore to a statement contrary to his testimony given before you. The oral declarations of said Brown not under oath and the statement signed and sworn to by him are not affirmative evidence of the truth of any matter therein contained or mentioned and they should not be considered by you excepting as affecting the credibility of the evidence of the said
2399 Brown given in his deposition, and in determining this matter of credibility you should consider the testimony of both sides showing the circumstances under which Brown made said declarations and statement as well as all other evidence bearing on that question.

I will also call your attention to the evidence of C. R. Walters who testified on behalf of the defendants. Letters written by him to H. S. Clarke, of Lawrence, were introduced in evidence by plaintiff tending to show that he made statements in such letters contrary to his evidence given upon the witness stand. That such letters were written and such contradictory statements made, if such is the case, is to be considered by you solely as affecting the credibility of the testimony of said Walters and not as affirmative evidence of any statement made by him in the letters, and in that connection you should take into consideration the testimony of the said Walters as to his motive and purpose in writing the letters as he did. Certain letters written by Frederick Adolph Walters were given in evidence by defendants. The contents of such letters should be considered by you not as narratives of facts communicated to said Frederick Adolph by others, nor yet as proof that he actually went away from Wichita, but as evidence that shortly before the time when other evidence tended to show that he went away, he had the intention of going and of going with Hillmon which makes it more probable that he went and that he went with Hillmon, than if there had been no proof of such intention.

It was lawful for the coroner of Douglass county, Kansas, to hold an inquest over the body that was brought to Lawrence, and he had the authority to order the exhumation of the body for further examination after it was once interred.

Evidence introduced at this trial that John H. Brown testified to certain things before the coroner's jury at Lawrence is not proof of the truth of the statement there made by him,

but is only to be considered by you as evidence of the fact that such a statement was then and there made by Brown. If a witness at the coroner's inquest should have wilfully testified falsely regarding any material matter in such proceeding he would have been guilty of perjury. The sworn
2400 statement of John H. Brown given to W. J. Buchan, even if wilfully and intentionally false would not constitute perjury because it was given ex parte and not in any proceeding in court nor in any proceeding authorized by law.

The causes and reasons why human beings recognize one another with whom they are acquainted do not generally depend upon analysis of separate features, but rather upon general appearance in which many elements combine, and it is therefore immaterial if a witness when called upon to describe in detail the features of a party whom he is identifying, differs in some of these details from others if he is able to say that as a whole he recognizes the person by his general appearance. The act of recognizing between friends and even members of the same family may not depend upon the color of the hair, the condition of the teeth, the size or shape of the nose or any independent feature, but upon the individual appearance of the person as it makes an impression upon the mind or brain of the observer.

All efforts or attempts by anyone interested in any manner under investigation to suppress or destroy or to accomplish the suppression or destruction of pertinent evidence are always deemed prejudicial circumstances of great weight against such person; and all attempts by any such person to disturb the current of truth and justice or to prevent a fair or impartial trial by endeavors to intimidate witnesses or persuade them to the concealment, suppression, destruction or alteration of any matter of evidence are to be regarded as denoting on the part of such person a consciousness of wrong and a desire to evade the pressure of facts tending to establish it.

This is an important case, gentlemen of the jury, and is the conclusion of six long, expensive trials. It is very desirable that you should agree upon a verdict. I do not desire however that any juror should surrender his conscientious convictions. On the other hand, each juror should perform his duty conscientiously and honestly according to the law and the evidence, and the verdicts rendered should in the end be the result of his convictions. In conferring together you should pay respect to each other's opinions with a disposition to be
2401 convinced by each other's arguments and you should endeavor to harmonize the conflicting testimony of credible witnesses if the same may be reasonably done, and come

ultimately to some unanimous conclusion that will be in accord with your honest judgment respecting the merits of this controversy.

I will hand you four forms of verdict, two in each case; one in each case being prepared upon the theory that your verdict may be for the plaintiff and the other upon the theory that your verdict may be for the defendant in such case. Whichever forms may be in accord with the result of your determination you should sign by one of your number as foreman and return the same into court. You may retire.

WILLIAM C. HOOK, Judge.

Indorsed: No. 3147-3149 Hillmen vs. Insurance Companies. Instructions. Filed Nov. 18, 1899. Geo. F. Sharitt, Clerk.

2402 And thereupon the defendants, in open court, in the presence of the jury, and before the jury had retired, excepted to the following portion of the charge of the court, to wit:

"In these cases the defendants allege that John W. Hillmon, John H. Brown and Levi Baldwin, and divers other persons unknown, unlawfully conspired together to cheat and defraud the defendants by procuring the insurance policies, by substituting the body of another person, claiming it to be the body of Hillmon, and by thereby obtaining the money upon the policies. The objects of the conspiracy alleged to have been formed contemplated the commission of a crime, that of obtaining money by false and fraudulent pretenses, and it is claimed by the defendants that during the progress of the conspiracy it resulted in the commission of murder. Whoever alleges a conspiracy or fraud, whether as a cause of action or as a defense against the cause of action of another, is required to be definite and precise not only in the description of the conspiracy or fraud charged, but also in respect of the persons sought to be held as conspirators or participators in the fraud, especially if they are parties to the suit in which the charge is made. In these cases although it was known that the policies of insurance were made payable to Sallie E. Hillmon and that no one else could obtain the money thereon without her act and assent, there is no allegation in the answers of the defendants that she was either a party to the alleged conspiracy or participated therein at any time or had any knowledge thereof. Consequently, it cannot be claimed in this case that she was a party to any alleged conspirarcy or had any guilty participation therein or knowledge thereof."

Exception allowed.

And thereupon the defendants, in open court, in the presence of the jury, and before the jury had retired, excepted to the following portion of the charge of the court, to wit:

"On the other hand, even if you should find that there was a conspiracy between the three men as charged by the defendants, but should also find that Hillmon died in March, 1879, and that his body was brought to Lawrence as I have stated, your verdicts in such event should be for the
2403 plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in the case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you may deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, then it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse."

Exception allowed.

The foregoing exception was taken at the time mentioned by Mr. Barker, of counsel for defendants, in the following language:

"We except to what you say on the subject of conspiracy." He also stated: "We except to the refusal to give the instructions which we requested."

This was all that was said by counsel upon the subject of exceptions to the instructions requested and charge given.

2404 And now, inasmuch as the exceptions herein set forth and preserved are not of record in said cause, and are not available to the defendant for review by the Circuit Court of Appeals of the Eighth Judicial Circuit, or the Supreme Court of the United States, except by means hereof, the defendant, the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, has, by leave of Court first duly had and obtained and within the time limited therefor, prepared, and does now present to the Court for allowance, settlement and signing, this, its bill of exceptions of said trial; and the Court having examined the same, and being satisfied that it is a true and complete bill of exceptions of said trial; that it contains all the evidence offered by the parties and admitted by the Court, and all written evidence offered by the defendant and excluded by the Court, except certain original exhibits admitted in evidence, which, by order of the Court, will be transmitted to the said Circuit Court of Appeals; that it was prepared within the time limited therefor, and that it has received the approval of the adverse party, does now

Settle, allow and sign the same as a true and complete bill of exceptions of said trial, and does order that it be sealed

and filed with the papers and record in said cause to the end that it may be made a part of the same, which is accordingly done, this 2d day of April, 1900.

WILLIAM C. HOOK, Judge.

[Seal]

Indorsed: In the Circuit Court of the United States for the District of Kansas. Sallie E. Hillmon, Plaintiff vs. The Mutual Life Insurance Company of New York, Defendant, No. 3147. Bill of Exceptions. Filed April 2, 1900. Geo. F. Sharitt, Clerk.

206 United States of America,
District of Kansas—ss.

In the Circuit Court of the United States for the District of Kansas, First Division.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

The defendant in this the above entitled action, and its attorneys are hereby notified that the plaintiff in this the said action, will, on Monday the 9th day of April A. D. 1900, at the court room where the Circuit Court of the United States for the District of Kansas, in the First Division thereof, is usually held, in Topeka, in said District, at two o'clock p. m. of that day, apply to and move said court to amend the entry of the judgment heretofore and on the 18th day of November A. D. 1899 rendered in said action so as to make the same correct, and to consider, order and adjudge that the judgment heretofore and on the 18th day of November, A. D. 1899 rendered in and by said Circuit Court in said action be fully entered of record and written in and on the Journal and record of said court in said above entitled action, nunc pro tunc, and as of that date; and to then and there render make and enter of record on and in the record and journal of said court in said action, such judgment, and to consider, order and adjudge that said plaintiff Sallie E. Hillmon have and recover of and from The Conecticut Mutual Life Isurance Company, of Harftord, Connecticut the sum of Eleven thousand and thirty-four dollars with interest thereon at the rate of six per cent per annum from said 18th day of November A. D. 1899, and the cost by said plaintiff in said action incurred, taxed at $....., and that execution issue therefor. And to insert the proper amount of costs therein, and that such judgment be so rendered and entered of record nunc pro tunc and as of said 18th day of November, A. D. 1899, for the following reasons, namely: because such judgment was actually rendered in said

action on that day, and it was only because of clerical
207 mistakes that the same does not more definitely appear of record than as shown by the Journal Entry made in said action on that last named day.

And you are further notified that affidavits and other evidence will be used, read and given, on the hearing of said application and motion.

Dated this 30th day of March, A. D. 1900.

JNO. H. ATWOOD,
L. B. WHEAT,
Attorneys for plaintiff.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Connecticut Mutual Life Ins. Co. of Hartford, Connecticut. Acknowledgment of service of notice for judgment entry nunc pro tunc.

The within notice was served on me as attorney of the within named defendant by delivery of a duplicate thereof to me at Lawrence, Kansas, on the 31st day of March, A. D. 1900.

J. W. GREEN,
Atty. for said defendant.

Filed Apr. 9, 1900. Geo. F. Sharitt, Clerk.

208 United States of America,
District of Kansas—ss.

At a term of the Circuit Court of the United States of America, for the District of Kansas, begun and held at the city of Topeka, in said District on Monday the 27th day of November A. D. 1899, proceedings were had and appear of record in words and figures as follows, to wit:

Monday, April 9th, 1900.

Sallie E. Hillmon, Plaintiff,
No. 3149. vs.
The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, Defendant.

And now on this ninth day of April A. D. 1900, at two o'clock p. m. comes Sallie E. Hillmon, the plaintiff herein by L. B. Wheat, one of her attorneys herein and also comes The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, the defendant herein, by James W. Green, Esqr., its attorney herein.

And thereupon said plaintiff applies to and moves the Court here to amend the entry of the judgment heretofore and on the 18th day of November A. D. 1899 rendered in this action so as to make the same correct, and to consider, order and adjudge that the judgment on that day rendered in and by this court in this action be fully entered of record and written

in and on the journal and record of this court in this action nunc pro tunc, and as of that date, and to now here, render, make and enter of record on and in the record and journal of this court in this action, such judgment, and to consider order and adjudge that said plaintiff have and recover of and from said defendant the sum of Eleven thousand and thirty-four dollars, with interest thereon at the rate of six per cent per annum from said eighteenth day of November A. D. 1899, and the costs by said plaintiff in this action incurred, taxed at $....., and that execution issue therefor. And to
209 insert the proper amount of costs therein; and that such judgment be so rendered and entered of record nunc pro tunc and as of said eighteenth day of November A. D. 1899, because such judgment was on that day actually rendered in this action on the verdict for that amount that day found and rendered in this action in favor of said plaintiff.

And it appearing to the court that said defendant has been duly notified of said application and motion, and that such judgment was on that day actually rendered in this action, thereupon said application and motion is now by the court here sustained.

It is therefore now by the court here nunc pro tunc and as of said eighteenth day of November, A. D. 1899, considered, ordered and adjudged that said plaintiff Sallie E. Hillmon have and recover of and from The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, the defendant herein, the sum of eleven thousand and thirty-four dollars, with interest thereon at the rate of six per cent per annum from the eighteenth day of Novmber A. D. 1899, and the costs by said plaintiff in this action incurred, taxed at $....., and that execution issue therefor

To which action, ruling, decision and judgment of the court in granting and sustaining the said plaintiff's application and motion, the defendant, the Connecticut Mutual Life Insurance Company, then and there duly excepted.

WILLIAM C. HOOK, Judge.

210 In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon, Plaintiff,

No. 3149. vs.

The Connecticut Mutual Life Insurance Company, Defendant.

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Circuit.

Comes now the above named defendant, the Connecticut Mutual Life Insurance Company, by Edward S. Isham and J. W. Green, its attorneys, and shows to the court that the

above entitled cause was consolidated for trial with cause number three thousand one hundred forty-seven (3147) being the cause of Sallie E. Hillmon against the Mutual Life Insurance Company of New York, then pending in said Circuit Court, by order of said court over the objection of said defendant and said actions were tried together but a separate verdict was returned and a separate judgment was entered in each cause.

And said defendant, The Connecticut Mutual Life Insurance Company, by its said attorneys, complains that in the record and proceedings had in said cause and also in the rendition of the judgment in the above entitled cause in said United States Circuit Court for the District of Kansas at the June Term thereof, 1899, on the 18th day of November, 1899, manifest error hath happened to the great damage of said defendant and said defendant presents and files herewith and makes the same a part of this petition, the assignments of error on which it will rely for its prosecution of a writ of error in the above entitled cause.

Wherefore said defendant prays for the allowance of a writ of error and for an order fixing the amount of bond for supersedeas in said cause and for an order vacating and setting aside the judgment entered herein and granting the said defendant the Connecticut Mutual Life Insurance Com-
211 pany a new trial herein and that said defendant be restored to all things it has lost by reason thereof and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Eighth Judicial Circuit.

Dated this 11th day of May, 1900.

EDWARD S. ISHAM,
J. W. GREEN,
Defendants' Attorneys.

Allowed May 11th, 1900.
AMOS M. THAYER, Circuit Judge.

Endorsed: 3149. Sallie E. Hillmon vs. The Conn. Mut. Life Ins. Co. Petition for a writ of error. Filed May 9, 1900. Geo. F. Sharitt, clerk.

212 In the United States Circuit Court of Appeals, in and for the Eighth Judicial District.

The Connecticut Mutual Life Insurance Company, Plaintiff in Error.
3149. vs.
Sallie E. Hillmon, Defendant in Error.

And now comes the plaintiff in error and files the following assignments of error upon which it will rely for its prosecution of the writ of error in the above entitled cause:

1. That the United States Circuit Court for the District of Kansas first division, erred in overruling the motion of plaintiff in error to quash the venire and discharge the entire panel of jurors drawn for the trial of the above entitled cause.

2. The said court erred in making its order consolidating said cause for trial with a certain other cause then pending and determined upon the law side of said court, wherein Sallie E. Hillmon was plaintiff, and the Mutual Life Insurance Company of New York was defendant, numbered 3147.

3. The said court erred in overruling the motion of the plaintiff in error to vacate and set aside the orders of said court consolidating said cause with a certain other cause then pending and undetermined upon the law side of said court, wherein Sallie E. Hillmon was plaintiff and the Mutual Life Insurance Company of New York was defendant, numbered 3147.

The defendant, in support of the foregoing assignment- of error, calls the attention of the court to the difference between the two policies sued upon, to be found in the record of this case and in the record of case No. 3147 and particularly to the conditions contained in said policies. Also the agreement of parties in regard to the separate trial, which is as follows:

"And thereupon the defendant, to maintain the issue
213 in its behalf, read in evidence to the court the following stipulation, to wit:

In the Circuit Court of the United States for the District of Kansas.

Sallie E. Hillmon

vs.

New York Life Insurance Company.

Sallie E. Hillmon

vs.

Mutual Life Insurane Company, of New York.

Sallie E. Hillmon

vs.

Connecticut Mutual Life Insurance Company.

Whereas, since the making and entering by the court of the order consolidating the above entitled action for trial, the said plaintiff, Sallie E. Hillmon, now Sallie E. Smith, has sold and conveyed her interest and claim against the defendant, the New York Life Insurance Company, to one James F. Lord, who has become plaintiff in said action. And whereas, the reason for the consolidation of the said action for trial no longer exists.

It is, therefore, stipulated and agreed by and between the parties hereto, that is, the said Sallie E. Hillmon, now Sallie E. Smith, the said James F. Lord, the defendant, the New York Life Insurance Company and the other two defendants above named that the order of consolidation heretofore made shall be by the court annulled and wholly set aside, and that each plaintiff and each defendant shall be entitled to have, and shall have a separate trial in each of said actions.

C. F. HUTCHINGS,
SAML. A. RIGGS,
L. B. WHEAT,
Attys. for the Plaintiff.
GEO. J. BARKER, and
J. W. GREEN,
Attys. for defendants.

No. 3147/3149. Stipulation. Filed October 16th, 1899. George F. Sharitt, Clerk.

It it admitted by the parties that said stipulation was made some time in December, 1897.

214 This stipulation was presented to Judge Williams, holding this court in February and in May, 1898, when these causes were up for trial, and a request was made for separate trials thereof, pursuant to said stipulation; and the court, nevertheless, renewed the order of consolidation thereof, so far as these two causes are concerned, as shown by the records.

After argument by counsel, the court said that if there was no consolidation, he would certainly make the order; that if there was reason for consolidating the three, there was reason for consolidating the two.

And thereupon the court, after hearing said stipulation read, and the arguments of counsel, overruled the motion to vacate and set aside the order of consolidation, to which action and ruling of the court the defendants and each of them then and there duly excepted.

4. The said court erred in ruling that the defendant in error was entitled to six peremptory challenges.

5. The said court erred in the empanelling of the jury in said cause in permitting the defendant in error, after having exercised three peremptory challenges to exercise a fourth peremptory challenge.

6. The said court erred in the empanelling of the jury in said cause, in permitting the defendant in error, after having exercised four peremptory challenges to exercise a fifth peremptory challenge.

7. The said court erred in the empanelling of the jury in said cause, in permitting the defendant in error, after having exercised five peremptory challenges to exercise a sixth peremptory challenge.

8. The said court erred in overruling the motion of plaintiff in error that the jury as empanelled be discharged, and that a new jury be ordered.

9. The court erred in overruling the defendants' challenge for cause directed against juryman P. Botkin. The defendant calls the attention of the Court to the following examination of said juryman:

"P. Botkin, one of said twelve men, was asked the following question upon his voir dire by counsel for the defendants:

Q. Suppose the testimony of this case was just equally balanced, no preponderance either way; which way
215 would your verdict go under those circumstances?

To which said Botkin made answer:

A. The verdict would be for the woman, of course.

And thereupon the defendants, and each of them, challenged the juror for cause.

By the Court: Suppose the instructions of the court should be that if the evidence were equal, the verdict should be in favor of the defendant; would you so find?

By the Juror: That is, if the court so instructed?

By the Court: Yes, you would obey the instructions of the court?

By the Juror: Yes sir."

And thereupon the court overruled the challenge of the defendants, to which action and ruling of the court the defendants and each of them then and there duly excepted.

10. The said court erred in permitting the defendant in error to offer in evidence as against this defendant the policy issued upon the life of John W. Hillmon by the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut.

11. The said court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness, Sallie E. Smith:

"Q. Look at this Connecticut Mutual Policy and state from whom you received it," To which the witness replied: "I received this of Mr. Selig."

12. The court erred in overruling the plaintiff in error's objection to the answer of Sallie E. Smith, plaintiff formerly Sallie E. Hillmon, to the following question:

The plaintiff had testified that at the beginning of the suit her name was Sallie E. Hillmon. The following question was then propounded:

"Q. You have been married since then?

Mr. Barker: We object to that on the ground that it is incompetent, irrelevant and simply self-serving testimony.

216 By the Court: I will instruct the jury that the fact that Mrs. Hillmon remarried since the commencement of these suits is not evidence of the death of John W. Hillmon, and the jury will not so consider it. With that statement the objection is overruled, and the defendant may answer.

To which ruling of the court the defendants and each of them at the time duly excepted, and still except.

A. Yes, sir.

Q. Whom did you marry?

Same objection as last above.

Court: The same ruling with the same admonition to the jury.

To which ruling the defendants and each of them at the time duly excepted and still except.

A. James C. Smith.

Q. State whether that was since both of these suits were commenced? A. Yes, sir."

13. The said court erred in refusing to permit the witness, James W. Green, to answer the following question asked by counsel for plaintiff in error.

"Q. I don't know whether you have testified as to when that measurement took place?"

(The measurement above referred to was the one made by Dr. Stewart in connection with the last application made by Hillmon for a policy in the Connecticut Mutual Life Insurance Company.)

14. The said court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness John D. Patterson:

"Q. Now, you may state whether in your opinion from the examination of that body in making that model the shortness of that tooth might have made an appearance as though there was an absent tooth?" To which the witness replied: "Well, the straight lines drawn—or lip—drawn evenly around the upper teeth, the major part of that tooth would not appear while the others would, in the front part of the mouth.

217 I can show it to you here if you wish—show it to the jury. Compare the opening to the jaws, evenly, and you will see the shortness of the lateral compared with the teeth on the other side."

15. The court erred in overruling the plaintiff in error's objection to the following questions asked of the witness John D. Patterson:

Q. Now you may state to the jury whether or not, from the examination of that ring and this mark upon the finger, in your opinion the size and shape of the ring could have made the mark upon the finger?

A. "I think so; I think it could. In medical studies and dental studies I passed a great deal of time in dissecting rooms, and a ring worn and removed will have just the same appearance that was on this hand, when you find it in the dissecting rooms where rings have been removed before the bodies came into the dissecting rooms, you understand; and those marks appear very frequently."

15. The court erred in overruling the motion of counsel for plaintiff in error to strike out the foregoing answer and statement of the witness John D. Patterson to the question propounded in the foregoing assignment of error.

16. The court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness A. J. Phillips:

"Q. Now, from your recollection of John W. Hillmon, what, in your opinion, was his height?" To which the witness replied: "Well, I should think he was something like five feet eleven inches high—something like that."

(The witness had previously stated that he was not personally acquainted with John W. Hillmon; that he remembered seeing him but once, and that time in the street with Mrs. Hillmon, in Lawrence, and that he stood and talked with him some little time.)

17. The court erred in overruling the objection of the plaintiff in error to the question propounded to witness George Ware, as follows:

"Q. Now, I will get you to state to the jury what in your opinion was the height of John W. Hillmon? A. I
218 think he was in the nighborhood of 6 feet tall.

Witness had already testified that he had seen Hillmon perhaps a half dozen times; that he had never measured him, and had never seen him measured; that his attention had never been called to the question of his height; that he had never estimated in his own mind, or expressed any estimate of his height at all until after this suit was brought.

18. The court erred in overruling the objection of the plaintiff in error to the following question asked of the witness Joseph Rahskopf:

"Q. I will get you to state to the jury how tall a man was John W. Hillmon, in your opinion? To which the witness said to the best of his judgment:

"I think he was a man between five ten and five feet eleven inches; I would not be positive."

The witness had stated that he was slightly acquainted with Hillmon; that he had become acquainted with him in 1878; that he was introduced to him by some gentleman; that he was not intimately acquainted with him, and had seen him on the streets more or less; that he had seen him but three times.

19. The court erred in overruling the objection of the plaintiff in error to the following question asked of the witness Mary Judson, and the answer thereto:

"Q. Could he have had a missing upper front tooth, the absence of which was noticeable when talking or laughing, and you not know it? A. He could not."

The witness had already stated her acquaintance with Hillmon, and that to the best of her knowledge he had no missing tooth in front.

20. The said court erred in overruling the objection of counsel for plaintiff in error to the following question (numbered 33) asked of the witness John H. Brown:

"Q. What was the purpose of that trip?" To which the witness replied: "For hunting up and locating a cattle ranch."

(The "trip" referred to was the one made by the witness and John W. Hillmon, which as is claimed by defendant in error terminated in the latter's death at Crooked
219 Creek.)

21. The said court erred in overruling the objection of counsel for plaintiff in error to the following question (numbered 80) asked of the witness John H. Brown:

"Q. What was the purpose of the last trip you made with Hillmon from Wichita around through Medicine Lodge, Sun City, to the place where you say Hillmon was shot?" To which the witness replied: "It was for the purpose of finding a stock ranch, suitable with range and water, without getting too close to the farmers around the creeks."

22. The court erred in sustaining the defendant in error's objection to the following questions asked of the witness John H. Brown:

"Q. 401. On or about the fourth day of September, A. D. 1879, in Platte County, State of Missouri, in the presence of W. J. Buchan, of Wyandotte, Kansas, did you not make the following statement, to wit: "Along about the tenth of December 1878, John W. Hillmon and Levi Baldwin and myself talked about and entered into a conspiracy to defraud the New York Life Insurance Company, and the Mutual Life of New York out of some money, to be obtained by means of ef-

fecting a policy or policies on the life of said John W. Hillmon. Baldwin was to furnish the money to pay the premiums and to keep up the policies in case they had to be renewed. Our original arrangement was to get Hillmon's life insured for fifteen thousand, but it was afterward changed to twenty-five thousand dollars. Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact in some way find a subject to pass off as the body of John W. Hillmon for the purpose of obtaining the insurance money aforesaid. We had no definite plan of getting the subject, but to in some way get one, the final termination of the matter was the last idea thought of. Our first trip out from Wichita the last days of December, while the snow was on the ground, we expected to find a subject that would appear to be Hillmon, frozen to death, and that could not be identified only by the clothes and papers found upon it, and so could pass off as Hillmon. We went from Wichita to Medicine Lodge, then direct to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, thence to Larned, and on to Wichita via Hutchinson. Hillmon and my-
220 self were entirely alone on this trip. Iliff of Medicine Lodge, saw Hillmon on this trip. We put up at his stable." And did you not at said time and place sign a written statement and swear to the same before one Francis M. McDonald, a notary public, and did not said statement in writing include the statement embraced in this question?"

(Objected to by plaintiff's counsel on the ground of incompetency because the original statement being in writing, and in the possession of the defendant is the best evidence, and should be produced, shown to the witness, and offered in evidence.)

A. 401. Myself and Buchan together made such a statement similar to that at my brother's in Platte County. Don't think the statement included over half as much as this. I signed it or swore to it in Parkville, I don't remember which, with the understanding that the paper should never be used in law, and couldn't be used. He only wanted it to show to the insurance men and no one else, and was to hand it back to me and I was to destroy it myself, and I done so. He said he only wanted this statement from me to show to the insurance men in order that he should get his pay for his work, stating that the statement was not lawful, and wouldn't injure me hereafter any more at all, and if I did not the insurance men would hunt me down and have me put in the penitentiary for murder, and by doing this I would be released from any other trouble from them.

(The defendant moves to strike out all the witness' answer, commencing with the words—with the understanding—for the reason that the same is not responsive to any question, but is simply the uncalled for statement of the witness, and because the understanding and that portion of the statement of the witness is not competent evidence, and is irrelevant, to any issue in this case.)

Q. 402. Did you not both sign and swear to the statement in writing to which your attention has been called in question number 401? A. Don't remember whether I did or not.

Q. 403. Did you sign it?

A. I don't remember whether I did or not.

Q. 404. Did you not go with said Buchan to the office of Francis M. McDonald and swear to said statement before him?

221 A. I went with him to that office. I don't remember whether I swore to it or not.

Q. 410. Did not the paper which you have stated you [have stated you] signed or swore to in McDonald's office, in the presence of said Buchan, in Parkville, Platte County, State of Missouri, contain the statement to which your attention has been called, and which is contained in question 401 of this deposition? A. Similar to that.

Q. 411. Did it contain that very statement?

A. I don't think it did, as well as I can remember.

Q. 412. Do you swear that it did not contain that very statement?

A. Wouldn't swear it. Don't think it did, to the best of my judgment and memory."

23. The Court erred in sustaining the defendant in error's objection to the following question asked of the witness John H. Brown:

Q. 413. State definitely what portion, if any, of the statement contained in question 401 was not included in the statement or paper which you have testified to signing or swearing to in McDonald's office?

(Objected to by the plaintiff as incompetent, for the reason that the original paper which was signed or sworn to is in the possession of the defendant or its attorneys, and can and should be produced for identification by the witness, and as [them] best evidence in this case and as otherwise incompetent.)

A. Can't testify definitely. I don't remember.

24. The Court erred in sustaining the defendant in error's objection to the following question asked of the witness John H. Brown:

"Q. 414. Did you not, at the time and place mentioned in question 401, make the following statement to said Buchan:

"Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find the subject to pass off as the body of John W. Hillmon, for the purpose of obtaining the insurance money aforesaid," or did not the statement or paper which you have testified to signing or swearing to in McDonald's office contain said statement?

222 (Objected to on the ground the same as the question last preceding.)

A. Yes, sir; that is about the substance of it as near as I can remember.

25. The Court erred in sustaining the defendant in error's objection to the following question asked of the witness John H. Brown:

"Q. 622. Did you not, on or about the 4th day of September, in 1879, in Platte county, State of Missouri, sign a written statement and swear to the same before one Francis M. McDonald, a Notary Public at Parkville, in said county and state, which statement contained the following statement: "We got there about an hour before sundown and stayed in camp until the next morning. We overtook a stranger on this trip the first day out from Wichita, about two or two and one-half miles from town, who Hillmon invited to get in and ride, and who he, Hillmon, proposed to hire and work for him on the ranch as proposed to be located. This man was with us during all this trip. Hillmon proposed to me that this man would do for a subject to pass for him.

I told him and contended with him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because his proposition was to take the man's life, and I protested and said that that was going beyond what we had agreed, and something I had never thought of before, and was beyond my grit entirely, but Hillmon seemed to get more deeply determined and more and more desperate in the mat ter. Pains were taken not to have more than two of us seen together in the wagon. Sometimes one and then the other would be kept out of sight. On this trip up to Lawrence Hillmon was vaccinated; his arm was quite bad. Hillmon kept at the man until he let him vaccinate him, which he did, taking his pocket knife and using virus from his own arm for the purpose. He also traded clothes with him, Hillmon first giving him a change of underclothing, then traded suits, the one he was killed in; the suit he was buried in was a suit Hillmon traded with Baldwin for. The man appeared to be a stranger in the country, a sort of easy go long fellow, not suspicious or very attentative to anything. His arm became very sore and he got quite stupid and dull. He said his name was either

Berkley or Burgess or something sounding like that.
223 We always called him Joe. He said he had been around Fort Scott awhile, and also said he had worked at Wellington or Arkansas City. I don't know where he was from, or where his home or friends were. I did not see him at Wichita that I know of. I had but very little to say to the man, and less to do with him. He was taken in charge by Hillmon and yielded willingly to his will. I dreaded what I thought was to be done, and kept out of having any more to do with him than possible. I frequently remonstrated with Hillmon and tried to deter him from carrying out his intention of killing the man. The next evening after we got to the camp last named the man Joe was sitting by the fire. I was at the hind end of the wagon, either putting feed in the box for the horses or taking a sack out, when I heard a gun go off. I looked around, and saw the man was shot, and Hillmon was pulling him around to keep him out of the fire.

(Objected to by the plaintiff for the reason that the original statement is in the possession of the defendant and its attorneys and should be produced for identification by the witness and to enable him to refresh his recollection as to the statement he did sign, if any, and for the further reason that the question does not, and does not pretend to embody the whole of the statement which it is claimed, the witness made at the time and place stated in the question, and because the witness is fairly entitled to an inspection of the entire statement before being compelled to testify in relation thereto, and because the question is otherwise incompetent, irrelevant and immaterial; and the plaintiff hereby formally demands a full and accurate copy of said pretended statement in order that she and her attorneys may be fully advised as to the nature and extent of said pretended statement in order to intelligently examine the witness in relation thereto.)

A. 622. I signed or swore to a statment that Buchan and I made out, but what the contents were, I don't know anything about now; and as to this being the statement, I don't have any recollection or thought about it. He done all the writing and getting up of the paper. I gave the details of
our trip down there and back; and to him who was
224 with us after leaving Wichita at the camp there. He said he could fix it so he could make it appear to the insurance company that he and I could kill this man and pass him off for Hillmon. He first stated that he could make it appear that he froze to death or was killed some way. After I told him of this man that camped with us at Cowskin, then he said that he could make it appear that this man was killed instead of Hillmon, and stated in his paper in writing to that effect, and by the consenting to do this would insure me that

I would never have any trouble about [—] from that time on; and if I didn't the insurance men would hunt me down, and penitentiary me for murder, and that they had plenty of money, and never calculated to paying the woman her money, and it would enable him to get big pay for this paper, and that if I needed any money or anything he would give me all I wanted. I told him as to the money that it was not that I was wanting at all; all I wanted was to be freed from the insurance company, as he had often told me, before this, that they had been after me all the time or a wanting me, to arrest me, and put me in jail, and that it was through him that he had been keeping them off of me. At this point, and before the witness had finished his answer to the question, the counsel for plaintiff asked of the notary the time of day, to which the notary answered: "Ten minutes past 6 o'clock." Counsel for plaintiff then asked for an adjournment, to which counsel for defendant objected until witness should finish his answer. To this plaintiff's counsel objected and refused to proceed further at this time; thereupon the further taking of these depositions was by the undersigned notary public adjourned until to-morrow morning at 9 o'clock.

HENRY McGREW,

Jan. 6th, A. D. 1882. Notary Public.

My commission expires April 21st, 1883. [Seal]

Saturday morning, January 7th, A. D. 1882. The further taking of the depositions is hereby resumed pursuant to adjournment.

(And now plaintiff's counsel objects further to the question last asked the witness, for the reasons: That it calls for the contents of a written instrument which should be first produced and proven, and which would then be the best evidence of such contents. Second, said question is leading, and
225 is not a proper question for cross-examination. Third, the paper speaks for itself, and the contents can not be proven by parol or secondary evidence until its loss is duly shown. Fourth, the plaintiff demands the production of the original instrument so that she or her attorneys may inspect the same in order to ascertain whether it is subject to any legal objections, and if so that they may have an opportunity to make such objections, if any exist, before said statement or its contents is put in evidence. Fifth, that the evidence called for is immaterial and irrelevant.)

(Defendant's counsel object and protest against any further objections being interposed until the witness shall have fully completed the answer to the question, and here asks that the deposition show that this objection and protest were made be-

fore the said objections of the plaintiff were interposed, and now moves to strike out the objection of the said plaintiff.)

The plaintiff's counsel now ask that the question be read to the witness before he is required to make further answer, which then is accordingly done, which makes the second time the said question has been read to the witness in full by me, the Notary, since the commencement of the taking of the deposition on this day.

That is my answer, that is sufficient. I don't know anything about what the statement was I signed or swore to.

26. The court erred in sustaining the defendant in error's objection to the following questions asked of the witness John H. Brown by plaintiff in error:

"Q. 763. Did you not, on or about the 4th day of September, A. D. 1879, in Platte County, in the State of Missouri, state to W. J. Buchan in substance as follows: "The next evening after we got to the camp last named the man Joe was sitting by the fire; I was at the hind end of the wagon, either putting feed in the box for the horses or taking a sack of corn out, when I heard a gun go off. I looked around and saw the man was shot, and Hillmon was pulling him around to keep him out of the fire. Hillmon changed a day book from his own coat to Joe's and said to me everything was [alright], and in shape just as he wanted it, and that I need not
226 be afraid, but that it would be [alright]; he told me to get onto a pony, and to go down to a ranch about three-quarters of a mile and get some one to come up. He took Joe's valise and started north; this was about sundown. We had no arrangements about communicating with each other. He first proposed to do so, but I told him I did not want to know where he was, that in case I should I might find out in some other way. I have never heard a word from him since. At Lawrence, Mrs. Hillmon gave me to understand that she knew where Hillmon was, and that he was all right. The man over whom an inquest was held at camp afterwards at Medicine Lodge and at Lawrence, Kansas, was the man Joe Bergess, or Berkley, killed by Hillmon, as related above, and John W. Hillmon, I believe to be still alive; at least, he left our camp and went north, as stated above. After killing Joe, Hillmon said he would assume the name of William Marshall. Baldwin's wife and Mrs. Hillmon know all about this. In my testimony at Lawrence I stated the route taken as above described, but the man who I described as being in camp with us, and who I said went off with some wagoner, was Joe, the man killed," or did you not about the time and place above mentioned, in the presence of one Francis M. McDonald, sign or

swear to a statement in writing, which contained among others, the foregoing statement in substance?

(Plaintiff's counsel object to the question last asked the witness for the reasons: First, that it calls for the contents of a written statement which should first be produced and proven, and which would then be the best evidence of such contents. Second, said question is leading, and is not a proper question for cross-examination. Third, the paper speaks for itself, and the contents can not be proven by parol or secondary evidence until its loss is duly shown. Fifth, that the evidence called for is immaterial and irrelevant.)

A. 763. I didn't state such as that to Buchan, but Buchan made such a statement to me, and asked me how it would do. I told him he was doing that and knew better than I did. He told me he hadn't left anything undone; that it was all right, and that he wanted me to swear to it before a justice of the peace or a lawyer at Parkville, and I done so.

The question asked me is about the substance of what
227 he got in the statement.

Q. 773. You signed a paper in which you charged your friend Hillmon with the murder of a man by the name of Joe, and yet do you state now that you do not know whether you swore to such a statement or not?

A. I don't remember. Couldn't say whether I did or not. I have stated heretofore that I signed or swore to such a paper, but I don't remember which it was.

Q. 774. Did you not both sign and swear to that paper?

(Plaintiff's counsel object to the last above question on the same ground as in 771, that it is incompetent, and not the best evidence.)

A. No, not that I remember of.

Q. 775. Do you now testify that you never did swear to the contents of that paper before Francis M. McDonald at Parkville, Missouri, or before any other person?

A. I never swore to it before any other person, and whether I did before McDonald I don't remember.

Q. 1378. Did you not in May, 1879, write the following note or letter to plaintiff, Mrs. Hillmon: "I would like to know where John is, and how that business is, and what shall I do, if anything? Let me know through my father. Signed, John H. Brown."

(Objected to by the plaintiff as incompetent, because it is not authenticated either by envelope or postmark as a letter sent to the plaintiff, and because it does not appear that it ever was, or was intended to be sent to the plaintiff, or that it was ever received by her, and as otherwise incompetent, irrelevant and immaterial.)

A. 1378. No, sir, I never wrote that to her; I wrote [to] that to Buchan or for him, rather.

Q. 1379. Did you write the letter referred to in question number 1378?

(Objection by the plaintiff on the same ground as the question last preceding.)

A. Yes, sir.

Q. 1370. Did you write it at Lexington, Missouri, in the month of May, 1879?

(Objected to by the plaintiff on the same ground as the question last preceding.)

A. If I recollect right it was at Lexington, Missouri, in May 1879.

Q. 1381. Was this letter written at Lexington the
228 first time said Buchan was there when you was there?

(Objected to by the plaintiff on the same ground as the last preceding question.)

A. 1381. Yes, sir.

Q. 1382. (Here the attorneys for the defendants present to the witness the letter or note marked with the letter "B" by the notary.) Will you please read to the notary the letter or note written by you at Lexington, Missouri, in May, 1879?

(Objected to by the plaintiff for the reasons following: First, because it is not competent in this way to prove the contents of a letter. Second, because the paper shown the witness is not authenticated either by envelope or postmark as a letter, or as having been sent to the plaintiff, or that it had ever been sent to her. Third, because the testimony is otherwise incompetent, irrelevant, and immaterial.)

A. Here the witness read the paper as follows: "Mrs. Hillmon, I would like to know where John is, and how that business is, and what shall I do if anything. Let me know through my father. John H. Brown."

Q. 1383. Where was that note written, and who was present when it was written?

A. Close by the depot at Lexington. My brother Reub was present.

Q. 1384. In what building was it written?

A. It wasn't written in any building at all.

Q. 1385. Was it written upon the street? A. Yes sir.

Q. 1386. To what person did you refer in that portion of the letter where you say, "I would like to know where John is."

(Objected to by the plaintiff on the same ground as stated in objection to question number 1382.)

A. I referred to Hillmon.

Q. 1387. To what business did you refer in that portion of the letter "and how that business is?"

(Objected to by the plaintiff on same grounds as stated in objection to question number 1382.)

A. I didn't refer to any business at all

Q. 1388. To what business did you refer by the expression in that letter "that business?"

(Objected to by the plaintiff on the same grounds as stated in objection to question number 1382.)

A. To no business at all.

229 Q. 1389. What did you mean by the expression in that letter "what shall I do if anything?"

(Objected to by the plaintiff on the same grounds as stated in objection to question 1382.)

A. I didn't have any meaning for it.

Q. 1390. Where did you get the paper on which that note is written? A. Of Buchan.

Q. 1391. What information did you seek to obtain from Mrs. Hillmon through your father?

(Objected to by the plaintiff on the same grounds as stated in objection to question 1382.)

[—] I didn't seek to obtain any.

Q. 1392. What was it you desired Mrs. Hillmon to let you know through your father?

(Objected to by the plaintiff on the same grounds as stated in objection to question 1382.)

A. It wasn't anything at all.

Q. 1393. What did you mean by the expression in that letter, "Let me know through my father?"

(Objected to by the plaintiff on the same grounds as stated in objection to question 1382.)

A. I did not have any meaning for it at all.

Q. 1394. How long was this letter written before Buchan left on the train that day?

A. Fifteen or twenty minutes, as near as I can guess at it.

Q. 1395. After you had written the note, what did you do with it? A. I gave it to Buchan.

Q. 1396. After writing this note, when and where did you first see Mrs. Hillmon?

A. At Levi Baldwin's in September, 1879.

Q. 1397. How long was that after you and Buchan had prepared that statement at your brother's house?

A. Five or six days, as near as I can recollect.

27. The said court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness Reuben Brown:

Q. You may go on and state what conversation you had with Mr. Buchan at that time, "concerning which the court said: "I assume that by this question and others of a similar character you propose to show Buchan's connection with this case, so far as it leads up to the execution of these releases," to which Mr. Hutchings replied; "That is the object of this

testimony." To which question the witness replied: "I found Mr. Buchan in his office, and he wanted to know if I knew where John were; I told him that I did not, but I thought I could find him. He wanted I should go and look him
230 up; he said he had got himself into a bad scrape, and my father and brother had employed him for his attorney, and he wanted to do all he could for John and wanted I should go and hunt him up immediately."

28. The said court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness J. W. Green:

"Q. You may state, if you know, who employed attorneys if anybody, at Lawrence for the insurance companies." In explanation of which Mr. Hutchings said: "We want to show what Mr. Munn did, and to follow that by proof of interviews between the county attorney and Mr. Buchan to show the origin and genesis of the getting of these releases," and to which the witness replied: "Mr. Alton, of the Connecticut Mutual employed myself and one Doctor Carney; employed Mr. Barker and myself for the New York Life. I don't know who employed Mr. Barker for the Mutual Life.

29. The said court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness James W. Green:

"Q. I will ask you what was the subject of your interview with him (Munn) in July, and state whether it had any connection with this Hillmon matter?" With reference to which the court said: "Do you expect to show that he was a representative of the insurance companies by his own declarations?" And to which Mr. Hutchings replied: "We expect to show it by their accepting the fruits of what he did. These releases were obtained by him. He hired a man to get them, and we invoke the doctrine that where the insurance companies take the benefit of an act they take it cuonere." And to which the witness answered as follows: "Among other things we discussed this Hillmon matter."

30. The said court erred in overruling the objection of counsel for the plaintiff in error to the following question asked of the witness James W. Green:

"Q. Now, I will ask you to state what conversation you had with Mr. Buchan there on that occasion?" With reference to which Mr. Hutchings said: "It goes to the question of these releases." And to which the witness answered as fol-
231 lows: "Mr. Buchan came to the office, and among other things he proposed or he thought that he could get up the policies which had been issued on the life of John W. Hillmon."

31. The said court erred in overruling the objection of counsel for plaintiff in error to the introduction in evidence by counsel for the defendant in error during the examination of the witness, James W. Green, of the following document marked Exhibit 15 and commonly known as the Munn paper: "The undersigned attorney, representing the Mutual Life Insurance Company, of New York, The New York Life Insurance Company of New York and the Connecticut Mutual Life Insurance Company hereby stipulate and agree so far as said companies are concerned, to desist from any further suit and prosecution of John W. Hillmon, John H. Brown, or any other parties in connection with the Hillmon cases, provided the respective policies are surrendered and order for their delivery executed, and all claims under the same released to said companies by said Sallie E. Hillmon, wife of John W. Hillmon, and beneficiary under said policies, and in so doing represent their officers and agents everywhere.

Lawrence, Kansas, September 6th, 1879.

H. B. MUNN."

And concerning the introduction of which in evidence the court said: "Do you expect to connect this man Munn by further evidence with the Mutual Life?" And in reply to which Mr. Hutchings said: "I am not so certain as to that, except in this way: We shall know that these releases were obtained; that this paper was presented to the plaintiff herself; that it was one of the instrumentalities by which they obtained the releases; that they availed themselves of all that Mr. Munn did by virtue of this paper, and I think we will show that their attorneys, who are managing this case knew all about it when they set up the releases. It was claimed that Buchan was the attorney of Brown. This paper was given to Brown's attorney, and it was used as a lever on Brown through his attorney; it was then exhibited to the plaintiff, and the releases were obtained."

By the Court: I do not recall that it was shown to Brown.

By Mr. Hutchings: No, but it was shown to his attor-
232 ney; he was acting for the insurance companies, and for Brown. It will appear that the paper was written after the Parkville incident; that Mr. Munn, Mr. Buchan and Mr. Green were discussing the getting up of these policies at Lawrence on the 6th day of September, 1879; that Buchan wanted such a paper, and that Munn gave him this identical paper.

By Mr. Barker: In the first place it is conceded that Mr. Green was not the attorney of the Mutual Life, so of course he could not have any authority to speak for that company. It is admitted that the paper was written after the Parkville incident; therefore the paper could not have influenced John

Brown in his actions, and Mrs. Hillmon swears that she never heard of this paper until after the releases were signed.

By the Court: Were the releases ever delivered to Munn?

By Mr. Wheat: They were delivered to the companies. I think there is evidence that Munn had them at one time.

The court overruled the objection to which action and ruling of the court the defendant at the time duly excepted.

Mr. Hutchings then read the paper in evidence.

32. The said court erred in overruling the objection of counsel for plaintiff in error to the following question, asked of the witness, James W. Green:

"Q. Now then, I will get you to state to the jury what conversation there was at that time between you and Mr. Munn and Mr. Buchan as to giving him this kind of an instrument." (referring to the Munn paper marked Exhibit 15.) To which the witness replied: "I do not at this late day presume to state the exact words which were used at that time, but as I stated before, Mr. Buchan proposed that he could get up the policies which had been issued by the companies on the life of Hillmon I remember stating myself in substance I did not believe he could do any such thing, and he thought he could and wanted an opportunity to try. Mr. Munn told him that he might go ahead and try to get the policies up if he could, and if he could, that he would pay his expenses anyhow, and if he could get the policies up he would pay him liberally for so doing. Mr. Buchan then wanted authority from Mr. Munn to pay the plaintiff Mrs. Hillman something for delivering up the policies. Mr. Munn refused and said
233 that the companies would not pay a dollar; that they believed the whole scheme was a fraud, and consequently that they would not pay a dollar for these releases and went further and said that Mr. Buchan should not go so far as to pay any of the compensation which might be given him, or which he might receive in payment, to Mrs. Hillmon for delivering up the policies. That was substantially the conversation, a portion of it, possibly, in the words."

33. The court erred in refusing to permit the witness James W. Green to answer the following question asked by counsel for plaintiff in error:

"Q. Do you remember about his having testified about a third party having been with them, that is, Hillmon and Brown, at what is called the "Cowskin" on their second journey about the first day out from Wichita?"

The court had allowed the plaintiff to prove by the witness James W. Green a part of what the witness John H. Brown testified to at the coroner's inquest in Douglas county, Kansas, held on the 2nd day of April, 1879, and the question excluded called for the rest or a portion of the rest of the testi-

mony given by the said Brown at the same time, the witness Green on his direct examination having testified that John H. Brown testified that the body brought to Lawrence was the body of John W. Hillmon.

34. The court erred in sustaining the defendant in error's objection to the following offer on the part of the plaintiff in error:

The plaintiff in error offered to prove by James W. Green that Brown, at the inquest, was asked in regard to Hillmon's teeth, and that he had testified that he had never noticed his teeth.

35. The court erred in sustaining the defendant in error's objection to the following offer on the part of the plaintiff in error:

The plaintiff in error offered to prove that Brown, at the inquest, was asked in regard to Hillmon's height, and that he had answered that he did not know how tall he was (referring to Hillmon); that he had never seen him measured.

234 36. The court erred in overruling the plaintiff in error's motion to take from the jury the statement of the witness J. W. Green that John H. Brown had testified at the coroner's inquest, held at Lawrence, that the body which was brought from Medicine Lodge to Lawrence, and over which the inquest was being held was the body of John W. Hillmon.

37. The said court erred in overruling the objection of counsel for plaintiff in error to the following question asked the witness Harry M. Davis:

"Q. What did he then say his name was?" To which the witness replied: "After he was sworn to testify by the coroner the County Attorney asked him to state his name, and he said it was J. H. Brown."

38. The said court erred in overruling the objection of counsel for the plaintiff in error to the following question asked the witness Harry M. Davis:

"Q. State whether or not you had ever seen that man who called himself J. H. Brown before the time you saw him standing at the wagon as you described; if so, when and where? To which the witness replied: "I think I saw this man in company with Hillmon in the winter, but at that time I don't recollect as having heard his name."

39. The said court erred in overruling the objection of counsel for plaintiff in error to the following question (numbered 6) asked of the witness, Eli Smith:

"Q. State whether or not a man by the name of John W. Hillmon received from you as post master at Medicine Lodge,

Kansas, during the winter of 1878 and 1879, mail matter which came to that address, to that postoffice." To which the witness replied: "As to the John W., I don't know. A man who claimed to be named Hillmon did receive some letters. It was during that time as near as I can recall."

40. The said court erred in overruling the objection of counsel for plaintiff in error to the following question (numbered 7) asked of the witness Eli Smith:

"Q. About how many times did you deliver mail
235 matter directed as above to the man you say claimed to be named Hillmon?" To which the witness replied: "Once, possibly twice."

41. The said court erred in overruling the objection of counsel for plaintiff in error to the following question (numbered 11) asked of the witness Derrick Updegraff:

"Q. State the names of both of these men." To which the witness replied: "They called themselves Hillmon and Brown."

(The witness had previously stated that he kept a hotel at Medicine Lodge in 1879, and that he remembered the circumstances of a dead body having been brought there in March of that year, and that the dead body resembled a man who had been in Medicine Lodge about Christmas with Brown.)

42. The said court erred in overruling the objection of counsel for plaintiff in error to the following question (numbered 14) asked of the witness Derrick Updegraff:

"Q. State if you recognized the dead body, and if so, whose body was it?" To which the witness replied: "I recognized the dead body as the man they called Hillmon."

43. The said court erred in overruling the objection of counsel for plaintiff in error to the following question (numbered 17) asked of the witness Derrick Updegraff:

"Q. Repeat that conversation as near as you can." To which the witness replied, "I think they were inquiring where they could find a cattle ranch."

(The conversation referred to was between the witness and Brown and Hillmon at Medicine Lodge, four or five days before the witness saw the dead body.)

44. The said court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness W. W. Standiford:

"Q. What was the name of the person whose body that was, in your judgment?" To which the witness replied: "John W. Hillmon."

(The witness had previously stated that he was in
236 business in Medicine Lodge in March, 1879, that he remembered the circumstance of a dead body being brought there in that month; that he was a member of the coroner's jury at the inquest; that his "best recollection" was that he had seen the body in life sometime in the month of December preceding in his store. He had not stated that he had been introduced to him or knew his name.

45. The said Court erred in overruling the motion of counsel for plaintiff in error to strike out the answer of the witness W. W. Standiford, to the following question asked by counsel for defendant in error:

"Q. At the time you saw that body, calling your attention to the persons present either then or during the inquest, did you see a man by the name of John H. Brown?" To which the witness replied: I saw a man that they called Brown, but I couldn't say as to his initials."

46. The said Court erred in overruling the motion of counsel for plaintiff in error to strike out the answer of the witness W. W. Standiford, to the following question asked by counsel for defendant in error:

"Q. When you saw the man, John W. Hillmon, in your store state whether or not you saw the man Brown." To which the witness replied: "I did, the man that they called Brown."

47. The said Court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness W. W. Standiford:

"Q. Mr. Standiford, you may state what Mr. Hillmon said in that conversation, if anything, as to where he was going, and as to what his intentions were when he left Medicine Lodge." To which the witness replied: "He said he wanted to talk to me about a stock ranch; he was hunting a stock ranch."

48. The said court erred in refusing to permit the witness, Alva Baldwin to answer the following questions asked by counsel for plaintiff in error:

"Q. There was considerable excitement there in regard to the matter was there not?"

(The excitement referred to was attendant upon the second inquest held at Lawrence upon the body alleged to
237 have been the body of John W. Hillmon.)

49. The said Court erred in overruling the motion of counsel for plaintiff in error to strike out the answer of the witness, Sallie E. Smith, to the following question propounded to her by counsel for defendant in error:

"Q. State the contents of the letter, the substance of it." To which the witness replied: "I could not state just word for word: there was certain things that I remember distinctly, that he told me to go to Selig and tell him if the policy that he had in his hands or if he had not received it, for me to take the money back, as he would be home in a short time, and was going to drop that policy anyhow, and I could get the money on it."

(The letter referred to was the one alleged to have been received by the witness from her husband dated at Wichita, March 4th, 1879, and which has been destroyed.)

50. The said Court erred in overruling the motion of counsel for plaintiff in error to strike out the answer of the witness, Sallie E. Smith, to the following question propounded by counsel for defendant in error:

Q. Now, if you received that letter on the 4th day of March, dated the fourth day of March, at Wichita, from your husband, John W. Hillmon, you may state what you did in relation to the directions that he gave you." To which the witness replied: "Sometime afterwards I received a letter or postal card from Selig, asking me to come to his office, that he had received the policy, Mr. Hillmon's policy; I went to the post-office his office was just on the other side of the street; I went to his office and he told me what he had received. I told him I didn't want the policy, as I had just received a letter a short time before from Mr. Hillmon and he told me I could go and get the money and have the policy cancelled, as he was going to drop it anyway, and he thought it was not worth continuing it and I should take the money back."

51. The said Court erred in overruling the objection of counsel for plaintiff in error to the following question asked of the witness Sallie E. Smith:

238 "Q. What instructions did you give them (Levi and Alva Baldwin) when they went; for what purpose did you send them to Medicine Lodge?" To which the witness replied: "To bring my husband home. I sent them down to bring my husband home."

52. The said Court erred in overruling the objection of counsel for plaintiff in error to the following question asked the witness, Sallie E. Smith:

"Q. You may state if you remember who it was generally claimed was the person that had been killed at Medicine Lodge?" To which the witness replied: "Frank Nichols."

53. The Court erred in permitting the following to be asked by defendant in error and answered by Sallie E. Smith, plaintiff below:

"Q. Do you remember in the picture which of the two standing persons was the tallest?" To which the witness replied: "Yes, sir."

"Q. Which? To which the witness replied: "My husband was the tallest."

54. The Court erred in overruling the motion of the plaintiff in error to strike out the following question propounded to Sallie E. Smith, and her answer thereto:

"Q. You may state what, if any authority or permission you ever gave to take the body and deliver it to Bailey & Smith.

A. I never gave any. I never gave any permission to take it anywhere, but to bring it home to the house."

55. The Court erred in sustaining the defendant in error's objection to the following question asked of the witness Sallie E. Smith:

"Q. Now, in that description did he (referring to W. W. Nichols) state to you that your husband had a scar upon one hand or the other caused by the explosion of a cartridge, if he did not tell you that?"

(The plaintiff objects to the question as not properly cross-examination, and hearsay.)

By the Court: It would be cross-examination, but it is hearsay evidence. By that I do not mean to exclude any declaration that this lady may have made.

By Mr. Barker: Does the court exclude that question?

By the Court: The Court does.

239 To which ruling of the court the defendants and each of them at the time duly excepted.

(The witness had already testified to the fact that a short time before the first trial of this cause she went to the residence of one W. W. Nichols, and learned from him that he was well acquainted with her husband, John W. Hillmon, and that she went there to see Mr. Nichols in reference to ascertaining whether he could testify as a witness in the case about to be tried; and that she had a conversation with Mr. Nichols in regard to her husband's appearance, and at her request he gave her a description of the personal appearance of her husband, John W. Hillmon.

The witness testified that at this interview with her, the plaintiff, he told her that her husband had a scar upon his right hand, caused by the explosion of a cartridge, and that said Nichols was present at the first trial of this action as a witness on behalf of the plaintiff; that upon the streets of Leavenworth, she, the said plaintiff, asked the witness Nichols

in his testimony not to say anything in regard to the scar upon her husband's hand; that he declined her request, and that the said plaintiff did not call the said Nichols as a witness in her behalf; but he was called by the defendant.)

56. The Court erred in striking out the answer of the witness George A. Nichols, to the following question, asked by plaintiff in error:

"Q. Did you make an examination of his hand at that time? A. I took hold of his hand (referring to Hillmon) and looked at it, and he told me how it happened to get that way?"

(The witness George A. Nichols had testified in substance that John W. Hillmon was a brother of his (Nichols') wife; that in the spring of the year 1878, John W. Hillmon had visited his wife and himself at their home in Washington County, Kansas; that at the time he, Nichols, noticed a scar on the right hand of Hillmon, beginning at the ball of the hand, passing up between the thumb and forefinger, and extending about an inch on the back of the hand; that the witness W. W. Nichols testified in substance that while Hillmon and himself were engaged in killing buffalo in the Pan Handle of Texas, that he, John W. Hillmon, was suddenly wounded in his right hand by the discharge of a cartridge; that the one wound was a severe one, and that it left a scar upon his right hand which he, Nichols, afterwards observed; that this scar was on the same hand, to wit, the right hand, and began on the ball of the thumb, and extended between his thumb and forefinger, and about an inch on the back of his hand.)

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57. The court erred in sustaining the motion of the defendant in error to strike out the answer of the witness Henry W. Hillmon to the following question:

"Q. Did you know of his (referring to John W. Hillmon) having been wounded in the hand? To which the witness answered: "Yes, I heard that he was so wounded. When I left the buffalo ranch and went to Dodge City some buffalo hunters told me John had had his hand torn by a cartridge down on the ranch."

(The witness Henry Hillmon had testified that he was the brother of the said John W. Hillmon, and that he was in company with his brother down in the Pan Handle of Texas, but was not present at the time the accident is said to have occurred; that the witness W. W. Nichols testified that he was present at the time when John W. Hillmon's right hand was injured by the explosion of a cartridge; that he explained how the explosion took place, and the injury occurred; that the witness George A. Nichols testified that sometime after, he

saw John W. Hillmon at his house that he took hold of his hand and saw the scar thereon.

58 The court erred in permitting the witness Maggie J. Nixon to answer the following question over the objection of the plaintiff in error:

"Q. Now then, when Mrs. Hillmon said that if you were going to testify to that fact that she would turn Hillmon over to the authorities, did you take her seriously, or in fun?

(The witness Maggie J. Nixon had testified substantially that at the first trial of this cause at Leavenworth, in June, 1881, that the plaintiff, Sallie E. Hillmon, came to the room occupied by Mr. George A. Nichols, his wife, Mr. Nixon, and the witness, and that they had a conversation at that time in regard to what Mr. and Mrs. Nichols, Mr. Nixon and her-
241 self would testify if called as witnesses upon the trial of the cause; that they informed her among other things that John W. Hillmon had defective teeth, and had lost one of his front teeth; that he had a scar upon his right hand (See the evidence of George A. Nichols, Mrs. George A. Nichols, Mr. S. D. Nixon, and Miss Maggie J. Nixon) that thereupon Sallie E. Hillmon, the plaintiff, stated to them: "If that is the evidence you are going to give I will go back and dismiss the case and turn him (referring to J. W. Hillmon) over to the authorities.")

59. The court erred in overruling the motion of the plaintiff in error to take from the jury Exhibit Number 15, commonly known as the "Munn Paper," which was offered and read in evidence during the examination of James W. Green, a witness called by the defendant in error, and duly excepted to at the time. A copy of said paper is as follows:

"The undersigned attorney, representing the Mutual Life Insurance Company of New York, The New York Life Insurance Company of New York and the Connecticut Mutual Life Insurance Company, hereby stipulate and agree so far as said companies are concerned, to desist from any further suit and prosecution of John W. Hillmon, John H. Brown or any other parties in connection with the Hillmon cases, provided the respective policies are surrendered and order for their delivery executed and all claims under the same released to said companies by Sallie E. Hillmon, wife of said John W. Hillmon, and beneficiary under said policies, and in so doing represent their officers and agents everywhere.

Lawrence, Kansas, September 6, 1879. H. B. MUNN."

In support of said assignment the said plaintiff in error shows that said paper was introduced and read in evidence during the examination of James W. Green, a witness called for the defendant in error; that said witness testified in sub-

stance that said paper was prepared by one H. B. Munn and delivered to W. J. Buchan (See the evidence of James W. Green).

Thereupon the defendant in error offered in evidence said paper, and requested permission to read the same, to
242 which the plaintiff in error objected on the ground that it was incompetent, immaterial, and irrelevant; that in support of said defendant in error's offer, counsel made the following statement and promise:

By the Court: You expect to connect this man Munn by further evidence with the Mutual Life?

By Mr. Hutchings: I am not so certain as to that, except in this way: we shall know that these releases were obtained; that this paper was presented to the plaintiff herself; that it was one of the instrumentalities by which they obtained the releases; that they [aviled] themselves of all that Mr. Munn did by virtue of this paper; and I think that we will show that their attorneys, who are managing the case, knew all about it when they set up the releases. It was claimed that Buchan was the attorney of Brown. This paper was given to Brown's attorney, and it was used as a lever on Brown through his attorneys. It was then exhibited to the plaintiff, and the releases were obtained.

By the Court: I do not recall that it was shown to Brown.

By Mr. Hutchings: No, but it was shown to his attorney. He was acting for the insurance companies and for Brown. It will appear that the paper was written after the Parkville incident; that Mr. Munn, Mr. Buchan, and Mr. Green were discussing the getting up of the policies at Lawrence on the 6th of September, 1879; that Buchan wanted such a paper, and that Munn gave him this identical paper.

By Mr. Barker: In the first place, it is conceded that Mr. Green was not the attorney of the Mutual Life, so of course he could not have authority to speak for that company. It is admitted that the paper was written after the Parkville incident; therefore the paper could not have influenced Brown in his actions and Mrs. Hillmon swears that she never heard of this paper until after the releases were signed.

By the Court: Were the releases ever delivered to Munn?

By Mr. Wheat: They were delivered to the companies. I think there is evidence that Munn had them at one time.

The court overruled the objection, to which action and ruling of the court the defendants at the time duly excepted.

243 The defendant in error, Sallie E. Hillmon, testified in substance as follows: that after she had signed the releases at Leavenworth on the 15th of September, 1879, she went to Wyandotte, in company with John H. Brown, and W. J. Buchan, and that the next morning, after their arrival, she went to the office of W. J. Buchan, and there met Buchan and J. H. Brown, and that on that occasion she was shown for the first time the paper which is commonly known and called as John Brown's confession; and she was thereupon asked the following questions, to which she replied as follows:

"Q. Was there any other paper shown you there at that time? A. Yes, sir.

Q. Who was that signed by? A. By H. B. Munn.

Q. Who gave you that paper?

A. Mr. Buchan; he read it to me and then handed it to me.

Q. What did you do? A. I handed it back to him.

Q. You may look at that paper and see if that is the paper he read and handed to you on that occasion?

A. Yes, sir, that is the paper.

Q. This is marked at this trial No. 15.

By Mr. Hutchings: I would like to read this paper.

The defendants and each of them object to the reading of the paper because the same is incompetent, irrelevant and immaterial, and for the further reason that it could not possibly have operated to induce the plaintiff to give the releases, because it is not claimed that she knew of the existence of the paper until the occasion in Mr. Buchan's office, after the releases had been signed.

By the Court: While it may be true that it did not operate to induce the plaintiff to sign the releases; yet, on the other hand, it is an illustration of the purposes and motives of Buchan.

Mr. Hutchings again reads said paper to the jury.

Said witness, the defendant in error, on cross-examination, further testified:

Q. Were any other papers shown you except the releases and the orders you signed?

By Mr. Hutchings: Where?

244 Q. In Leavenworth at the Planters House, on the 15th of September, 1879?

A. No I didn't se any other papers; he said he didn't have Brown's statement there. He said it was at Wyandotte, and if I would go home with him he would give it to me.

Q. And you went home with him, did you? A. Yes sir.

Q. There was a paper produced there, was there?

A. Yes sir.

Q. That paper was read, was it?

A. There was two papers, Mr. Brown's statement was there, he got that.

Q. You read that, did you? A. No.

Q. You didn't read Mr. Brown's statement?

A. No, just a part of it.

Q. You just read a part of Mr. Brown's statement?

A. Yes sir.

Q. You say there was another paper there? A. Yes sir.

Q. You have described it as the Munn paper, have you not; that is, the paper you have already identified and marked as an exhibit?

A. That is the one; Mr. Buchan read it to me.

Q. That was the first time, was it? That you had ever seen or heard of the paper?

A. Yes sir, the first and only time.

Q. That was at Mr. Buchan's office after you had signed all of these releases and this order? A. Yes sir.

Q. Had gone with him to Mr. Wheat's office to get the policies? A. Yes sir.

Q. Then, he showed you this paper at Wyandotte?

A. He gave it to me.

(See the evidence of Sallie E. Hillmon.)

The witness, John H. Brown does not claim to have ever seen or read or heard of said paper that is testified to by Mrs. Hillmon until this meeting at Buchan's after the releases had been signed at Leavenworth, Kansas.

His testimony is as follows:

Q. You say that Buchan showed her the paper; what paper was that if you know?

A. I do not know what paper it was. He read it and handed it to her. I was not paying attention when he read it.

Q. Did he read it aloud?

A. He didn't read it very loud.

Q. Did he read it so that you could hear it if you desired to? A. Yes sir.

245 Q. After Mrs. Hillmon had finished reading that paper, what did she do with it?

A. Handed it back to Buchan. (See the testimony of Brown on this subject.)

60. The said court erred in overruling the motion of counsel for plaintiff in error to discharge the jury and issue a new venire on account of the following remarks made by the court in the presence of the jury, and while the court was in session:

"By the Court: I desire to say this: There is a juror here whose conduct is very commendable, and whom I honor for it, has stated to me that a communication has been made to

him, which he interpreted as preliminary to an offer to bribe. He stated to me the language that [—] used to him, and it looks very much to me as it did to him, but inasmuch as there might be some mistake, I think it best not to mention the name of the party who made the communication, or the name of the juror to whom it was made; but I desire to say this; that if there is any further effort made in that direction, I will have that man's name presented to the United States Grand Jury for indictment.

By the Court: It is no lawyer connected with this case; I do not mean to say that the effort came from either side of this case, and no counsel is called upon it is not necessary in the mind of the court for any counsel to say anything one way or the other about it. There is no reflection cast upon any one directly connected with this case, so far as I know, but I desire to say to the person that that must stop; it must proceed no further. If I can prevent it this case will not be tried with anything of that sort in it."

Afternoon session: Parties present as before.

By Mr. Barker: If the court please, the defendant has a motion which it would like to submit at this time, and I think it is a motion which ought not to be perhaps, argued in the presence of the jury, and we would like to have a moment to present it to the court.

By the Court (to the jury): Remembering the admonition that has been given you, gentlemen, please retire to the corridor beyond hearing of what may transpire in court.

246 The jury accordingly retired.

By Mr. Barker: It would seem from the remarks of the judge just before adjournment that an attempt had been made by some one, the foundation has been laid for bribing a juror; that the court believes that from the statements which the juror makes, has made. Now, upon that proposition, the court has said that at this time he would not investigate, but I submit that if anything of that sort has been done, if the judge of this court thinks anything has been done, that it ought to be probed to the very bottom; and done now, and we court the fullest investigation in regard to that matter. There is another matter which grows out of that, and upon that we make a motion, and that is, that the entire panel be discharged, and a new venire be issued. Taking into consideration the character of this case, the plaintiff, and the defendants, the fact that the plaintiff is a woman, and the defendants corporations, and taking into consideration the talk which has been had in court, the insinuations and remarks that have been made in regard to the millions which these

companies are alleged to have, I submit that when the court says in the presence of the jury that he believes that the foundation has been laid, or that a juror has been tampered with, that the imputation would go out, the impression would go out; it would make an impression upon the jury that if anybody had done that, it was the defendants in this case, because the defendants have the money I submit that under these circumstances, taking into consideration these facts, that we ought not to be required to go on with the trial of this case before a jury where the Judge of this court has made remarks of that kind, where the Judge of this court believes, as your honor evidently does, in regard to that matter. We are over here, so far as that is concerned, in Leavenworth county, where the plaintiff lives; where her counsel, two of them live, and if we have been guilty, directly or indirectly, or remotely, or anything of the sort, we ought to be punished for it, and we court the fullest investigation in regard to that. But furthermore, we submit that the statement of the court in regard to that matter would have a tendency,
247 and would necessarily and naturally prejudice the jury against defendants in this case, and that we could not go on now and have a fair trial and an impartial one before this jury, and we have submitted a motion here that on account of the statements of the court in that respect that the entire panel be discharged, and that a new venire issue, and we save, in addition to that, an exception to the remarks of the court in the presence of the jury.

By the Court: So far as any prejudice is concerned, I can not conceive how the court's remarks could operate to the disadvantage of the defendants any more than they would to the disadvantage of the plaintiff, for, as counsel says, on one hand are the insurance companies and they have the money—that is the expression used by counsel for the defendants; on the other hand, as counsel says, the plaintiff resides in this community, and two of her lawyers reside in this community. When this matter was first brought to my attention, I considered the propriety of allowing it to proceed to see to what extent it would be carried; but I thought then that that was perhaps beneath the dignity of the court; that it might, in a measure, be laying a trap for the man who possibly had an evil intent in that direction. I have no hesitancy in telling counsel the words that the juror repeated to me. They were a request on the part of the person in qustion to a juror to come to a certain place that there was something in it for him. Now, what was the court to do? As I say, I did not consider it the proper thing to allow that to proceed without calling attention to it, and yet, it bore to my mind the unmistakable ear marks of preliminary preparation for bribery, and I thought that the best thing to do was to call

the attention of counsel (and I do not think it made any difference [withere] it was in the presence of the jury or not) to what was considered by the court, as the beginning of an attempt to bribe a juror and to warn the person, who, I may say, was then in the court room, that if there was any further attempt in that direction, I would do my utmost to have him indicted by the Grand Jury. I would have done that without regard to the connection or relation of that person; I do not propose as long as I occupy this bench to tolerate any conduct of that character. Now, suppose I had mentioned the
248 name of the person who was guilty, or whom I thought might be guilty. It might have operated to cast a reflection upon him that he did not deserve. He might have said that although he made use of those remarks that they had reference to something entirely disconnected from this case, notwithstanding their equivocal character. Now, because of that occurrence, am I to discharge and lose all the time, all the care and all the energy that counsel and litigants have devoted to it up to the present time. I have stated to the jury that no lawyer connected with this case, and no party to it, was a party to that communication to the juror. Now, if there is anything further [than] I can say in that direction that will tend more fully to clear those who are connected with the trial of this case, I am willing to say it if counsel will suggest it to me, because I have not the remotest idea that that attempt, if it be one, was inspired by either side of this case.

By Mr. Isham: Certainly no one can concur with the court more heartily than we do in the view that the court has expressed, that nothing of this kind could be tolerated, or that the slightest shadow should fall over this case; nor do we for a moment believe or think in any wise that there was the slightest purpose in the mind of the court of doing prejudice to one party or the other by the remarks which your honor made this morning in the presence of the jury. They do, practically, because we think the burden of this thing will fall upon the defendants, and that the matter ought not to stop here; it ought not to be postponed, as your Honor suggested, but should be explored to the very bottom at once. Your Honor is perfectly aware that from the beginning to the end in the long history of this case, there has been a parade that is familiar to the people of Kansas from one end to the other of the poverty and weakness of the plaintiff, and of the money, power—that is the phrase dwelt on continually herein in this forum—of the defendants. We can not bring a witness from a distance, we can not take a single step that involves a little expense, but it is immediately dwelt upon; and has been here to an extent before the court that I think ought to have been stopped, and ought not to be permitted, as evidence of

the money power, and of the corruption of their wit-
249 nesses, and all that sort of thing, with nothing on the face of the earth to found it on except the fact that we have been able to bring witnesses from a distance, or we have been able to do this or that or the other to throw light upon the identity of this body at Lawrence. Now, the very first thought, if anything of this kind occurs, is, why such a thing can not emanate from this poor woman! Of course, it is the fact of these wealthy corporations! That is the sentiment that is published and spread abroad, and that is abroad in the community, and finds its expression continually from counsel in this case, which I think ought not to be allowed without some evidence to support it; but the imputation is at once in the mind of every juryman here, as it would be in the minds of any group of people that might be gathered on the street, to whom this thing might be presented; "Oh these insurance companies have done that; of course, this poor woman had nothing to buy jurors with." Now, with that fact, the absolutely certain fact of the situation before us, I think that it is absolutely impossible for us now to have a fair trial before that jury, and we ask these two things; we ask in the first place, that whatever of that sort of thing might have occurred, may be explored now; if we are guilty, if counsel here who are connected with this case, if anybody on our behalf has been doing anything of this kind we want to know it. If, on the other hand, anything has been done by anybody else, it ought to be known. If anything has been done and worked about so that it should be calculated to give an impression abroad that we have been doing anything of the kind it ought to be explored; it ought to be shown whether it is true or not; but in the present situation we think the whole thing should be explored now, and not deferred; and we think if it is deferred, in any event in the light of what has transpired here, that it is impossible for us to have a fair trial. I think consideration ought to be given to the fact of the very greatest disparity in weight and force of the slightest implication or word that emanates from the lips of the court, as compared with anything that counsel on either side might possibly say in the case. Any word emanating from the court that casts a shadow upon a juror would be potent beyond expression, and the court de-
250 clares emphatically that it is convinced that the preliminary step towards bribing a juror has occurred in in this case. To say that it [is] has not been done by the parties, and not by counsel, does not exonerate us.

By the Court: How would counsel interpret that language? When I said I was convinced I perhaps should have said that the language was very suggestive.

By Mr. Isham: I agree with the court; I agree with the court that the language was not quite sufficient to challenge investigation, to entirely justify the action of the court, even more action of the court but I think it was not necessary that the opinion should have been expressed before the jury.

By the Court: What could the court have done in that situation?

By Mr. Isham: It was just at adjourning; the jury might have been let go and counsel retained, and this matter laid before them as we are doing now, the jury might not have been retained here; they might have been let go, and this thing could all have taken place just as this discussion is now occurring between the court and counsel; and then, in addition to that, the court could take any measures, more rigorous and better, I think. This man, whoever he might be, should be hauled right up now. I haven't the slightest idea who he is, but he and his relations, and whoever is behind him, all should be brought right up, and the matter explored to the bottom now.

By the Court: It is something aside from the case on trial that that should be done now.

By Mr. Isham: The impression is inevitable in the situation upon the minds of the jury that an attempt has been made that, in the ordinary course of things would naturally be attributed to defendants in the light of the continual talk of counsel for plaintiff which has gone on since this trial commenced, and which will be continued until the court stops it. We can not protect evidence; we can not go anywhere and preserve evidence for the purpose of throwing light upon this question of identity under the issues in this case; we can not take a single step in which we are not charged with corrupting witnesses by money power, and doing everything that should not be done, when everything objectionable
251 throws light upon the question at issue. We have consulted upon this matter; our first impulse was to make this application and challenge investigation before the court adjourned; but we postponed it and took time to consider it carefully; and fully considered it during recess, and we think it impossible for us to have a fair trial before this jury now.

By Mr. Barker: Let us assume that the juror has been talked to, believes as the court does—that he has been approached. Now, it is no answer to say to that that he does not know by which side he has been approached; he may have his impression in regard to that matter. Now, I submit, to have a party to go on with the trial of a case before a jury, one member of which believes that he has been attempted to

be bribed by one party or the other—that that jury is disqualified from sitting in the case.

By the Court: That position must be illogical; otherwise in a case of importance, that is bitterly contested, and which takes from three weeks to two months to try, it could be made possible that we would never come to the end of it.

By Mr. Barker: So far as that is concerned, that is only a question of the effect of those things, or the possibility of them. I think it ought not to change the fact; you are asking us to go on with the trial of the case before a juror who believes, and whom the court thinks has attempted to be bribed. I submit that that juror's mind is not in a condition to receive evidence in this case. He is not in a condition to act fairly and impartially in the case; he believes one way or the other; if he has an impression of which side that came from, he will be striving and leaning against that side; in other words, he is absolutely disqualified from acting in this case, and so far as that is concerned, that matter has now gone before the whole panel. It has got before the whole panel now in this case, that the Judge of this court believes that a juror in the box has attempted to be—that there has been an attempt to bribe that juror. Now, I submit that a juror who has received an impression of that kind, however erroneous, and I do not say that it is erroneous, so far as that is concerned, I do not say anything in regard to that,

252 I do not criticise the views of the court in regard to that matter—but I submit that these matters having occurred; that the juror having heard these things, and having considered it of moment enough to discuss it before the jury, that that jury is disqualified from going on and hearing this case, and acting fairly and impartially between the parties. As has been said by my colleague—it is not so long since you were at the bar that you can not appreciate how much weight a remark of that kind coming from the judge of the court has; that the judge of the court being convinced; and expressing his opinion in that manner in which he did, would carry conviction to the minds of the jury that a matter of that kind had taken place; and I am frank to say that so far as the defendants in this case are concerned, that they firmly believe from this time on, if this case goes on, they will not receive justice at the hands of the jury.

By the Court: The Court is not responsible for the language that was uttered by that man to the juror; and counsel for the plaintiff, counsel for the defendants and the litigants are not responsible for it; that the whole panel heard the remarks of the court makes the situation in principle, no different than it would be if the juror to whom the invitation was

presented had alone heard it. Suppose that the juror who communicated the information to the Court had not done so until a verdict had been rendered in this case; nevertheless, he possessed the information at all times after the invitation had been presented to him; would the fact that the juror had been approached been sufficient to authorize the granting of a new trial upon the claim made by counsel that he must have received certain impressions from the personnel of the parties to the case? I think not; so, in principle, there is no difference between the knowledge of the situation on the part of one juror, and a knowledge on the part of the entire jury, and I can not agree with counsel that this incident prejudices one side or the other.

By Mr. Ware: There is another feature to this I would like to urge; having heard what the court said the language was, I have no doubt in my mind that that was right in the line of an attempt to bribe a juror; right in line with it. It is practically a contempt; it is within the presence of the court, so to speak; it is a contempt of the court; this matter has been discussed in open court. It will go into the newspapers.
253 Now, why will not the court bring that man right straight before the Court, or before the Judge, and let the lightning fall wherever it will fall, and clarify the situation as to the public, as well as to the parties?

By the Court: I will consider that suggestion. I will not act on it now. The motion to discharge the jury is overruled.

To which action and ruling of the Court the defendants and each of them then and there duly excepted.

The jury was thereupon brought into court.

The jury being in their seats, the court said:

Gentlemen of the jury: In addition to what I said immediately before taking the noon recess to-day, I desire to say further that I have no idea that the communication that was made to the juror, the character of which I indicated to you, was inspired by any counsel connected with this case, or by any of the parties litigant, the plaintiff or either of the defendants, and I desire to instruct you that in consideration of this case, and in your deliberations upon the verdict, you give no heed whatever to the incident that was mentioned.

61. The said Court erred in refusing to permit the witness, W. N. McKamy, to answer the following question asked by counsel for plaintiff in error:

"Q. What did Hillmon and Brown do with the oxen and wagons which they purchased from you, if you know?" To which the witness would have replied: "About two months

after I had furnished Hillmon and Brown with these supplies I learned that they were pulling out with the teams for the Pecos River, with the intention of beating me out of these teams and supplies. The boy came into the Pease River store and told my clerk immediately that Hillmon and Brown were pulling to the other side of the plains; that one of the drivers of Hillmon and Brown had told him to leave word at the Pease River store that Hillmon and Brown were pulling to the other side of the plains with the oxen, wagons, and supplies, with the intention of beating me out of them, and that the drivers were virtually their prisoners, as they had
254 threatened to kill any one of them who attempted to leave them or give them away."

(The witness had previously testified that he had sold upon credit to Hillmon and Brown a train of oxen and wagons for $3623.90; that he had taken [—] payment therefore their notes, one for $900 and two for $1361.95 each, secured by a chattel mortgage upon the oxen and wagons.)

62. The said Court erred in refusing to permit the witness, W. N. McKamy, to answer the following question asked by counsel for plaintiff in error:

"Q. What, if anything, did you do towards attempting to recover these oxen and wagons?" To which the witness would have repllied: "As soon as I heard of their running away I wrote to the Chief of Police at Lawrence, Kansas, to look out for them there, knowing that Hillmon was corresponding with a young lady there, and I figured that he would go there. Then I went to my Pease River store and struck out on the trail, and followed the trail to near the Pecos river. It then became evident to me that they were going up the Pecos River, and I then left the trail and went up to Las Vegas, New Mexico. At Las Vegas I received notice from the Chief of Police at Lawrence that the men were there, and also found a load of supplies that I had furnished them at my Pecos River store in the possession of a person to whom they had sold them. I also learned that they had traded off a portion of the oxen at Las Vegas, New Mexico, for a span of horses. I went up to Trinidad, Colorado, and on the road to Trinidad I found four yoke of the cattle which they had sold to a man who was working on the claim of the Atchison, Topeka and Santa Fe Railroad. At Trinidad I learned that they had sold the oxen and wagons in every direction. I stopped at Trinidad, Colorado and wrote down to Texas to have papers sent to me at Trinidad, so as to have Hillmon and Brown arrested in Kansas. Before the papers reached me I read a notice in the papers of the killing of John W. Hillmon in Barber County, Kansas, and presuming that this was correct, I returned to Texas."

(See explanation to the foregoing assignment of error.)

63. The said court erred in refusing to permit counsel for plaintiff in error to read in evidence Article 797 of the Criminal Code of the State of Texas, in connection with the deposition of W. N. McKamy as follows:

255 "Article 950 (797) Fraudulent disposition of mortgaged property. If any person has given, or shall hereafter give any mortgage deed or trust, or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the state, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be [punishment] by imprisonment in the penitentiary not less than two nor more than five years."

In support of said assignment plaintiff in error relies upon the deposition of W. N. McKamy, and the Exhibits thereto attached, and the evidence of John H. Brown, upon said subject, which is as follows:

W. N. McKamy's Deposition:

Question: You may state your name.

Answer. W. N. McKamy.

Q. Where do you reside?

A. In Guadalupey Calve, State of Chihuahua, Republic of Mexico.

Q. What is your business?

A. I am a mining superintendent.

Q. Where were you residing in January, 1878?

A. At Fort Griffin, Texas.

[—] What was your business, if any, at that time?

A. I was selling goods and buying buffalo hides.

Q. Where were you doing this business?

A. In Fort Griffin, Texas, and at store on and at the head of the Pease River, at the foot of the Staked Plains.

Q. Do you know a man by the name of John W. Hillmon?

A. Yes.

Q. When and where did you first become acquainted with him? A. At Fort Griffin, Texas.

Q. Did you know a man by the name of John H. Brown?

A. Yes.

Q. Where did you first become acquainted with him?

A. At Fort Griffin, Texas.

Q. Did you see these two men together, and if, so,

256 when?

A. At Fort Griffin many times, and at my store on Pease River; they were inseparable for about a year and a half that I know of.

Q. When did you last see these two men and where?

A. At my store on Pease River in the month of June or July, 1878.

Q. Did you ever have any business transactions with these two men, and if so, where?

A. I had business transactions with them first in selling them goods and supplies for buffalo hunting at Fort Griffin. Afterwards I sold them a train of oxen and wagons, consisting of nine wagons and thirty-three yoke of oxen, and sold them goods at various times after that up to July following this transaction.

Q. What was the date of this sale of cattle and wagons?

A. January 10, 1878.

Q. What did they agree to pay you for these cattle and wagons?

A. They agreed to pay Thirty-six -hundred and twenty three dollars and ninety cents ($3623.90).

Q. Was this a cash transaction, or how did they agree to pay the consideration?

A. They gave me three notes; one for $900, and two for $1361.95 each, and secured these notes by a mortgage on the oxen and wagons which I sold them, and certain buffalo hides which they represented that they had on Croton Creek in the Pan Handle of Texas.

Q. Were these oxen and wagons your individual property?

A. They were not; they belonged to the firm of McKamy and Anderson, of which firm I was a member.

Q. What was Mr. Anderson's full name?

A. His name was L. B. Anderson.

Q. Where is he, if you know, at the present time?

A. The last account I had of him, about six months ago, he was near Tuscon, Arizona.

Q. Look at the three notes shown you by Mr. Green, the attorney here present representing the defendant, and which notes said Green requests the notary taking this deposition to attach his name and mark, Exhibits A, B and C, and also to attach his notarial seal, and state in whose handwriting the names of the payors of said notes is?

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A. The names were written by John E. Hillmon, in the presence of John H. Brown, and in my presence.

Q. Look at the notes marked Exhibits A, B, and C, and state if those are the notes which you have heretofore stated were given in consideration of the oxen and wagons sold by you to John W. Hillmon and John H. Brown?

A. They are the same notes beyond question.

Q. Are these the notes given by John W. Hillmon and John H. Brown in purchase of the oxen and wagons sold by you to them? A. They are.

Q. Look at the notes marked Exhibits A, B, and C, and state whose notes they are and for what they were given?

A. They are the notes of John W. Hillmon and John H. Brown and were given to me and my partner in payment of thirty-three yoke of oxen and nine wagons.

Q. Have those notes been paid? Or any portion of them?

A. Not one dollar of them.

Q. What arrangement, if any existed or was made between Hillmon and Brown and yourself in the matter of paying these notes?

A. The $900 note was to be paid from the sale of the buffalo hides that are expressed in the mortgage; and the other two notes were to be paid from the proceeds of their freighting and hunting, and were to be paid at maturity.

Q. You may state whether or not the amount of the consideration of the three notes marked Exhibits A, B, and C, is still due and owing from Hillmon and Brown to the firm of McKamy & Anderson? A. It is, the entire amount.

Q. Look at the paper now shown you by James W. Green, and to which he requests the notary taking the deposition to attach his name and notarial seal and mark exhibit D, and state in whose handwriting the signatures of John W. Hillmon and Brown are.

A. I think the signatures are in the handwriting of John W. Hillmon—I know the signatures to the notes are, as they were signed in my presence.

258 Q. State what the paper marked Exhibit D. is.

A. It is the mortgage given to secure the payment for the thirty-three yoke of oxen and nine wagons sold to John W. Hillmon and John H. Brown.

Q. Did John W. Hillmon or John H. Brown ever transfer these oxen and wagons to you and Mr. Anderson in satisfaction of these notes? A. No, and no portion of them.

Q. Do they, John W. Hillmon and John H. Brown, owe you anything over and above these notes?

A. Yes, somewhere from one thousand to fifteen hundred dollars. It has been a long time, and I have not access to my books, and I speak from memory.

Q. How did this indebtedness arise?

A. The greater portion of it arose from my furnishing them supplies to go out to the western edge of the Staked Plains to exchange them for buffalo hides, they representing to me that the hunters were killing large numbers of buffalo there at that time, they bringing to me a man by the name of W. H. West, who had just come from there, to confirm their statement.

Q. Where were these goods furnished them?

A. At my Pease river store.

Q. Did they ever return to that place after you had furnished them these goods? A. No they never did.

Q. Was it a fact that at that time the hunters were killing buffalo in the region in which they stated they were?

A. No, there were no buffalo in that section of the country, and there were no hunters in that section of the country at that time, as I afterwards ascertained from personal observation and inspection.

Q. What did Hillmon and Brown do with the oxen and wagons which they purchased from you, if you know?

(Counsel for the plaintiff object to this question as incompetent, irrelevant, immaterial and hearsay.

By Mr. Barker: We offer this testimony for the pur-
259 pose of showing not only the financial condition of John W. Hillmon, but to rebut the testimony offered tending to show that he was going down into Southern Kansas in 1878 for the purpose of buying a cattle ranch; that instead of that he was fleeing from the justice of Texas.

By the Court: It would have no bearing if he was trying to avoid arrest by the authorities of Texas. It runs in my mind that John Brown was asked in reference to this matter, and this may be offered by way of impeachment of his testimony; but I think that whatever might be contained in the deposition of John Brown, beginning at the bottom of page 4, all of page 5 and the first line of page 6 should not be read.)

To which ruling of the court the defendants at the time duly excepted.

A. About two months after I had furnished Hillmon and Brown with these supplies I learned that they were pulling out with the teams for the Pecos River, with the intention of beating me out of these teams and supplies. The boy came into the Pease River store and told my clerk to notify me immediately that Hillmon and Brown were pulling to the other side of the plains; that one of the drivers of Hillmon and Brown had told him to leave word at the Pease River store [with] Hillmon and Brown were pulling to the other side of the Plains with the oxen, wagons and supplies with the intention of beating me out of them, and that the drivers were virtually their prisoners, as they had threatened to kill any one of them who attempted to leave them or give them away.

Q. What, if anything, did you do towards attempting to recover these oxen and wagons?

A. As soon as I heard of their running away, I wrote to the chief of police at Lawrence, Kansas, to look out for them there, knowing that Hillmon was corresponding with a young lady there, and I figured that he would go there. Then I went to my Pease River store and struck out on the trail and followed the trail to near the Pecos River. It then became evident to me that they were going up the Pecos River, and I then left the trail and went up to Las Vegas, New Mexico. At Las Vegas I received notice from the Chief of Police at Lawrence, that the men were there, and also found a lot of the supplies that I had furnished them at my Pecos River store, in the possession of a person to whom they had
260 sold them. I also learned that they had traded off a portion of the oxen at Las Vegas, New Mexico, for a span of horses. I went up to Trinidad, Colorado, and on the road to Trinidad I found four yoke of the oxen which they had sold to a man who was working on the grade of the Atchison, Topeka and Santa Fe Railroad. At Trinidad I learned that they had sold the oxen and wagons in every direction. I stopped at Trinidad, Colorado, and wrote down to Texas to have papers sent to me at Trinidad so as to have Hillmon and Brown arrested in Kansas. Before the papers reached me I read a notice in the papers of the killing of John W. Hillmon in Barber county, Kansas, and presuming that this was correct, I returned to Texas.

Q. Look at the photograph now shown you by James W. Green, and to which he requests the notary to affix his name and notarial seal, and attach the same to this deposition, and state if it is a photograph of any one you have heretofore known, and if so, whom?

A. It is the photograph of John W. Hillmon as I knew him in 1877 and 1878 at Fort Griffin, Texas, and on the plains hunting buffalo.

W. N. McKAMY.

$1361.95/100. Fort Griffin, Texas.
Jan. 10th, 1878.

Four months after date, for value received, we promise to pay to the order of McKamy & Anderson Thirteen Hundred and sixty-one 95/100 Dollars.

HILLMON AND BROWN [Seal]
McKAMY AND ANDERSON.

GEO. R. HARVEY,
[Seal] Notary Public, Exhibit B.
Exhibit "L" Nov. '99. W. C. H. Judge.

261 $1361.95/100 Fort Griffin, Tex., Jan., 10th, 1878.

Six months after date, for value received, we promise to pay to the order of McKamy and Anderson Thirteen Hundred and Sixty-one and 95/100 dollars.

HILLMON AND BROWN, [Seal]
McKAMY & ANDERSON.

Geo. R. Harvey,
[Seal] Notary Public,
Exhibit C.
Exhibit "M" Nov. '99, W. C. H.

$900.00 Fort Griffith, Tex., Jan. 10th, 1878.

Two months after date, for value received, we promise to pay to the order of McKamy and Anderson Nine Hundred Dollars.

HILLMON AND BROWN [Seal]
McKAMY and ANDERSON.

Geo. R. Harvey,
Notary Public, Exhibit A.
Exhibit "N" Nov. '99 W. C. H.

State of Texas, Shackleford County.

Know all men by these presents that we, John W. Hillmon and J. H. Brown, doing business under the firm name of Hillmon and Brown, in consideration of the sum of two dollars to us paid by W. N. McKamy and L. B. Anderson, doing business under the firm name of McKamy and Anderson, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell unto the said McKamy and Anderson, the following described property, viz: nine wagons, thirty-three yoke of oxen branded H on the left horn; said oxen and wagons are better known as the Billy Rhoads train, twenty-five hundred buffalo bull cow, and kip hides, now piled on the banks of Croton Creek, near head of said creek, to have and to hold all and singular the said goods and chattels unto the said McKamy and Anderson, their executors, administrators and assigns to their sole use forever; and we, the said Hillmon and
262 Brown, for ourselves and our executors and administrators do covenant and with the said McKamy and Anderson, their executors and administrators, and assigns, that we are lawfully possessed of the goods and chattels as of our own property; that the same are free from all incumbrances, and that we will, and our executors and administrators shall warrant and defend the same to the said McKamy and Anderson, their executors, administrators and assigns against the lawful claims and demands of all persons; provided, nevertheless, that if the said Hillmon and Brown, their executors and administrators, shall on or before the date of

maturity well and truly pay to the said McKamy and Anderson, their executors, administrators, or assigns, the sum of the following promissory notes: One note of Nine Hundred dollars, payable two months after date; one for thirteen hundred and sixty-one 95/100 dollars payable four months after date; one for thirteen hundred and sixty-one 95-100 payable six months after date; then this deed, as also our said promissory notes, bearing even date herewith, signed by said Hillmon and Brown, whereby we promised to pay the said McKamy and Anderson the said sums at the time aforesaid, shall be void; otherwise shall remain in full force and virtue; and provided also that until default by us, and said Hillmon and Brown, our executors, or administrators in the performance of the condition aforesaid, or for some part thereof, it shall and may be lawful for us and them to keep possession of the said wagons and oxen, and to use and enjoy the same; and to hold and keep possession and control over said buffalo hides until a sale of same is effected, when the proceeds of same shall be by us paid on the aforesaid promissory notes. But if said property or any part thereof shall be attached at any time before payment as aforesaid by any other creditor or creditors of us, the said Hillmon and Brown; or if we, the said Hillmon and Brown, shall attempt to sell the same, or any part thereof, without notice to the said McKamy and Anderson, their executors, administrators, or assigns, and without their assent to such sale in writing expressed; then it shall be lawful for the said McKamy and Anderson, their executors, administrators, or assigns, to take immediate possession of the whole of said granted property to their own use.

263 In testimony whereof we have hereunto set our hands this the 10th day of January, in the year of Our Lord one Thousand eight Hundred and seventy-eight.

HILLMON AND BROWN.

The witness John H. Brown for the plaintiff, testified that he was employed by J. W. Hillmon in the latter part of 1877 and the fore part of 1878 in freighting from Sherman to Fort Griffin, Texas; that Hillmon's business at this time was killing buffalos, buying and selling buffalo hides, and freighting; that they were using 32 yoke of oxen and 11 wagons in this business; and in answer to the following question: "Where and from whom did he (referring to Hillmon) get this train," replied, "He got it from a man by the name of McKamy; it was in the winter season of '76 and '77, as well as I remember, and at his store on the range close by, West of Griffin about 50 or 75 miles." Also question 285 of the same deposition: "What part of the business of killing buffalo and freighting hides did Hillmon, himself, perform?"

A. He part of the time killed buffalo himself, and in other times he would be buying hides around camp and have them hauled to his camp.

Q. 286. From Reynoldsville where did you and Hillmon next go? A. Went to Mexico.

Q. How were the buffalo killed, by rifles? A. Yes, sir.

Q. When did you and Hillmon leave Reynoldsville, state definitely for Mexico?

A. As well as I can remember we left there in June or July, 1877.

Q. 289. How did you travel; of what did your train consist, and who were with you?

A. Traveled with an oxen and with a mule team. The train consisted of about thirty yoke of oxen and nine or ten wagons, a mule team, two saddle ponies. The wagons were trailed up together, and made three teams out of the cattle; four teamsters. Hillmon and myself were the persons.

Q. 290. State the names of the teamsters.

A. John Caffey, Jim Dobbs, John Cook and Joe, I
264 don't remember his other name; I know his name was Joe.

Q. 291. State the residence of either of said teamsters.

A. I don't know.

Q. 292. To what person or firm did you sell the hides which you freighted to Griffin? A. To McKamy.

Q. 293. Do you mean McKamy, the same man from whom Hillmon got the train? A. Yes, sir, the same man.

Q. 294. Did he live or do business at Griffin?

A. He done business there at Griffin.

Q. 295. State definitely when you delivered the last load of hides at Griffin, and who was with you.

A. It was in the winter of '76 or '77; there were two teamsters with me; the same two was with me both trips.

Q. 296. After delivering this last load of hides at Griffin, how long did you and Hillmon remain in and about Reynoldsville?

A. Until about June or July from the time we delivered the last load of hides.

Q. 297. To what place did you freight your hides after that? A. To McKamy's store.

Q. 292. State definitely when you delivered the last load of hides at McKamy's store?

A. Near about the first of June, as well as I remember.

Q. 293. What was the next place you stopped at after leaving Reynoldsville? A. Las Vegas, New Mexico.

Q. 294. Did you and Hillmon go direct from Renoldsville to Las Vegas, New Mexico? A. Yes, sir.

Q. 295. When did you and Hillmon arrive at Las Vegas, New Mexico? A. In July, as well as I can remember, 1877.

Q. 296. How far is Reynoldsville from Las Vegas?
A. I don't know, I guess it was 150 or 175 miles.
Q. 297. Did you have the same train and teamsters with you with which you started from Reynoldsville?

265 A. Yes sir, just the same.

Q. 298. In what business, if any, did Hillmon engage at Las Vegas? A. None, that I know of.
Q. 299. How long did you and Hillmon remain at Las Vegas? A. A day or two only.
Q. 300. From Las Vegas, where did you and Hillmon go with your train? A. Trinidad, Colorado.
Q. 301. Were you at Fort Elliot?
A. Yes sir; been there once.
Q. 302. Was Hillmon with you? A. Yes sir.
Q. 303. When were you and Hillmon at Fort Elliot?
A. When he was at Sweetwater; when we first went down.
Q. 304. In what year was that? A. In 1876.
Q. 305. Were you and Hillmon at Camp Supply?
A. Went through there.
Q. 306. Were you and Hillmon ever at Camp Supply and Fort Elliot on more than one occasion?
A. No sir; never was.
Q. 307. When did you and Hillmon leave Fort Elliot?
A. In the summer of 1876. It was right there within three miles of Sweetwater, where we were all summer, and I happened to be there one day with him.
Q. 308. From Fort Elliot did you and Hillmon go to Croton Creek, Texas, in the fall of 1877?
A. No sir; went there in the summer.
Q. 309. State if you did not, on or about the 5th day of April, 1879, in the office of George J. Barker, in the City of Lawrence, in his presence and in the presence of others, make the following statement:
"We, meaning Hillmon and yourself, "left Fort Elliot in the fall of 1877, and went to Croton Creek, Texas, about 175 miles and continued same business?"

(Objected to by the plaintiff as incompetent being an attempt to impeach the witness by proving different statements concerning an immaterial matter, and as irrelevant, immaterial and not proper cross-examination.)

266 A. I made a statement similar to that, but as to the date of the year I might have been mistaken.

Q. 314. When you and Hillmon went from Croton Creek to Las Vegas, how many teams did you have, and who drove them?
A. Had four teams, John Caffey, Jim Dobbs, John Cook and Joe; I don't remember his other name.
Q. 322. From Las Vegas, did not you and Hillmon go to Fort Union? A. Yes sir, we went.

Q. 323. When did you and Hillmon arrive at Fort Union, and who were with you?

[—] In July as well as I can remember; the four-rivers, myself and Hillmon.

Q. 326. How long did you and Hillmon remain at Fort Union?

A. Didn't stop there; passed right on through.

Q. 330. From Fort Union, to what place did you and Hillmon next go? A. To Trinidad.

Q. 331. When did you and Hillmon arrive at Trinidad?

A. In July or August; the latter part of July, or the first of August.

Q. 332. When you and Hillmon arrived at Trinidad, did you have the same train with which you left the vicinity of Reynoldsville and Las Vegas, New Mexico?

A. Yes sir; the same train, with the exception of two yoke of cattle; traded them off for a pair of mares.

Q. 333. State how much Hillmon paid for that train, and how he paid for it?

(Plaintiff's counsel object to this question because it calls for irrelevant, immaterial and incompetent testimony and second that the inquiry is not a legitimate cross-examination.

A. I don't know just what he did pay for it; he paid for it in buffalo hides and freighting, so far as I know.

Q. 334. Was this train loaded from Las Vegas to Trinidad?

(Same objection as to last preceding question.)

A. No, sir.

Q. 335. Was it loaded from the vicinity of Reynoldsville to Las Vegas?

(Same objection by plaintiff's counsel as to last preceding question.)

267 A. No sir.

Q. Did not Hillmon have difficulty about this train, and was he not accused of running his train out of the country?

(Objected to by plaintiff's counsel on the same ground as the last preceding question, and also for the reason that the question calls for hearsay evidence.)

A. Not that I know anything of.

Q. 339. When where, and to whom did Hillmon sell this train?

A. In the month of August, as near as I can remember, in the year 1877, in Trinidad and Pueblo, Colorado. The names to whom sold I don't remember of the persons to whom sold.

Q. 340. What part of the train was sold at Trinidad?

A. Six or seven yoke of oxen, two or three wagons, a pair of mares and harness, and one or two ponies and a pair of mules.

Q. 341. How much did he receive at the sale at Trinidad?

A. I couldn't say, not knowing.

Q. 342. What part of the train was sold at Pueblo?

A. The rest of the train—cattle and wagons and two saddle ponies.

Q. 343. How much did he receive for this portion of the train? A. I couldn't say, not knowing.

Q. 344. What teamsters were with you at Pueblo?

A. Joe, the kid, and I couldn't call the other name, for I don't remember.

Q. 347. How long did you and Hillmon remain at Pueblo?

A. About two days.

Q. 348. State in what month and what day of the month you and Hillmon left Pueblo?

A. In the month of August, 1877, as well as I can remember.

Q. 349. Where did you and Hillmon go from Pueblo, and how did you travel?

A. I came to Wyandotte, and he came to Lawrence; on the cars.

Q. 350. Over what road?

A. The Atchison, Topeka and Santa Fe.

Q. 351. When did you and Hillmon arrive at Lawrence?

A. August or September, 1877, as near as I can remember.

Q. 354. After your return to Wyandotte in 1877, when did you next see Hillmon?

A. In August or September, 1877, as well as I can remember.

268 Q. 356. State about how long it was after you got back? A. Inside of two or three months.

Q. State as definitely as you can the first time you went to Lawrence after your arrival home in 1877?

A. Two or three weeks after I came home, as near as I can remember.

Q. 369. When did you next go to Lawrence?

A. In November or December of that year, as well as I remember of 1877.

Q. 370. Who went with you? A. I went alone.

Q. 378. After your first visit to Lawrence in November or December, 1877 as you have stated, when did you next go up there?

A. I went up there in the month of December, if I remember right a while before Christmas.

Q. 379. State the time of this visit as definitely as you can with reference to Christmas?

A. A few days before Christmas, as well as I can remember, in the year 1877.

Q. 380. Are you positive as to that year?

A. I wouldn't be right positive about it.

Q. 381. Was this last visit to Lawrence a while before Christmas of which you have spoken, before or after John W. Hillmon was married to Sallie E. Quinn?

A. It was afterwards.

Q. 384. How long before your visit to Lawrence about Christmas 1877, was Hillmon married to Miss Quinn?

A. Don't know just how long.

Q. 385. State as nearly as you can?

A. Two or three months, as near as I can guess at it.

Mrs. Sallie E. Smith, the plaintiff, testified that she was married to John W. Hillmon on the 3rd of October, 1878.

64. The said court erred in refusing to permit the witness E. D. F. Philips to answer the following question asked by counsel for plaintiff in error:

"Q. Now you may state what the conversation was
269 so far as it relates to any inquiries he (Levi Baldwin) made of you of the effect of death upon bodies?" To which the witness would have replied in substance: "He asked me if I had an insurance, and whether I knew about certain insurance companies, whether they were safe or not; he said he had been thinking about taking out some insurance; and in the same conversation, or at the same time, he asked me how long a dead body would—how long a dead body would decompose after it was buried. I said it would depend on whether decomposition had set in before the body was buried or not; and it would depend on the condition of the body when buried. He said, wouldn't—in connection with the conversation of insurance—he said wouldn't it be a good scheme to get a good insurance on your life and go South and get the body of a Greaser and pass it off as your body—wouldn't it be a good scheme to go down South to get the body of a Greaser, or get a large amount of insurance on your life and go down south and get the body of some "Greaser" and pawn it off as your body and get the money."

(The witness had been called to the house of Levi Baldwin as a physician to re-set a dislocated elbow of Baldwin's son, and after the operation had been performed the conversation set forth in the foregoing answer took place.)

The following evidence had been previously developed in the case, and established a prima facie case of conspiracy between Hillmon, Baldwin and Brown to rob the insurance companies. (Names in brackets refer to witnesses testifying to facts preceding brackets):

Levi Baldwin and John W. Hillmon had known one another intimately for eight or ten years prior to 1879. Baldwin had employed Hillmon on his farm and in purchasing cattle for him. During his visits at Lawrence Hillmon generally stopped with Baldwin. John H. Brown accompanied Hillmon on many trips, and was well acquainted with Levi Baldwin. Sallie E. Quinn, plaintiff was a dependent upon and worked for her cousin Levi Baldwin, and met Hillmon at his house. (Claude Holliday, William Brown, Lemuel Evans, Sallie E. Smith, Henry Clay.) In the fall of 1878 Levi Baldwin was in embarrassed circumstances financially and was hard
270 pressed by his creditors (J. H. Blythe) John W. Hillmon married Sallie E. Quinn, the cousin of Levi Baldwin, October 4th, 1878. At this time John W. Hillmon was insolvent and was owing McKamy and Anderson about $5000.00 (See McKamy's deposition and exhibits) and was owing various other parties small sums of money, and had no assets; and sometime after his marriage he and his wife occupied a room in Mrs. Mary Judson's house, and did their cooking on the stove of Mrs. Mary Judson. Levi Baldwin and John W. Hillmon became deeply interested in life insurance. They go to J. H. Blythe, a lawyer and fire insurance agent at Tonganixie, and Baldwin introduces Hillmon to Blythe, and they ask the latter various questions about life insurance, what companies are good ones, and how to collect in case of loss. Baldwin and Hillmon go to G. W. E. Griffith, a special agent for the Mutual Life, and ask questions about life insurance, Griffith refers them to Theodore Wiseman, an agent of the Mutual Life, and they talked insurance together. Baldwin inquires particularly about insurance, but later says he does not want to take out any but that Hillmon does. An application is made out and policy ultimately delivered. On February 26th, 1879, in a conversation with Wiseman on the street Hillmon said he was going West on business, and asked about proofs of loss, what the widow must do in order to obtain her insurance money, what evidence she would have to furnish if he were killed,—that he might be killed out West. Wiseman told him if he were killed he would have to have a coroner's inquest and verdict. (G. W. E. Griffith; Theodore Wiseman.) Hillmon and Levi Baldwin went to A. L. Selig agent for New York Life, and talked insurance with him. Hillmon made application for an insurance policy, but on receiving it refused to accept it because its provisions forbade his carrying fire arms while herding cattle. Subsequently he took out regular life policy. (A. L. Selig.) In conversation with Wiseman Hillmon stated as a reason for taking out so much insurance, that he did it to protect his relatives, who advanced money on stock that he had out west; drew Wiseman's attention to the fact that he had been vaccinated

as required by the New York Life though not required by the Mutual Life. (Wiseman) The total amount of insurance taken out was $25,000.00 the total annual premiums of which amounted to $359.25. John W. Hilmon and John H.
271 Brown on their last trip passed through Wichita. While stopping at the Globe Hotel Hillmon met H. B. Marshall, and finding that he was a horseman, and understood catching wild horses, asked him to go out on the range in Western Kansas with him and offered him five or six hundred dollars if he would go, with three hundred dollars down. Marshall refused the offer. (H. B. Marshall). They also stopped with two half brothers, Michael Mesh and Ben Helde at their shanty near Wichita, in the latter part of February, 1879. Hillmon told Mesh that he and Brown were going to buy a ranch, and offered him one hundred dollars if he would accompany them. Returning from town the night before they left, Hillmon said he had been to Lawrence to be vaccinated, and he wanted Mesh to go and get vaccinated also, and then accompany them on the trip. They offered him $100.00 as a present in addition to his salary. He refused to to go. Brown told Helde a similar story, and tried to get him to accompany them saying that they were going into the cattle business and that they had lots of money. He refused to go. (Michael Mesh; Ben Helde.)

Upon receiving news of Hillmon's alleged death, Levi Baldwin brought Mrs. Hillmon to her home, and he and his brother Alva, immediately started for Medicine Lodge, where they met Brown. Levi Baldwin stated that he and his brother went there at Mrs. Hillmon's request for the purpose of fencing in the grave. Alva Baldwin testifies that they went there for the purpose of bringing the body back to Lawrence, but that on account of the weather they concluded to fence in the grave. (Sallie E. Smith, Levi Baldwin.) At the grave the two Baldwins and Brown find representatives of the insurance companies, Walker, Tillinghast and others. The body is exhumed, and upon the cloth being removed from the face Alva Baldwin exclaims "Hell, that aint Hillmon" (Wiseman, Tillinghast). At the coroner's inquest at Lawrence Alva Baldwin remains in town, but was not asked by Levi Baldwin or Mrs. Hillmon to testify, and he has never testified or given his deposition at any trial before the present one. (Alva Baldwin.)

After the inquest Brown fled from the state, returning from time to time. In September, 1879, after making statements
272 at the request of defendants in error's counsel to the effect that the dead body was that of John W. Hillmon, he made a contrary statement to William J. Buchan, confessing that he had lied before, and that this statement

to Buchan was the truth. In this statement he in substance said that he and Levi Baldwin and Hillmon had put up a job on the insurance companies to get Hillmon's life insured, and that the intention was that he and Hillmon should go southwest somewhere and find a body which they could pass off as Hillmon. That Hillmon was to get the policies and Baldwin was to furnish the money to pay the premiums, and that in pursuance of that scheme they left Lawrence and went to Wichita and various other places in the hope of finding a frozen body on the plains but failed, and Hillmon then returned to Lawrence while he Brown, remained at Wichita. Hillmon came back to Wichita and they started out on another trip. They overtook a man and asked him to ride with them. Hillmon had been vaccinated at Lawrence, and he persuaded this fellow to let him vaccinate him also, taking the virus from his own arm; that Hillmon during the trip traded clothes with this man; that one night while this man was lying at the fire Hillmon shot him; that he then took a valise and started off, saying that his name would be Marshall, and that he, Brown, would hear from him from time to time; and he, Brown, got on his horse and rode to some of the neighbors and told them that he had shot his partner, Hillmon, by accident.

John H. Brown, also at that time, signed and swore to a statement setting forth substantially the above facts. (W. J. Buchan.)

After making this statement on September 12, 1879, John H. Brown met Mrs. Hillmon at Levi Baldwin's house, and informed her that he had made such a statement, and that Buchan wanted to make an appointment and see her at Leavenworth. He remained at Baldwin's that night and talked with her further in the morning with reference to this matter, and she consented to a meeting with Buchan at Leavenworth on Monday. Levi Baldwin was at home during this conversation. On Monday Mrs. Hillmon met Buchan and Brown at Leavenworth, and Buchan told her that Brown had made this contrary statement to the effect that the body was not that of her husband, and that she must get back the policies from her attorneys, and give them up to the companies. She accompanies Buchan to the office of her attorneys, Wheat & Clough, and demanded the policies.
273 Wheat refused to give them up, claiming to have a lien for $10,000 upon them. She returned to the hotel with Buchan and voluntarily executed releases of all of her claims against the companies upon the policies. On September 25th, 1879, she executed another release to the New York Life Insurance Company at Wyandotte to correct an error in the first releases. (Sallie E. Smith, W. J. Buchan.)

65. The said Court erred in refusing to permit the witness E. D. F. Phillips to answer the following question asked by counsel for plaintiff in error:

"Q. I will ask you this question then: At that time was inquiry made of you by Levi Baldwin in regard to the length of time which would be required for a body to decompose as to become unrecognizable?" To which the witness would have answered substantially as set forth in the answer to, the question propounded in the foregoing assignment of error. (For explanation see foregoing assignment of error.)

66. The said Court erred in refusing to permit the witness, J. H. Blythe to answer the following question asked by counsel for plaintiff in error:

"Q. What was said by Mr. Baldwin on that occasion?" To which the witness would have replied: "Mr. Baldwin on that occasion asked me if I knew anything about life insurance and about the companies; that a friend of his wanted to get some insurance, and he wanted to know if I could recommend some good company to him, and I told him how to do it."

(The witness, a fire insurance agent, had previously testified that he knew John W. Hillmon and Levi Baldwin; that they had called at his office and asked him concerning life insurance, how to get it, what were the good companies, how they should make application, whether a person could travel in different countries without forfeiting the insurance, what proceedings were necessary to collect the insurance upon death, what length of time would be required, etc. That a week or ten days before this conversation he had met Baldwin alone on the street. The conversation set forth in the above answer took place on that meeting. As to the relevancy and materiality of the above question and answer, see the gen-
274 eral explanation to assignment No. 64.

67. The said Court erred in refusing to permit the witness J. H. Blythe to answer the following question asked by counsel for plaintiff in error:

"Q. Did he say a friend?" To which the witness would have replied: "No, sir; not on that occasion. I think the gentleman said it was a relative of his or connection; I don't know who it was; I didn't know Mr. Hillmon then."

For explanation see foregoing assignment of error; and for relevancy and materiality see general explanation to assignment of error No. 64.

68. The said Court erred in refusing to permit the witness J. H. Blythe, to answer the following question asked by counsel for plaintiff in error:

"Q. That was a few days before these parties came to your office?" To which the witness would have replied: "Yes, sir."

(This question immediately follows the question set forth in the preceding assignment of error, and for its relevancy and materiality see the general explanation to assignment of error No. 64.)

69. The said Court erred in refusing to permit counsel for the plaintiff in error to read in evidence the deposition of James S. Crew. The substance of said deposition is as follows:

The witness, aged 49 years, was then a resident of Oakland, California; resided in the spring of 1879 in Lawrence, Kansas, was a bookseller, and at the time receiver for the Simpson bank. Was acquainted with Mrs. Hillmon and knew Levi Baldwin for a long time prior to 1879. As receiver of the Simpson Bank, he had two or more notes of Levi Baldwin for collection. They had been then due for sometime. Two of the notes were secured by mortgage on real estate, and one by chattel mortgage on live stock. Had talked of foreclosing mortgages, and had consultation with Baldwin both at his house and at the bank had been unable to collect either principal or interest; had had a conversation with
275 Baldwin with reference to how his indebtedness to the bank had arisen; that Baldwin had told him that a part of the money represented by his indebtednes had been furnished to insure the life of John W. Hillmon; that this conversation took place somewhere between the 20th of February and the 1st of March; that he remembered the circumstance of the reputed death of John W. Hillmon; that he heard of it a few days from the time of his death in the latter part of March; that he had a conversation with Levi Baldwin in regard to the latter's indebtedness to the bank after he had heard of the reputed death of Hillmon; that the conversation took place in the morning in the witness's store; that Baldwin came in hurriedly and told him to let his (Baldwin's) matters rest as he was then on his way west after the body of John W. Hillmon; that he had arranged for a portion of the life insurance on the life of Hillmon, and that as soon as he got it would be able to straighten up all his affairs; that Baldwin stated that he was to have $10,000 of this insurance; that he had acquainted himself thoroughly with Baldwin's financial condition and had found him in very straightened circumstances, having quite an amount of property, but all mortgaged and mostly mortgaged twice—first and second mortgages, and that Baldwin's indebtedness was pressing him at this time severely.

(For relevancy and materiality of the foregoing see genera explanation to assignment of error No. 64.)

70. The said Court erred in refusing to permit the witnes Alexander Carr to answer the following question asked b counsel for plaintiff in error:

"Q. Now, you may state, if you please, what conversation if any, you had with Mr. Baldwin in regard to any busines transaction that he and Mr. Hillmon were in?" To which th witness would have replied: "I had one or two. He was talk ing to me a couple of times about his and John Hillmon's busi ness—speaking about John Hillmon as much as a couple o three times."

(The witness had previously stated that he knew Lev Baldwin and Hillmon; that in March, 1879, he and Baldwi were out together buying stock—sometime after the 10th o March. The conversation above referred to then too
276 place. For relevancy and materiality see general ex planation to assignment of error No. 64.)

71. The said Court erred in refusing to permit the wit ness Alexander Carr to answer the following question aske by counsel for plaintiff in error:

"Q. Now, you may state what he (Levi Baldwin) said." To which the witness would have replied. "Well, he was talk ing one day about him and Mr. Hillmon going into a shee ranch—talking about going into a sheep ranch together; an one day he was speaking about that he was under brogue wit John W. Hillmon, and he said he and Hillmon had a schem under brogue, and he said if that worked out all right that h was all right."

(For explanation see preceding assignment of error, and fo relevancy and materiality see general explanation to assign ment of error No. 64.)

72. The said Court erred in refusing to permit counsel fo plaintiff in error at the conclusion of its case, to offer in evi dence the testimony previously offered and excluded bearin upon the elements of fraud and conspiracy between Hillmo and Brown and Baldwin in procuring these policies, viz. the Crew deposition and the testimony of Dr. Phillips an Mr. Blythe, and Mr. Carr.

(The substance of said testimony is set forth in the fore going assignments numbered 64 to 71 inclusive, and wil therefore not be repeated here.)

In addition to the facts and evidence set forth at length i connection with assignment of error No. 64, the followin additional facts had been developed in evidence:

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About the time John W. Hillmon and John H. Brown were in Wichita in the early part of March, 1879, letters were received at Fort Madison, Iowa, from Frederick Adolph Walters, dated at Wichita, by Alvina D. Kasten, Walter's sweetheart, C. R. Walters, his brother, Elizabeth Rieffenach, his sister, and Henry Spreen, a member of his lodge, all of them to the effect that he, Walters, had been hired by a man named John W. Hillmon to accompany him out west on a sheep ranch; that he had been promised large wages, and that he ex-
277 pected to start about March 5th. This was the last letter or message of any kind received from Walters by his family and friends, and he has never been heard of by them since.

(See the testimony of Alvina D. Kasten, C. R. Walters, Elizabeth Reiffenach and Henry Spreen.)

73. The said court erred in refusing to permit plaintiff in error to amend its answer instanter by charging Mrs. Hillmon with being a conspirator with Baldwin, Hillmon and Brown to cheat and defraud the plaintiffs in error by the procurement of the policies.

74. The said court erred in limiting as follows in scope and effect, as evidence the letter commonly known as the "Alvina Kasten letter."

The letter referred to, gentlemen of the jury, will be read to you and should be considered by you not as a narrative of facts communicated to the writer of the letter by others, nor as proof that the writer of the letter,—I take it to be Walters, —actually went away from Wichita, but as evidence that shortly before the time when other evidence tended to show that he went away, he had the intention of going and of going with Hillmon. In order to apply the letter as I have directed, you should find from the evidence that it was written by Walters. If it is not found from the evidence, that it was written by Walters, then you give no attention to it whatever, but if you find that it is a genuine letter, written by Walters, then you give it such effect as evidence as I have described to you, not as a narrative of facts communicated to the writer by others, nor as a proof that the writer went away from Wichita, but as evidence that shortly before the time when other evidence tended to show that he went away he had the intention of going and of going with Hillmon, and that the Hillmon mentioned in the letter is the Hillmon mentioned in this case.

(The letter referred to as the "Alvina Kasten letter" is as follows:

Wichita, Kansas, Mar. 1st, '79.

Dearest Alvina:

278 Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia so I did not have time to answer it at Emporia. I will stay here until the fore part of next week and then I will leave here to see part of the country that I never expected to see when left home as I am going with a man by the name of Hillmon who intends to start a sheep range and as he promised me more wages than I could make at anything else I concluded to take it for a while at least until I strike something better. There is so many folks in this country that have got the Leadville Feever, & and if I would not of got the situation that I have got now I would have went there myself but as it is at present I will get to see the best portion of Kansas Indian Territory, Colorado and Mexico the route that we intend to take would cost a man to travel from $150 to $200 but it will not cost me a cent besides I get good wages. I will drop you a letter occasionally until I get settled down then I want you to answer it. (You bet honey) Dont it? So you can see that I will not get home for a few months yet, but can not tell how soon I will get back. I am about as anxious to see you as you are to see me. But I do not want to get back there without a cent of money for that is not what I left for (You know) When I get back you will get to see me in about the way we parted (You bet.) If any one asks you what I am doing tell them that you were not informed for it is none of their business and another thing dont ask me to write long letters for I would without being told if I could find the words when I write as I am generally busy when I receive a letter from my (Old Woman) Sweet little girl. But you know how that is without being told so I will not have to waist any more paper on that subject (at present) I will have to come to a close before long or I will have to do as that other fellow write two sheets and swindle the P. Master out of three cents and you know that I dont like to do that. (Pet) Please give compliments to inquiring Friends and all the love that you can embrace for yourself & and nobody else. I will close for this time love, to let you hear from me soon again.

Yours as ever,

F. A. WALTERS.

279 P. S. Much obliged for that poetry & I done as you said (thought of you when I read it)"

75. The said court erred in refusing to permit the witness, Mrs. Elizabeth Rieffenach to answer the following question asked by counsel for plaintiff in error:

"Q. Now, what was said and done at the time those pictures were shown to you?" To which the witness would have replied in substance as follows: That the two pictures referred to, marked Exhibits 29 and 30, which were pictures of the cadaver, taken as it lay in the coffin, were brought home by the witness' father, Daniel Walters, and were shown to her and her sister, Fannie Walters. That the mother was present at that time, and that before the mother had seen the picturs the father accidentally dropped one of them on the floor; that while it was being picked up the mother saw it and exclaimed: "Oh, it is my son" and immediately fell in a swoon.

76. The court erred in sustaining the objection of the defendant in error to the following question asked by plaintiff in error of the witness Elizabeth Reiffenach, which question is as follows:

"Q. State what, if anything, your mother did at the time?"

The witness would have testified that the two pictures, to wit, Exhibit 29 and 30 (being the two views of the dead body) were shown to the witness and her sister Fannie Walters, by her father Daniel Walters in his house; that his daughters (the witness and Fannie Walters) saw them, and immediately recognized them as pictures of their brother Frederick Adolph Walters; that before the mother had seen the pictures the father accidentally dropped one of them on the floor, and that while it was being picked up the mother saw it and exclaimed, "Oh, it is my son" and immediately fell in a swoon,

By the Court: The part in parenthesis you may show; that which is not in parenthesis is excluded.

(Theodore Wiseman, called on behalf of the plaintiff in error, testified in substance that he received through Dr. Morris, Coroner of Douglas County, a letter from Mr. Walker, secretary of the Masonic Lodge of Wichita, inclosing a letter of inquiry from the Master of the Masonic Lodge at Fort
280 Madison concerning one F. A. Walters; that thereupon the witness Theodore Wiseman testified that he sent to the master of the lodge at Fort Madison two photographs of the cadaver, to wit, Exhibits No. 29 and 30.

Said Daniel R. Walters testified in substance that he received copies of photographs marked Exhibits 29 and 30 in January, 1889, from the master of the lodge in Wichita.)

Mrs. Rieffenach testified on this subject as follows:

"Q. Will you look at the two pictures marked Exhibit 29 and 30, and state if you recognize these pictures as those of any one you have known, and if so state who that person was.

A. Yes sir, I do.

Q. Whose picture?

A. Pictures of my brother, Frederick Adolph Walters.

Q. When did you first see those pictures, Mrs. Reiffenach, or pictures identical with these?

A. January, I think, in the year 1880.

Q. Where did you see them?

A. At Fort Madison, Iowa.

Q. At what place in Fort Madison?

A. At my father's house.

Q. Who had the pictures?

A. They were sent to father, and father brought them home.

Q. Did he show them to you? A. Yes sir.

Q. And the family? A. Yes sir.

Q. Who was present when he showed them to you?

A. Mother, and I think my sisters.

Q. Which sister?

A. Both sisters: Sister Fannie and Annie, I think.

Q. Now what was said and done at the time those pictures were shown to you?

Plaintiff objects to the question as incompetent, irrelevant, immaterial and hearsay. Objection sustained, the defendants and each of them at the time duly excepting.)

The witness Fannie Walters testified on this subject substantially as the witness Elizabeth Rieffenach.

77. The court erred in sustaining the objection of the defendants in error to the following question propounded by the plaintiff in error to the witness Elizabeth Rieffenach:

"Q. Now, you may state if there is a tombstone lo-
281 cated in your family lot in Fort Madison." And to the following question: "What if any inscription has been placed upon the tombstone in the cemetery at Fort Madison in reference to your brother Frederick Adolph Walters?" The witness would have replied that the following inscription was placed upon the family tombstone in the graveyard at Fort Madison, Iowa:

F. A. Walters; born June 25th, 1855; died March 17th, 1879; interred at Lawrence, Kansas.

That this inscription was placed by her father, Daniel Walters.

78. The Court erred in sustaining the objection of the defendant in error to the following question asked of the witness Theodore Wiseman:

"Q. Was there anything unusual in this transaction in your office in the bank?"

The witness testified in regard to his years of experience in soliciting life insurance, and was qualified as an expert to speak in regard to this matter. The witness testified that he was an agent of the Mutual Life Insurance Company, and engaged in soliciting insurance; that on the 31st of October, 1878, he came to Lawrence; that he brought along with him certain advertisements for insurance literature, setting forth that he was a special agent of the Mutual Life nsurance Company of New York, and was at Lawrence in the interest of that company, and would be at the service of those who might want insurance; that he caused circulars to be scattered abroad on the streets of Lawrence; that on the 15th day of December, 1878, he was in the back room of the Merchants Bank, of Lawrence, when Mr. Griffith, the cashier of the bank, came in with two men, and introduced them as Mr. Baldwin and Mr. Hillmon; that Mr. Baldwin had one of the circulars which he had caused to be distributed in his hand; that Baldwin said that he had come to talk insurance with him; that he had a conversation with him, and that they asked questions in regard to the kind of policy they wanted; that Mr. Baldwin asked him about the different kinds of policies the Mutual Life of New York issued, and their rates; that he explained to
282 him the different forms the rates of insurance, etc.; that he then asked Baldwin if he wanted to get his life insured; that he replied no, but Mr. Hillmon did; that he then invited Mr. Hillmon to sit down at the table, and that he secured a blank and conversed with Hillmon as to the kind of policy he wished to take out; that Hillmon stated that he wished to take one of the ordinary life plan, premium payable semi-annually; that he, the witness then filled out an application, and that the said Hillmon signed it; that the whole time consumed was from half an hour to an hour; that during all this time the said Levi Baldwin remained in the room; that the three then left the Bank Building and went to the office of Dr. Miller, who was the medical examiner of said company; that the witness had not sent any person previous to this interview at the bank to see Hillmon in regard to Life Insurance, nor had he ever had any conversation with him on that subject; that the application called for $10,000 Life Insurance.

79. The said Court erred in excluding the memorandum made by the witness Dr. V. G. Miller, which memorandum is as follows:

Lawrence, Kansas, December 17th, 1878.

John W. Hillmon called on me and reported a slight mistake in his height. He (Hillmon) is five feet nine inches in

place of five feet eleven inches, as stated in his policy of life insurance in the New York Mutual.

V. G. MILLER."

The said Miller testified substantially that he was the examining physician for the Mutual Life Insurance Company of New York; that he was the physician who had made the examination for Hillmon at the time he took out his policy for $10,000 with said company, it being the policy sued upon in this action; that at the time of making said examination he put down the height of Hillmon at five feet eleven inches; that he did not measure him at the time, but took the height from a statement made to him by the said Hillmon; that this was on or about the 4th of December, 1878; that on the 17th of December, 1878, said Hillmon came to his (Miller's) of-
283 fice, and informed him that he had made a mistake in his height as stated to him (said Miller) at the time of making the application; that instead of being five feet eleven inches, he was five feet nine inches in height; that the said Hillmon asked of him if he could not make a correction; that he (Miller) informed Hillmon, that the application had been sent on to New York, and that it was out of his power; but that he would measure him, and make a minute of the same, so that in the future if the matter should be brought up they would have his correct measurement; that he (Miller) then proceeded to measure John W. Hillmon and found his height to be five feet nine inches as he (the said Hillmon) at the time stated it to be; that he then, in the presence of the said Hillmon, made the above entry in a ledger, which he used in his business.

80. The Court erred in sustaining the motion of the defendant in error to strike out the answer to the following question propounded to G. W. E. Griffith on behalf of the plaintiff in error:

"Q. Did she know the color of his hair?" To which the witness replied: "She did not appear to, no sir."

The defendant in error, Sallie E. Hillmon, testified that on the 2nd day of April, 1879, she went to the office of the witness, G. W. E. Griffith, and that on that occasion she had a conversation with the said G. W. E. Griffith, in which she told him that her husband, J. W. Hillmon, had dark brown hair, and had perfect teeth, and that he was five feet eleven and one-half inches in height; that the witness Griffith had testified in substance that he had talked with her on that occasion in regard to the appearance of her husband; and that he asked her to give a description of him; that in response to the question propounded by him as to the height of her husband; she stated that she could not say; and that in response to the

question by him as to the character of her husband's teeth, she stated that she could not state definitely; that she thought he had good teeth, but that he might have had some defective ones, that she was not certain.

81. The Court erred in sustaining the objection of the defendant in error to the following question propounded by the plaintiff in error to the said witness G. W. E. Grif-
294 fith:

"Q. I will ask you if on that occasion she said that her husband was five feet eleven and one-half inches in height?"

Plaintiff in error relies upon the evidence as set forth in the foregoing assignment of error.

82. The Court erred in sustaining the objection of the defendant in error to the following question asked by the plaintiff in error of the witness C. W. Smith:

"Q. State if at that time or any other time he made any objection to you as to what you were doing or permitting to be done there?"

The evidence of Sallie E. Smith in substance showed that the body which was brought from Medicine Lodge to Lawrence, and claimed by her to be that of her husband J. W. Hillmon, was taken on its arrival to the undertaking establishment of Bailey and Smith, without her knowledge and consent; that she also testified that she sent her cousins Levi and Alva Baldwin, to Medicine Lodge for the purpose of taking care of the body and bringing it to Lawrence; that Levi Baldwin testified that he brought the body from Medicine Lodge to Hutchinson by team, and from Hutchinson by railroad, Santa, Fe, to Lawrence; that the witness Charles W. Smith testified that on the evening of the second of April, 1879, he received a telegram from Levi Baldwin, dated at Hutchinson, Kansas; that the telegram was lost; that he showed the telegram to one A. L. Selig; who took a copy thereof; that A. L. Selig testifies that the following is a true copy of the telegram shown to him by the witness C. W. Smith:

"Received April 2, 5:50 p. m. 1879.

Bailey & Smith: See Mrs. J. W. Hillmon; have lot secured and grave dug immediately; be in 6 a. m.

LEVI BALDWIN."

That the said witness C. W. Smith, testified further that in response to said telegram, "the next morning we took the team we used in our business, with the driver, and proceeded to the Santa Fe depot, and when the train came in received the
285 body; that we put the body in the wagon and took it to our place of business on Massachusetts street; Levi Baldwin rode with me in the wagon from the depot to our

place of business and no one requested us to take it to any other place. Afterwards autopsy was held upon the body, and later a coroner's inquest was held over the same. While the body remained at our undertaking establishment Levi Baldwin visited it frequently, bringing other parties to do the same."

The defendant in error, Sallie E. Smith, never complained or objected to the witness Smith of the disposition which had been made of the body. Upon the discussion of said objection the following remarks were made by the counsel for defendant in error prejudicial to the plaintiff in error's rights in this case, which were duly excepted to at the time.

Follow the remarks found on page 1645 of the proceedings:

By Mr. Atwood: I object to the question because there is nothing to indicate that he had any knowledge of it until after it was done. The body was left there, and within two or three hours the cormorants fell upon it and cut it up, and that he asks if Mr. Levi Baldwin objected to something that had been already done.

By Mr. Isham: I ask that the language of counsel be taken down and our exception be noted to it. From the beginning of this trial there has been a constant making on his part of remarks of that kind to witnesses before this court and jury. I say that this treatment of witnesses, by the character of questions addressed to them, has been most unseemly. We have not put a witness upon the stand who has not been treated with indignity by counsel, and I ask that his language be taken down, and our exceptions noted to it, and that that character of thing may hereafter be stopped.

By the Court: Gentlemen of the jury, you will give no heed, pay no attention to outside comments of counsel. Counsel on both sides, at almost the slightest opportunity, will make speeches outside of the point that is properly before the court and jury for consideration. I think perhaps Mr. Atwood has offended more in that particular than other counsel, but the suggestion applies in a general way to both sides.

286 83. The court erred in sustaining the objection of the defendant in error to the introduction of the certified copy of the enlistment of John W. Hillmon; the offer made, the objection thereto, the ruling of the court thereon, and copies of said enlistment and discharge are as follows:

By Mr. Barker: We now offer in evidence Exhibit T, being a duly certified copy of the enlistment of John W. Hillmon, to show a description of John W. Hillmon.

By Mr. Hutchings: Any statement in that paper of description is hearsay. It is not made by John W. Hillmon, nor by his direction, nor with his knowledge, so far as it appears. We object to it as incompetent, irrelevant, and immaterial, and hearsay.

By the Court: That is, you offer the certificate of the recruiting officer; that is, the part of it you claim is material?

By Mr. Barker: Yes, sir.

The Court sustained the objection, to which action and ruling of the court the defendants and each of them then and there duly excepted.

Said enlistment is in words and figures as follows:

No. OP'S Exhibit "T" Nov. '99 W. C. H.

United States of America.
War Department.

Washington, D. C., February 17, 1888.

Pursuant to section 682 of the Revised Statutes, I hereby certify that it appears from the records of the office of the Adjutant General of the Army that the accompanying paper is a true copy of the enlistment of John W. Hillmon, Company I, 1st Nebraska Cavalry.

2
R. C. DRUM, Adjutant-General.

Be it known, that R. C. Drum, who signed the foregoing certificate is the Adjutant-General of the U. S. Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof, I have hereunto set my hand, and caused the seal of the War Department to be affixed, on this
287 18th day of February, one thousand eight hundred and eighty-eight.

[Seal WM. E. ENDICOTT,
Secretary of War.

1. Insert title of office.
2. To be signed by the officer in charge of the office.

(Form No. 9.)

Copy.

Volunteer Enlistment.

Territory of Nebraska. Town of Omaha.

I, John W. Hillmon, born in Montgomery County, in the state of Indiana, aged 18 years, and by occupation a farmer, do hereby acknowledge to have volunteered this 20th day of September, 1864, to serve as a soldier in the army of the United

States of America for the period of one year, unless sooner discharged by proper authority. Do also agree to accept such bounty, pay, rations, and clothing as are, or may be established by law for volunteers. And I, John W. Hillmon, do solemnly swear that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly and faithfully, against all their enemies or opposers whomsoever; and that I will observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.

Sworn and subscribed to at Omaha, N. T.

JOHN W. HILLMON.

this 20th day of September, 1864
Before Lieut. S. W. Moore.

I certify, on honor, that I have carefully examined the above named Volunteer, agreeably to the general regulations of the army and that, in my opinion, he is free from all bodily defects, and mental infirmity, which would any way disqualify him from performing the duties of a soldier.

N. B. LARSH,
Asst. Surgeon 1st Nebraska Vet. Cav. Examining Surgeon.

288 I certify on honor that I have minutely inspected the volunteer John W. Hillmon, previously to his enlistment, and that he was entirely sober when enlisted; that to the best of my judgment and belief he is of lawful age, and that, in accepting him as duly qualified to perform the duties of an able-bodied soldier, I have strictly observed the regulations which govern the recruiting service. This soldier has brown eyes, brown hair, dark complexion, is five feet eight inches high.

S. W. MOORE, end Lt.,
Lst Regiment of Neb. Cav. Vet. Volts.
Recruiting Officer.

Mustered into the service of the United States for three years or during the war, from the date of enlistment, in company ....., First Regiment of Neb. Cav. Vet. Volunteers, on the 20th of September, 1864, at Omaha, N. T.

Oscar F. Davis, Capt., and Pro. Mar. Dist Neb.,
Mustering Office.

Declaration of Recruit.

I, John W. Hillmon, desiring to volunteer as a soldier in the army of the United States, for the term of one years, do declare that I am eighteen years and ..... months of age. That I have never been discharged from the United States Service on account of disability or by sentence of a court

martial, or by order before expiration of the term of enlistment; and I know of no impediment to my serving honestly and faithfully as a soldier for three years.

Given at Omaha, Nebraska Ter., the 20th day of September, 1864.

JOHN W. HILLMON.

Witness: Josiah Burton, 1 Reg., Neb. V. V. Co. H.

Consent in Case of **Minor.**

I.....do certify, That I am the.....
of.....; that the said ..... is .....
years of age; That I do hereby freely give my consent to his volunteering as a soldier in the Army of the United States for the period of three years.

289 Given at ..... the ..... day of .....
.....

Witness
.....

No. 9

John W. Hillmon volunteered at Omaha N. T. September 20th, 1864, by LT. S. W. Moore 1st Reg. Neb. Cav. v v
one year
..... enlistment: last served in company (.....)
..... Regt. of .....
Discharged ..... 18...

Note.—This blank will be used for both enlistments and re-enlistments—enlistments of veterans, etc., etc. In the Volunteer service. They will be made out in duplicate in all cases, one to accompany the return (recruiting return) of the superintendent (not the recruiting officer) to the Adjutant General and to accompany the accounts of the officer who pays bounty etc.

The regiment and company in which the soldier last served should be given at the back.

Note 2.—An enlistment holds to service. A muster in must, in all cases, precede payment of pay, bounty, pensi... etc. A muster in roll must, in all cases, be filed in the Adjutant General's office as Evidence of Muster in. The mustering officer, commissary, or assistant commissary of musters, as the case may be, will countersign both enlistments, as having mustered the soldier into the service of the United States before either of them is given to the disbursing officer.

Ex. D. D.—I A. S.
(A. G. O. 74 and 76)

84. The said court erred in refusing to permit counsel for plaintiff in error to prove by the witness, Fannie Walters, sub-

stantially the facts as set forth in the answer to the question propounded in assignment of error No. 75.

85. The court erred in refusing to incorporate in
290 the charge to the jury the following instruction asked by counsel for plaintiff in error: "In this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon. Proof has been offered, which has not been disputed, that the corpse had a perfect set of teeth, without decay or imperfections. If it appear by a preponderance of evidence that John W. Hillmon in his lifetime had lost a tooth or that any of his teeth were imperfect, then it follows that the body at Lawrence was not the body of John W. Hillmon but the body of some other person and if you find from a preponderance of the evidence that John W. Hillmon in his lifetime had lost a tooth or had imperfect teeth, then you will return a verdict for the defendants. In determining the preponderance of the evidence on this question, if the number of the witness- testifying on this question are persons of equal credibility and standing and with equal means of knowledge, then the party producing the greatest number of witness- on that question must prevail in this case."

The witnesses Dr. J. H. Stewart, Dr. John D. Patterson, Dr. V. G. Miller, Dr. Henry W. Howe, Claude Holliday, examined the body in question and made particular examination of the teeth, and the substance of their testimony was that the teeth were perfect, singularly large, even, all sound, a little worn by attrition and mastication, no fillings, no decays. Dr. Patterson made a model of the teeth, which was offered in evidence as Exhibit No. ...., and which shows their perfect character. No other witnesses testified as to the character of these teeth. The witness- Theodore Wiseman, Joseph Bebout, William Brown, James F. Cameron, E. Summerfield, Mrs. Eleanor Faxon, Mrs. Cockedell, Thomas Jefferson Schleppy, W. W. Nichols, George A. Nichols, Mrs. Maggine J. Dixon, Mrs. George A. Nichols, and Wm. Hillmon (brother of John W. Hillmon) testified in substance that Hillmon had one or more teeth lost or decayed.)

86. The said Court erred in refusing to incorporate into its charge to the jury the following instruction asked by counsel for plaintiff in error:

"31. The statements made by J. W. Hillmon to the
291 agents of the Life Insurance Company when he made out applications for policies that he was five feet eleven inches in height are not to be taken by you as evidence that such was his height."

(The witness Theodore Wiseman and Dr. V. G. Miller testified that at the time the application in the Mutual Life was

made out by the former, Hillmon stated to him that he was five feet eleven inches in height. Neither Wiseman nor Dr. Miller measurd him at that time; Dr. Miller testified that subsequently after the policy had been delivered Hillmon came into his office and told him that he, Hillmon, had made a mistake when he informed the doctor that he was five feet eleven inches in height, and that his correct height was five feet nine inches.)

87. The said Court erred in refusing to incorporate into its charge to the jury the following instruction asked by counsel for plaintiff in error:

"No. 36. The jury are instructed that if they believe from the evidence and before the institution of this suit the plaintiff had been told and was informed and was thereby notified that Levi Baldwin, John H. Brown, and John W. Hillmon had confederated and conspired together to procure from the defendant insurance companies the policies sued upon in these cases, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured, and of thereby falsely representing the said insured to be dead; and that they had accordingly in fact produced, received and accepted said policies in execution to that extent of the design and propose aforesaid; and that the dead body presented to the defendants was one procured and presented by said persons conspiring together as aforesaid, and was falsely represented by them to be the body of the insured; then by the institution of this suit, and by claiming therein the body so presented to be the body of the insured she thereby availed herself of and adopted and made, in legal effect, her own, all the acts done by the said persons and each of them so confederating and conspiring in
aid and furtherance of the matter of said unlawful com-
292 bination and conspiracy with like legal effect as to
her as if she had been one of the parties originally conspiring."

(For statement of facts and evidence showing the relevancy of the foregoing instruction, see general explanation to assignments of error Nos. 64 and 72.)

88. The said Court erred in refusing to incorporate into its charge to the jury the following instruction asked by counsel for plaintiff in error.

"No. 37. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case for the purpose of, and with the intent to defraud and the said defendants by procuring and presenting to the said defendants a dead body of another person than the in-

sured, representing the same to be that of said John W. Hillmon, thereby pretending to the defendant that said insured was dead, though still living; and that they procured and accepted the said policies in pursuance and in furtherance of said unlawful scheme, and that thereafter while engaged in the prosecution of said unlawful scheme, the said John W. Hillmon actually came to his death; then the jury are instructed that no right of action against the defendants accrued and no action can lie on the said policies, even though the dead body actually presented to the defendants, was really that of the said John W. Hillmon."

(For statement of facts and evidence showing the relevancy of the foregoing instruction, see general explanation to assignments of error Nos. 64 and 72.)

89. The said Court erred in refusing to incorporate into its charge to the jury the following instruction asked by counsel for plaintiff in error:

"No. 38. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued
293 upon in this case, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured, and of thereby falsely representing said insured to be dead; and that they did accordingly, in fact procure, receive and accept said policies in execution to that extent of the design and purpose aforesaid, then and in such case the said contracts of insurance, so fraudulently and with such fraudulent intent procured and received, were never valid, but were void, and never attached to the life of John W. Hillmon, and no right of action can be founded thereon in this case, and the jury must find for the defendants."

(For statement of facts and evidence showing the relevancy of the foregoing instruction, see general explanation to assignment-of error No. 64 and 72.)

90. The said court erred in refusing to incorporate into its charge to the jury the following instruction asked by counsel for plaintiff in error:

"No. 46. The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, the Mutual Life Insurance Company of New York upon the life of John W. Hillmon was procured through fraud or through any attempt at fraud by said Hillmon confederating and conspiring with Levi Baldwin and John H.

Brown, then said policy is absolutely null and void, and they are to find for the defendant."

(For statement of facts and evidence showing the relevancy of the foregoing instruction, see general explanation to assignment of error No. 64 and 72.)

91. The court erred in giving the following portion of its charge to the jury:

In these cases the defendants allege that John W. Hillmon, John H. Brown, and Levi Baldwin and divers other persons unknown, unlawfully conspired together to cheat and defraud the defendants by procuring the insurance policies, by substituting the body of another person, claiming it to be the body of Hillmon, and by thereby obtaining the money
294 upon the policies. The objects of the conspiracy alleged to have been formed contemplate the commission of a crime, that of obtaining money [be] false and fraudulent pretenses, and it is claimed by the defendants that during the progress of the conspiracy it resulted in the commission of murder. Whoever alleges a conspiracy or fraud, whether as a cause of action or as a defense against the cause of action of another, is required to be definite and precise, not only in the description of the conspiracy or fraud charged but also in respect to the persons sought to be held as conspirators or participators in the fraud, especially if they are parties to the suit in which the charge is made. In these cases, although it was known that the policies of insurance were made payable to Sallie E. Hillmon, and that no one else could obtain the money thereon without her act and consent, there is no allegation in the answers of the defendants that she was either a party to the alleged conspiracy or participated therein at any time or had any knowledge thereof. Consequently it can not be claimed in this case that she was a party to an alleged conspiracy or had any guilty participation therein or knowledge thereof."

(For statements of facts and evidence in connection with which it will be urged that the foregoing portion of the charge was improper, see explanation at length of assignments of error Nos. 64 and 72.)

92. The court erred in giving the following portion of the charge to the jury:

"On the other hand even if you should find that there was a conspiracy between the three men as charged by the defendants but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdict in such events would be for the plaintiff and against the defendants. In other words, the

existence or non-existence of the conspiracy is not the controlling question in this case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you may deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was
295 that of John W. Hillmon, it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse."

(For statements of facts and evidence in connection with which it will be urged that the foregoing portion of the charge was improper, see explanations at length of assignments of error Nos. 64 and 72.)

93. The court erred in refusing to give instruction No. 11 asked by the plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"Q. That every witness who identifies the body as that of F. A. Walters in effect denies the identity of the body as that of Hillmon."

94. The court erred in refusing to give instruction No. 12, asked by the plaintiff in error to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed: Said instruction is as follows:

"No. 12. The releases signed by the plaintiff, Mrs. Hillmon discharging and releasing the defendant companies from all claim under and liability upon the policies sued on are such written instruments as, under the law, import a consideration, and the execution of said releases being admitted, they are admissable on the part of the defendant as evidence as admissions of the plaintiff that no lawful claim could be made under said policies, or that no right of action thereon existed when said releases were made; and in considering her act in executing these releases, and in ordering the policies to be surrendered and delivered up to the defendants, the jury should ascribe to her only the ordinary and usual motives which ordinarily influence persons, and not ascribe to her unusual and fanciful motives, inducements, or controlling influences."

95. The court erred in refusing to give instruction No. 13, asked by the plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

296 "No. 13. The execution of an order for the policies and releases of the policies by Mrs. Hillmon would justify the jury in finding that Mrs. Hillmon knew at the

time of the execution of the aforesaid papers, that her husband was alive."

96. The court erred in refusing to give instruction No. 14, asked by the plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 14. That the jury are at liberty to find that the reason why the plaintiff executed the order for the policies, and also executed the releases of the policies was the fact that she was aware that John H. Brown had made a statement, and that her executing this paper was an acquiescence on her part in the fact that her husband was not killed in Barber county, but was still alive."

96. The court erred in refusing to give instruction No. 18 asked by the counsel for the plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 18. If it is a fact that the relatives and parents of Frederick A. Walters at once recognized the picture of the dead body immediately on seeing it as the body of their son such fact is entitled to great weight on the question of the identity of the body at Lawrence. This identification in connection with the letter of Frederick A. Walter to his sister, from Wichita stating that he would start from Wichita West on March 5th with a man named Hillmon; and in connection with the confession of John H. Brown as to the killing by Hillmon of a man near Medicine Lodge on March 17th, 1879, constitute evidence of great weight in determining the identity of the body brought to Lawrence."

The plaintiff in error relies in support of this exception on the evidence of Daniel Walters, Fannie Walters, Elizabeth Rieffenbach, and the confession of John H. Brown. Also the letter of F. A. Walters to his sister, dated at Wichita, Kansas, March 4th, or thereabouts. Also the letter of F. A. Walters to Alvina Kasten found in a deposition of said Alvina Kasten.

297 The said Daniel Walters, Fannie Walters, and Elizabeth Rieffenach testified in substance that immediately upon Daniel producing the photographs which he had received of the dead body from the master of the lodge at Wichita, Kansas, they, and other members of the family immediately identified the same as a picture of the dead body of their son and brother.

97. The Court erred in refusing to give instruction No. 22, asked by the counsel for the plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was allowed. Said instruction is as follows:

"Q. Flight by a party is legitimate evidence tending to show his consciousness of guilt, and in this case you can take into consideration the fact for the purpose of determining whether or not there was a crime committed in Barber County, with which, he Brown, was connected, the fact that he, Brown, fled from the state of Kansas."

The plaintiff relies upon the evidence of Colonel Samuel Walker, Theodore Wiseman, and W. J. Buchan, John H. Brown and Reuben Brown for this assignment. Colonel Walker and Theodore Wiseman testified in substance that during the coroner's inquest being held over the dead body brought from Medicine Lodge to Lawrence, which inquest was held on and after the second day of April, 1879, that the said John H. Brown left during the night, and before his examination as a witness was concluded. John H. Brown says that he left early in the morning of one of said days, and went to his father's house in Wyandotte county; and that afternoon crossed over to his brother's in Platte County, Missouri, and from there went to a small town by the name of Orrick, and remained there for some time. W. J. Buchan and Reuben Brown testify that they found John H. Brown at the town of Orrick, being a small town some distance from Kansas City, Missouri, shortly after he had left Lawrence.

The evidence of said John H. Brown further shows that he worked at a tie camp down in the timber lands of Missouri, and that he had a horse there in his possession, which belonged to his brother, and which he had borrowed from
298 his brother the afternoon he left his brother's place in Platte county.

98. The Court erred in refusing to give instruction No. 25 asked by the counsel for the plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was allowed. Said instruction is as follows:

"No. 25. Exhibit Number 15, which has been called in this case the "Munn Paper" is not, under the laws of Kansas, the compounding of a felony, nor is it possible as a matter of law for any agent of a corporation to bind its principal or agree for them to compound a felony."

A copy of said Exhibit No. 15, commonly known as the "Munn Paper" is set forth, in assignment No. 59.

Plaintiff relies upon the evidence of W. J. Buchan, John H. Brown and the letter of authorization of John. H. Brown, found in the evidence of W. J. Buchan, which is as follows:

W. J. Buchan testified that in an interview with John H. Brown in Parkville, Missouri, he, Brown, told Buchan that they could get up these insurance policies; that after some conversation on that subject, he, Brown, gave said Buchan, a letter authorizing him, Buchan, to settle with the insurance companies, and to take up the policies, which letter is set forth above, in full.

John H. Brown, in his cross-examination, testified substantially to the same facts.

99. The Court erred in refusing to give instruction No. 28 asked by counsel for plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was allowed. Said instruction is as follows:

"No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case for the reason that the real question in this case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gun shot wound at the hands of one John H. Brown, at Barber county, on the 17th day of March, 1879."

In support of the foregoing assignment of error the
299 plaintiff in error calls the attention of the Court to the pleadings in this case, particularly the petition and reply of the defendant in error, in which defendant in error alleges that John W. Hillmon met his death from a gun shot wound at the hands of John H. Brown at Barber county, Kansas, on the 17th day of March, 1879, and that this action was commenced on July 13, 1880; also the testimony of W. H. McKamy and the testimony of John H. Brown offered in support of assignments of error Nos. 62 and 63.

100. The said Court erred in refusing to give instruction No. 33, asked by counsel for plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 33. There is no proof in this case that the plaintiff has married since the commencement of the action, and it would not be competent for the plaintiff to make such proof because she could not by her own acts make evidence for herself, or attempt to strengthen the presumption of the death of the said John W. Hillmon on March 17th, 1879, by her subsequent re-marriage."

The plaintiff, Sallie E. Hillmon was asked the following question: "State what your name was when this suit was brought? A. Sallie E. Hillmon.

"Q. You have been married since then?" To which the plaintiff in error objected on the ground that it called for incompetent, irrelevant and self-serving testimony. Thereupon the Court instructed the jury as follows: I will instruct the jury that the fact that Mrs. Hillmon remarried since the commencement of these suits is not evidence of the death of John W. Hillmon, and the jury will not so consider it. With that statement the objection is overruled, and the witness may answer.

To which ruling of the court the defendants and each of them at the time duly excepted and still except. Thereupon the witness answered "Yes, sir."

Q. Whom did you marry? (Same objection as last above, with the same ruling.)

A. James C. Smith.

300 State whether that was since both of these suits were commenced? A. Yes, sir.

101. The said Court erred in refusing to give instruction number 39, asked by counsel for the plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 39. The jury are instructed that where there are a number of witnesses upon any general subject, combination among them is rendered more difficult and opportunities and facilities of contradictory alleged facts, if they be not true, are increased in proportion to the number of such witnesses or circumstances. The general accordance of all material circumstances and the general credit of the whole are confirmed by subordinate and slight diversities, which show that the general agreement and concord have not been produced by meditation or fraudulent contrivance, but must necessarily be true. Differences between witnesses or between statements of the same witness upon such matters as dates, localities or other subordinate matters may often confirm the sustantial truth of the testimony. In all such cases the jury may consider and determine whether such diversities arise from a purpose of the witness to deceive or whether they illustrate merely the general uncertainty of human memory in matters of minute and subordinate detail."

In support of this assignment the plaintiff in error calls the attention of the court to the large number of witnesses called by the plaintiff in error who testified in regard to the defective condition of Hillmon's teeth, among whom were his brother and sister, neighbors and schoolmates, and intimate friends and acquaintances. Most of these witnesses testified that John W. Hillmon had lost at least one tooth, but did not agree

uniformly as to which tooth he had lost, while the testimony show that the cadaver had a perfect set of teeth, remarkably fine, as some of the witnesses described them. See statement attached to assignment of error No. 85.

301 102. The said court erred in refusing to give instruction number 40, asked by counsel for plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 40. There has been some allusion in the course of the trial to the compounding of a felony. The court during the progress of the trial instructed you that you were to pay no attention to the insinuation of counsel, and the court now further instructs you that there has been no proof introduced of the compounding of any felony nor is there any issue of that kind in this case, and you are to wholly disregard any allusions of counsel on that subject."

103. The said court erred in refusing to give instruction No. 41 asked by counsel for plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 41. If you believed that John W. Hillmon sold or disposed of mortgaged chattel property in such manner, in 1878, as to be guilty of a crime in Texas, punishable with imprisonment in the penitentiary, you are then at liberty to consider the probability that such a crime would tend to induce him to disappear or to go to unknown parts or conceal himself, and this tendency you may further consider in your deliberations as to whether the body found at Crooked Creek was the body of Hillmon."

(See offer and explanation in assignment No. 63 to same.)

104. The said court erred in refusing to give instruction No. 42 asked by counsel for plaintiff in error, to which refusal the plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 42. You are instructed that by the laws of the State of Texas in the year 1878, it was provided that if any person had given a mortgage in writing upon any personal or movable property, and should, during the existence of such chattel mortgage, remove the said property out of the state, or dispose of the same with intent to defraud the person having such lien; such act or acts would be criminal and the

302 person found guilty thereof would be subject to imprisonment in the penitentiary of Texas for a term of not less than two nor more than five years."

(In support of said assignment of error see offer of evidence and general explanations to assignment No. 63.)

105. The said court erred in refusing to give instruction number 44, asked by counsel for plaintiff in error, to which refusal the plaintiff in error then and there duly excepted, which exception was duly allowed. Said [exception] is as follows:

"No. 44. The jury are instructed that the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness."

In support of this assignment the said plaintiff in error calls the attention of the court to the statement by John H. Brown at Parkville, Missouri, September 4th, 1879, which is substantially set forth in foregoing assignments of error Nos. 22, 24, 25 and 26. It appears from the record that this statement was offered in evidence by counsel for defendant in error during the cross-examination of the witness Wm. J. Buchan.

106. The said court erred in refusing to give instruction number 47 asked by counsel for plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 47. The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, upon the life of John W. Hillmon was fraudulently procured by the said Hillmon alone, or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then such policy is absolutely null and void, and they are to find for the defendant."

In support of this assignment see statement of facts
303 and evidence showing the relevancy of the foregoing instruction, and general explanation to assignments of error Nos. 64 and 72.

107. The said court erred in refusing to give instruction number 34, asked by counsel for plaintiff in error, to which refusal the said plaintiff in error then and there duly excepted, which exception was duly allowed. Said instruction is as follows:

"No. 34. The Supreme Court of the United States in the case of Gregg vs. Houston, 104 U. S. 553, speaking through Chief Justice Waite:

'If upon the evidence the jury had brought in a verdict against the defendants, it would have been the duty of the court to set it aside and grant a new trial. It is right, therefore, to direct a verdict for the defendants.'

In accordance with the rule of law which is again enunciated by the same court in the case of Randall vs. The B. & O. Rd. Co., 109 U. S. 479, being of opinion that it would be my duty in the event of a verdict for the plaintiff to set the same aside, I charge you that you must find a verdict for the defendants."

108. That the said court erred in rendering a judgment for the said Sallie E. Hillmon, defendant in error, when it should have been rendered for the Connecticut Mutual Life Insurance Company, plaintiff in error, according to the law of the land.

The said Connecticut Mutual Life Insurance Company, plaintiff in error, therefore prays that the said judgment rendered against it may be reversed, vacated and set aside, and it be granted a new trial, and the said plaintiff in error be restored to all things it has lost by reason thereof.

EWARD S. ISHAM,
J. W. GREEN,
Attys. for Plaintiff in Error.

Indorsed: No. 3149. Sallie E. Hillmon vs. The Conn. Mut. Life Ins. Co. Assignments of Error. Filed May 9", 1900. Geo. F. Sharitt, Clerk.

304 United States of America,
District of Kansas—ss.

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings, including the petition for a writ of error and assignment of errors (and excepting the Bill of Exceptions) in a certain cause in said court wherein Sallie E. Hillmon is plaintiff and The Connecticut Mutual Life Insurance Company, of Hartford, Connecticut is defendant, No. 3149.

I do further certify that the original citation and writ of error are hereto attached and herewith returned.

The Seal of the Circuit Court of the United States District of Kansas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 20" day of June, A. D. 1900.

GEO. F. SHARITT, Clerk.

[Cancelled 10c U. S. Int. Rev. stamp.]

Filed Jul. 2, 1900. John D. Jordan, Clerk.

Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1900, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the third day of December, A. D. 1900, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the second day of July, A. D. 1900, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Connecticut Mutual Life Insurance Company was plaintiff in error and Sallie E. Hillmon was defendant in error.

(*Motion as to Bill of Exceptions.*)

And on the seventh day of June, A. D. 1900, a motion as to bill of exceptions was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
SALLIE E. HILLMON, Defendant in Error,

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
SALLIE E. HILLMON, Defendant in Error.

Now at this day comes The Mutual Life Insurance Company of New York, plaintiff in error, and shows to the court that heretofore, to wit, at the June term, A. D. 1899, there was pending for trial in the circuit court of the United States for the district of Kansas two actions, the one the cause of Sallie E. Hillmon against the Mutual Life Insurance Company of New York, being cause number three thousand one hundred forty-seven (3147) on the docket of said court, the other the cause of Sallie E. Hillmon against the Connecticut Mutual Life Insurance Company, being cause number three thousand one hundred forty-nine (3149) on the docket of said court, and that by the order of said court said causes were consoli-

dated for trial; that said causes were tried together and a separate verdict returned and a separate judgement entered in each of said causes against each of said defendants.

That thereupon each of said defendants appealed to the United States circuit court of appeals for the eighth judicial circuit, and each of said defendants have prepared a separate bill of exceptions.

That the bill of exceptions prepared by each of said plaintiffs in error are the same in all respects; that said bills of exceptions are quite voluminous and the making of a copy thereof will be attended with great expense.

The said plaintiff in error, The Mutual Life Insurance Company of New York, further avers that on the 2nd day of April, 1900, the Honorable William C. Hook, judge of said court, duly made an order in each of said causes directing the clerk of said court to transmit to the circuit court of appeals with the record in each case certain particularly described exhibits which were offered and admitted in evidence during the trial of said causes; a copy of which order, but entitled in the case of Sallie E. Hillmon against the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, is hereto attached, marked Exhibit "A," and made a part of this petition.

That the same exhibits were introduced in evidence in each of said causes; that only one plaster cast or model of the teeth of the cadaver was used or introduced in evidence.

Wherefore said plaintiff in error prays an order of this court that the clerk of said circuit court of the United States for the district of Kansas be directed to make and forward to this court but one copy of said bills of exceptions, and that said copy of said bill of exceptions *ne* made and filed in the case of said Sallie E. Hillmon against the Mutual Life Insurance Company of New York, but that said copy be taken, treated, and considered by this court in all respects as though made and filed in each of said causes.

Also that the said clerk be ordered and directed by this court to forward with said bill of exceptions in the above-entitled action the exhibits mentioned in said order of Judge Hook, to be filed with said bill of exceptions and to be taken, treated, and considered by this court in all respects as if they had been filed with each bill of exceptions.

In the Circuit Court of the United States for the District of Kansas, First Division.

SALLIE E. HILLMON, Plaintiff,
vs.
THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY OF Hartford, Conn., Defendant. } 3149.

Now, on the 2nd day of April, 1900, the above-entitled cause came on for hearing upon the application of the defendant for an order directing the clerk to transmit to the circuit court of appeals with the record in said cause the following particularly described

exhibits, which were offered and admitted in evidence during the trial of said cause, to wit:

1. Plaster cast or model of upper and lower teeth of cadaver or corpse, whose identity is in question in said cause. (Unmarked.)

2. Copy of tin-type of John W. Hillmon, marked Ex. No. 22, W. C. H., and also marked Ex. D, W. C. H.

3. Small photograph of Frederick Adolph Walters (with mustache), marked Ex. B; also marked Ex. V; also marked Exhibit No. 35, Nov., '99, W. C. H.

4. Small photograph of Frederick Adolph Walters (without mustache), marked Exhibit No. 36, Nov., '99, W. C. H.

5. A cabinet-sized copy of the photograph of Frederick Adolph Walters (without mustache), last above mentioned, marked Exhibit No. 33, Nov., '99, W. C. H., judge.

6. A cabinet-sized photograph of John W. Hillmon, marked Exhibit No. 10, Oct., '99, W. C. H., judge.

7. A small photograph of John W. Hillmon, marked No. 14, of which a copy enlarged to cabinet size is marked Exhibit No. 34, Nov., '99, W. C. H., judge; both to be sent.

8. A front view of cadaver or corpse in a coffin, marked "G," Ex. No. 29, Oct., '99, W. C. H., judge.

This is the same as Ex. No. 13, W. C. H., judge.

9. A side view of the same cadaver or corpse in a coffin, marked "G," Exhibit No. 30, Oct., '99, W. C. H., judge.

This is the same as Ex. No. 12, W. C. H., judge.

And the court, having examined said exhibits and being satisfied that the application of the defendants ought to be allowed, does order that said original exhibits or duplicates thereof be transmitted by the clerk with the record in said cause to the circuit court of appeals.

WILLIAM C. HOOK, *Judge.*

Endorsed: No. 3149. Order, clerk to send original exhibits to court of appeals. Filed Ap'l 2, 1900. Geo. F. Sharitt, clerk.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of an order of said court from the record of the proceedings thereof in the suit of Sallie E. Hillmon *vs.* The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, case No. 3149, in said court.

In testimony whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 7th day of May, A. D. 1900.

GEO. F. SHARITT, *Clerk.*

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error,
vs.
SALLIE E. HILLMON, Defendant in Error.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
SALLIE E. HILLMON, Defendant in Error.

It is stipulated and agreed by and between the parties hereto that all of the statements, recitals, and averments in the foregoing petition contained are true, and said parties hereby agree and said defendant in error hereby consents that the court may make in said cases the order prayed for in the foregoing petition.

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——— ———.
——— ———.
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(Endorsed:) No. 1450. Mutual Life Insurance Co., pl'ff in error, *vs.* Sallie E. Hillmon. No. 1451. Connecticut Mutual Life Insurance Co., pl'ff in error, *vs.* Sallie E. Hillmon. Motion pl'ffs in error as to bill of exceptions. Filed Jun- 7, 1900. John D. Jordan, clerk.

(*Order as to Bill of Exceptions and Original Exhibits.*)

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
SALLIE E. HILLMON, Defendant in Error.

Now, at this day, came The Connecticut Mutual Life Insurance Company, plaintiff in error, by J. W. Green, its attorney, and came also The Mutual Life Insurance Company of New York, plaintiff in error, by Geo. J. Barker, its attorney; and thereupon came on for hearing the motion and application of said plaintiffs in error for an order directing the clerk of the circuit court of the United States for the district of Kansas to prepare and forward but one bill of exceptions and one copy of the original exhibits in said causes; and it appearing to me that said defendant in error had been duly notified in writing of this application, and that she has made no objections thereto, and it further appearing from the evidence that said causes were, by the order of the court, consolidated for trial and were tried together, and that a bill of exceptions in each case has been duly signed, settled, and allowed by the Honorable Wil-

n Hook, judge of the circuit court of the United States for the trict of Kansas, and duly filed with the clerk thereof, and it ther appearing that said bills of exceptions so filed in each case identical, that the same are voluminous, and that the making two copies thereof is an unnecessary expense—

It is therefore ordered that Geo. F. Sharitt, clerk of the circuit art of the United States for the district of Kansas, make, prepare, d forward to this court one copy only of said bill of exceptions; d it is further ordered that said copy be filed in the case of The utual Life Insurance Company of New York, plaintiff in error, *vs.* llie E. Hillmon, defendant in error, but that said copy shall be eated the same in all respects as if the same had been made and ed in each of said actions, to wit: The Mutual Life Insurance ompany of New York, plaintiff in error, *vs.* Sallie E. Hillmon, de- ndant in error, and The Connecticut Mutual Life Insurance Com- any, plaintiff in error, *vs.* Sallie E. Hillmon, defendant in error.

The same directions are hereby given in regard to the filing and he consideration to be given to the original exhibits offered in evi- ence upon the trial of said causes and directed by the Honorable William C. Hook, judge of the circuit court of the United States or the district of Kansas, to be forwarded to the clerk of this court.

The clerk of this court is hereby directed to forthwith forward to said Sharitt a certified copy of this order.

AMOS M. THAYER,
Circuit Judge.

(Endorsed:) No. 1451. Connecticut Mutual Life Insurance Co., pl'ff in error, *vs.* Sallie E. Hillmon. Order as to bill of exceptions and original exhibits. Filed Jun- 7, 1900. John D. Jordan, clerk.

(*Appearance for Plaintiff in Error.*)

And on the second day of July, A. D. 1900, an appearance of Mr. J. W. Green, counsel for plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
SALLIE E. HILLMON. } No. 1451.

The clerk will enter my appearance as counsel for the plaintiff in error.

J. W. GREEN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1451. The Connecticut Mutual Life Insurance Co., plaintiff in error, vs. Sallie E. Hillmon. Appearance. Filed Jul- 2, 1900. John D. Jordan, clerk. J. W. Green, counsel for pl'ff in error.

(*Appearance for Plaintiff in Error.*)

And on the second day of July, A. D. 1900, an appearance of Messrs. Seddon & Blair, counsel for plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, vs. SALLIE E. HILLMON. } No. 1451.

The clerk will enter my appearance as counsel for the plaintiff in error.

JAMES A. SEDDON.
JAMES L. BLAIR.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1451. Connecticut Mutual Life Insurance Co., pl'ff in error, vs. Sallie E. Hillmon. Appearance. Filed Jul- 2, 1900. John D. Jordan, clerk. James A. Seddon, James L. Blair, counsel for pl'ff in error.

(*Certified Copy Appeal Bond.*)

And on the third day of July, A. D. 1900, a certified copy of appeal bond was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, vs. SALLIE E. HILLMON, Defendant in Error.

Know all men by these presents that we, The Mutual Life Insurance Company of Hartford, Connecticut, as principal, and Jefferson Brumback and J. W. Green, as sureties, are firmly held and bound unto Sallie E. Hillmon, now Sallie E. Smith, in the full and just sum of five hundred (500) dollars, to be paid to the said Sallie E. Hillmon, now Sallie E. Smith, her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of June, in the year of our Lord one thousand nine hundred.

ereas lately, at a session of the circuit court of the United for the district of Kansas, in a suit now pending in said court en Sallie E. Hillmon, plaintiff, and The Connecticut Mutual nsurance Company, defendant, a final judgment was rendered st said defendant, and the said Connecticut Mutual Life Insur- Company, defendant, having obtained from said court a writ ror to reverse the judgment in the aforesaid suit, and a citation ted to said Sallie E. Hillmon is about to be issued, citing and onishing her to be and appear at a United States circuit court peals for the eighth judicial district, to be holden at St.

s:

ow, the condition of the above obligation is such that if the Connecticut Mutual Life Insurance Company shall prosecute rit of error to effect and shall pay such costs as may be ded against it if it fails to make its plea good, then the above gation to be void; otherwise to remain in full force and virtue.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
By J. W. GREEN, *Its Agent & Attorney.*
J. W. GREEN, *Lawrence, Kansas.*
JEFFERSON BRUMBACK.

TE OF MISSOURI, } ss:
ackson County, }

efferson Brumback, of lawful age, being duly sworn, on oath that he is worth the sum of twenty-five thousand dollars over above his just debts, liabilities, and exemptions.

JEFFERSON BRUMBACK.

ubscribed and sworn to before me on this 21st day of June, 1900.

BEZALEEL WELLS,
Notary Public.

ly term expires April 29, 1902.

Approved as a cost bond June 29th, 1900, and ordered filed.

AMOS M. THAYER,
Circuit Judge.

Endorsed:) No. 3149. Bond. Filed July 2, 1900. Geo. F. aritt, clerk.

ITED STATES OF AMERICA, } ss:
District of Kansas, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States America for the district of Kansas, do hereby certify the fore- ing to be a true, full, and correct copy of bond as filed in the case Sallie E. Hillmon *vs.* The Connecticut Mutual Life Insurance mpany, No. 3149.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said dis- EAL.] trict of Kansas, this 2nd day of July, A. D. 1900.

GEO. F. SHARITT, *Clerk.*

(Endorsed:) No. 1451. Connecticut Mutual Life Ins. Co., pl'ff in error, *vs.* Sallie E. Hillmon. Certified copy bond. Filed Jul. 3, 1900. John D. Jordan, clerk.

(*Appearance for Plaintiff in Error.*)

And on the tenth day of October, A. D. 1900, the appearance of Mr. Edward S. Isham, counsel for plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, *vs.* SALLIE E. HILLMON. } No. 1451.

The clerk will enter my appearance as counsel for the plaintiff in error.

EDWARD S. ISHAM.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1451. The Connecticut Mutual Life Insurance Company, plaintiff in error, *vs.* Sallie E. Hillmon. Appearance. Filed Oct. 10, 1900. John D. Jordan, clerk. Edward S. Isham, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the tenth day of October, A. D. 1900, an appearance of Mr. Lysander B. Wheat, Mr. John H. Atwood, and Mr. Charles F. Hutchings, counsel for defendant in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, *vs.* SALLIE E. HILLMON. } No. 1451.

The clerk will enter my appearance as counsel for the defendant in error.

LYSANDER B. WHEAT.
JOHN H. ATWOOD.
CHARLES F. HUTCHINGS.

Oct. 9, 1900.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1451. The Connecticut Mutual Life Insurance Company, pl'ff in error, *vs.* Sallie E. Hillmon. Appearance. Filed Oct. 10, 1900. John D. Jordan, clerk. Lysander B. Wheat, John H. Atwood, Charles F. Hutchings, counsel for def't in error.

(*Appearance for Plaintiff in Error.*)

And on the seventh day of December, A. D. 1900, an appearance of Mr. J. E. McKeighan, counsel for plaintiff in error, was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, vs. SALLIE E. HILLMON. } No. 1451.

The clerk will enter my appearance as counsel for the plaintiff in error.

J. E. McKEIGHAN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1451. The Connecticut Mutual Life Insurance Company, plaintiff in error, vs. Sallie E. Hillmon. Appearance. Filed Dec. 7, 1900. John D. Jordan, clerk. J. E. McKeighan, counsel for pl'ff in error.

(*Argument Commenced.*)

And on the seventh day of December, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an entry in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

FRIDAY, *December* 7, 1900.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, vs. SALLIE E. HILLMON. } No. 1451.

In error to the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order, argument was commenced by Mr. J. E. McKeighan in behalf of the plaintiff in error, but the argument not being concluded at the hour of adjournment, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission.*)

And on the eighth day of December, A. D. 1900, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, Decemb
Term, 1900.

SATURDAY, *December* 8, 1900.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,
vs.
SALLIE E. HILLMON. } No. 14

In error to the circuit court of the United States for the district
Kansas.

This cause having been called this day for further hearing, arg
ment was continued by Mr. J. E. McKeighan, for plaintiff in erro
and by Mr. Charles F. Hutchings and Mr. Lysander B. Wheat, f
defendant in error, and concluded by Mr. Edward S. Isham, for t
plaintiff in error.

Thereupon the cause was submitted to the court upon the tra
script of record from said circuit court and the briefs of coun
filed herein.

(*Opinion.*)

And on the third day of April, A. D. 1901, an opinion of sa
United States circuit court of appeals for the eighth circuit was fil
in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, Decemb
Term, A. D. 1900.

THE CONNECTICUT MUTUAL LIFE INSURANCE Company, Plaintiff in Error,
vs.
SALLIE E. HILLMON, Defendant in Error. } No. 1451. In Error
the Circuit Court of t
United States for t
District of Kansas.

Mr. J. E. McKeighan and Mr. Edward S. Isham (Mr. Buell M
Keever, Mr. J. W. Green, Hon. Shepard Barclay and Mr. M.
Watts were with them on the brief), for the plaintiff in error.

Mr. C. F. Hutchings and Mr. L. B. Wheat (Mr. John H. Atwo
was with them on the brief), for the defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

This is an action on a policy of life insurance in the sum
$5,000, which was issued March 4, 1879, on the life of John W
Hillmon for the sole use and benefit of his wife, Sallie E. Hillmo
the plaintiff below and the defendant in error here. The case h
had an eventful history. John W. Hillmon was killed, as it
claimed, on March 17, 1879, by the accidental discharge of a gun
a camp near Medicine Lodge, in a portion of Kansas which was the
sparsely settled. The defendant company alleged fraud and refus
to pay the policy, claiming that Hillmon was still living and th
the body produced as being his, was the corpse of another man, wh

had either been murdered by Hillmon or was a cadaver that had been found by him somewhere on the plains of southwestern Kansas. The action was brought on July 13, 1880, and has been tried, as we are advised, six times before as many different judges and juries, resulting in a mistrial on each occasion except the last and a trial which took place in 1888, on both of which occasions the plaintiff below prevailed.

The defense to the action that was relied upon principally on the last trial is set forth in the defendant's answer, after a general denial of all of the allegations of the complaint, in the following language:

"2nd. Said defendant further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons, to the defendant unknown, unlawfully and fraudulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to wit: in the New York Life Insurance Company. * * * the sum of ten thousand dollars; in the Mutual Life Insurance Company of New York, * * * the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy * * * the sum of five thousand dollars.

"That thereafter and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin, did falsely and fraudulently pretend and represent unto this defendant and others that said Hillmon was dead and did, on or about the months of March and April, A. D. 1879, and thereafter for the purpose of securing the payment of said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid."

In addition to the foregoing plea the answer contained another plea to the effect that the plaintiff had released the cause of action sued upon, for a sufficient consideration, by a writing which was executed by her on March 4, 1881. To the plea of release the plaintiff replied, in substance, that it was obtained without consideration by fraud; and the facts constituting the fraud were specifically set forth.

THAYER, circuit judge, after stating the case as above, delivered the opinion of the court.

During the progress of the trial and in its final charge to the jury, the lower court ruled, in substance, that the defendant company had not averred in its answer that Sallie E. Hillmon, the sole beneficiary in the policy, was a party to the alleged conspiracy between John W.

Hillmon, John H. Brown and Levi Baldwin to defraud it and other life insurance companies; that as her connection with the conspiracy had not been averred it could not be claimed that she was a party thereto; that the substantive defense which was pleaded in the answer was, that Hillmon was not dead, for which reason no liability had accrued on the policy when the suit was filed; that the principal question in the case was whether John W. Hillmon died, as claimed by the plaintiff, in consequence of a gunshot wound inflicted on March 17, 1879, and that the existence of the alleged conspiracy between Hillmon, Brown and Baldwin was only relevant to strengthen the probability that Hillmon was still living. In various ways exceptions were reserved to these rulings, which will collectively form the first subject for consideration.

It is manifest, we think, from an inspection of the answer, that the trial court was right in holding that the defendant had not pleaded that Mrs. Hillmon was a party to the alleged conspiracy between the three persons last above named, and such seems to have been the view that was entertained at the trial, by counsel for the defendant company, for in his opening statement to the jury, after alluding to a remark which had been made by the plaintiff's attorney in his opening address, to the effect that the defendant had never claimed that Mrs. Hillmon was a party to any conspiracy—he said "What evidence will be deduced on that point is for you gentlemen to determine; what we say on paper is that John W. Hillmon, Levi Baldwin and John H. Brown did conspire to defraud these insurance companies." This was an admission that the defendant had only charged in its answer that the three parties last named had conspired to defraud the company and that it had not ventured to commit itself to the statement that Mrs. Hillmon had ever participated therein.

It is further manifest that the trial court was right in holding that the fact that John W. Hillmon was not dead when the action was brought, but was concealing himself somewhere, constituted the substantial defense pleaded in that part of the answer which is quoted above; that the issue tendered by the plea was whether he was dead or alive, and that such issue presented the principal question of fact for the consideration of the jury. It will not be presumed that the second plea contained in the answer was intended to state more than one defense, for which reason the first paragraph thereof which alleges in effect that Hillmon, Brown and Baldwin had entered into a conspiracy to defraud certain insurance companies among others the defendant, cannot be regarded as stating a substantive defense to the plaintiff's cause of action, but that averment must be treated as being merely introductory to the fact afterwards alleged that Hillmon was not dead. As we construe the plea, this latter allegation constitutes the defense on which the pleader intended to rely. We do not perceive, therefore, that the lower court committed any error in the several rulings last aforesaid, or in making the statement that the existence of the conspiracy between the parties named in the plea, was not a controlling issue, but at most was only relevant in so far as its existence, if shown, might tend to strengthen

the probability that Hillmon was still living. It was not only not alleged that Mrs. Hillmon ever became a party to the conspiracy, but, as we understand the contention of defendant's counsel, the evidence upon which they now rely to show her possible connection with the conspiracy is the fact that she saw the remains of the man who was shot near Medicine Lodge after they had been exhumed and brought back to Lawrence, Kansas, where the plaintiff resided. The argument is that as she saw the remains of the person who had been shot, not immediately after the occurrence, but at Lawrence, Kansas, some weeks after the alleged shooting, she probably discovered that they were not the remains of her husband, and that by suing on the policy after she had made such discovery, she attempted to avail herself of the fruits of an existing conspiracy, and by so doing became a party thereto. It is obvious, however, that if she did make the supposed discovery, as counsel assume, and if the jury had been satisfied of that fact (as they evidently were not), then as John W. Hillmon was not dead her right to recover on the policy was defeated by the very evidence, and the only tangible evidence as it seems, which is now depended upon to show that she adopted the conspiracy and became a party thereto after it was partially executed. The trial court was requested, however, to instruct the jury, in substance, that if the alleged conspiracy between Hillmon, Brown and Baldwin was entered into, and if Mrs. Hillmon was advised of that fact when the alleged body of Hillmon was brought back to Lawrence and she discovered that it was not the body of her husband, and if she thereafter brought the present action, then she adopted the conspiracy; and one complaint which is made by the defendant is that this instruction was not given. For reasons already sufficiently indicated no error was committed in refusing the request, however correct it may have been as an abstract proposition of law. The crucial question whether the body last above mentioned was the dead body of the plaintiff's husband or that of some other person was submitted to the jury and the plaintiff's right to recover, so far as the second plea was concerned, was made to turn upon the finding upon that issue. The finding was against the defendant, the jury being satisfied, after listening to the testimony of a multitude of witnesses, that Hillmon was dead and that the body which was returned to Lawrence was his body. Such being the state of the case, it is obvious, we think, that as the material issue presented by the request was submitted, the defendant has no cause to complain of the refusal to submit the issue in the proposed form.

It is urged in behalf of the defendant, and an instruction embodying the proposition was refused by the trial judge, that if the policy in suit was taken out in pursuance of the alleged conspiracy between Hillmon, Brown and Baldwin, and if Hillmon was afterwards accidentally killed in the manner alleged by the plaintiff, while he was engaged in hunting for the corpse of some other person on the plains of southwestern Kansas—then there could be no recovery. One good and sufficient reason why such an instruction ought not to have been given is that no such defense was pleaded in the an-

swer. We have already expressed the opinion that the
made by the second plea was in substance and legal eff
Hillmon was not dead and that the plea cannot be cons
containing dual defenses. Manifestly it ought not to be c
as containing two defenses which are inconsistent, the one
that Hillmon was killed on March 17, 1879, and averring
was still alive, and the other admitting that he was accidenta
as alleged. It is not necessary to assert that the two defen
so utterly irreconcilable that they could not have been emb
the same answer, but it is clear, we think, that if the defen
tended to rely on the defense which it actually pleaded and
the one which was outlined in its instruction, they should ha
pleaded separately so as to advise the plaintiff of the precis
which she would be compelled to meet. A pleading, howev
fully framed, will never be construed by the courts so as to
the unwary, but will be interpreted according to its obvio
and meaning. This action at the time of the last trial ha
pending for more than twenty years, and if the long lapse
and the fact that Hillmon had not been unearthed, had led
fendant company to suspect that he was in fact killed at t
and place alleged, then it should have amended its answer
sired to avail itself of the defense which is suggested by the
instruction—namely, that the policy was void because it wa
out originally in pursuance of a fraudulent purpose. We ca
gard its second plea as embodying any such defense, or as havi
framed by counsel with a view of presenting any such defen
the answer was filed. Aside from this view of the case
much doubt, although it is unnecessary to express a definite
on the point, whether the fact that the policy was solic
pursuance of the alleged conspiracy and with intent at some
the future to make a fraudulent claim thereunder, would con
defense to the action brought by Mrs. Hillmon, who was not
to have been a party to the conspiracy when the policy was s
or to have been in anywise concerned therein. The contrac
surance was founded upon a valuable consideration. It was
unlawful contract. Mrs. Hillmon had a well-recognized in
interest in the insured life and it is not claimed that the pol
issued in consequence of any false or fraudulent represen
Under these circumstances it is not apparent that a mere in
on the part of John W. Hillmon to make a fraudulent clai
under, which was never in fact made, could impair the bene
right of recovery. But be this as it may, the instruction al
ferred to was properly refused.

This brings us to a consideration of some of the exception
admission and exclusion of testimony. The defendant c
offered to show by four witnesses, namely: Phillips, Blyth
and Carr, certain statements which had been made to them b
win at various times between the fall of 1878 and the spring
when the policy in suit was issued. One of these offers was
ment by Baldwin to Crew that he had borrowed money fro
tain bank to pay Hillmon's life-insurance premium; anothe

statement by Baldwin to Carr that "he and Hillmon had a scheme under brogue," and if it worked out "he (Baldwin) was all right;" another was a conversation between Baldwin and Phillips, in which Baldwin inquired, in substance, either in jest or in earnest, if it wouldn't be a good scheme to get insurance on one's life in a large sum and go South and get the body of a greaser and palm it off as your own body; and another was a request made by Baldwin to Blythe to recommend to him some good insurance companies, as he had a friend who wanted to take out some insurance.

These several statements were excluded, and, as we think, properly excluded. Even when there is sufficient evidence in a case to warrant a finding that a conspiracy was entered into by certain of the parties to the action to do some wrongful act, it does not follow that any and every declaration which may have been made by one of the conspirators is admissible even as against his associates in the scheme. Declarations made by one conspirator are not admissible against the others to prove the existence of the conspiracy if such statements are not made in the others' presence. Neither are mere admissions or narrations of what has already taken place admissible, which have no tendency to promote the objects of the conspiracy—the rule being that declarations by individual conspirators to be admissible against their associates must be made in furtherance of the common design while it is under way or in process of execution so as to form properly a part of the *res gestæ*. State *v.* Johnson, 40 Kan., 266, 268; People *v.* McQuade, 110 N. Y., 284, 307; People *v.* Kief, 126 N. Y., 661, 662; Greenleaf on Evidence, vol. 3, sec. 94, 15th ed., and cases there cited. Tested by this rule some of the statements mentioned above, particularly those to Crew and Carr, were merely narrative of past transactions and not admissible for that reason. But for other reasons as well the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by original participation in the scheme or by subsequently adopting it, and in the absence of any such averment we are of opinion that it would have been erroneous to have admitted as against her such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown and Baldwin to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead but was concealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hillmon was accidentally killed at the time and place alleged in the complaint.

Further complaint is made by the defendant because the trial court refused to permit it to show by certain oral testimony and by reading one section of the Criminal Code of the State of Texas, that in the early part of the year 1878, Hillmon had committed an

offense against the laws of the State of Texas by removing that State certain personal property which he had bought and gaged, with an intent to defraud the mortgageor. The admiss of this evidence is urged upon the ground that if admitted it have disclosed a motive for Hillmon's "disappearance and con absence." We are of opinion, however, that the evidence w necessary for this purpose, as a sufficient motive was disclo his disappearance and continued absence, and no further ev in that behalf was needed, if the defendant's theory of the ca right, that Hillmon was not dead when the suit was brough was merely hiding to enable his wife to collect certain insu upon his life. The trial court did not permit the defendant t the purchase of the personal property in question and the r given by Hillmon for its purchase and the fact that it had b moved and not paid for, and that the property was subseq sold, this latter testimony being admitted, as we infer, upo theory that the defendant had the right to trace all of Hill movements and to exploit his actions for some months befo policy in suit was taken out, for the light it might possibly sh his subsequent conduct. The introduction of the Criminal S of Texas and the other evidence was unnecessary to establish a r for Hillmon's disappearance and the exclusion thereof can regarded as a material error.

A further complaint is made because the trial judge said charge with reference to a written statement that had been ma John H. Brown, one of the alleged conspirators, whose depo had also been taken and read by the plaintiff, that said stateme "not affirmative evidence of the truth of any matter therein con and * * * should not be considered * * * except as ing the credibility of the evidence of said Brown given in his d tion." The statement of Brown which was thus mentioned a deposition were entirely irreconcilable as respects the qu whether Hillmon was killed on March 17, 1879, or whether th son killed was another man. The direction which the cour to consider Brown's statement as affecting the credence which s be given to his deposition was in effect, therefore, a direction jury to determine on which occasion Brown had told the whether when his deposition was taken or when an *ex parte* ment was obtained from him by a lawyer by the name of Bu who seems to have been in the employ of the defendant com or at least to have been acting in its behalf and in its interest. are relieved, however, of the necessity of deciding whether the anything misleading in the excerpt from the charge which ha quoted above, by the fact that no exception was taken th and we may reasonably infer from the fact that no exceptio taken, that the direction given by the court that Brown's statement to the defendant's attorney was not "affirmative evid etc., was not deemed to be of much importance or as liable t lead, when the case was submitted to the jury.

In behalf of the defendant company an instruction was which was refused, to the effect that Brown's sworn statement

was in conflict with his deposition might "be considered in connection with the deposition * * * as evidence of the facts therein stated * * * with like effect as the deposition of John H. Brown, and may also be considered as affecting the credibility of said Brown." We think that this instruction was faulty and fully as liable to mislead, as the court's charge on the subject, inasmuch as it required the jury to attach as much weight to the one document as to the other, irrespective of the circumstances under which the two documents had been obtained. There was evidence in the case which tended to show that the *ex parte* statement had been obtained from Brown on September 4, 1879, by much persuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action upon the policy in suit without consideration. On the other hand, Brown's deposition had been taken at a later date in the usual way and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement and asserted that the statements therein contained to the effect that Hillmon was not dead and that another man had been killed were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide, in view of all the circumstances tending to show how the *ex parte* statement had been obtained and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the plaintiff, not as credible testimony, but merely for the purpose of discrediting it—whether they would treat it "with like effect" or consider it as entitled to the same credence as Brown's deposition. If the court had given the defendant's instruction it might well be said, we think, that it had invaded the province of the jury.

Complaint is made in behalf of the defendant company because the trial court did not give an instruction to the effect that proof had been offered which had not been disputed, that the corpse brought back from Medicine Lodge to Lawrence, Kansas, had a perfect set of teeth and that the jury should return a verdict for the defendant if they found from a preponderance of evidence that Hillmon in his lifetime had lost a tooth or had imperfect teeth.

This instruction was in the nature of a commentary on one feature of the evidence which the court, in our judgment, was not required to make, inasmuch as it appears that there was considerable conflict in the evidence as to the kind of teeth which Hillmon had. Some persons, as it would seem from the testimony, might regard him as having good teeth and some as having teeth that were imperfect. Besides, this instruction singled out one fact bearing upon the question whether the corpse that was brought back to Lawrence was Hillmon's body and gave it undue prominence, inasmuch as there were many other facts and circumstances in evidence which had an immediate bearing on the same question and might be regarded as very persuasive evidence that the body returned was Hillmon's dead body. This issue as to whether it was Hillmon's

body or the body of some other person was fairly submitted to the jury by the court's charge, and we do not perceive that a reversible error was committed in the refusal of the defendant's instruction.

Another contention on the part of the defendant company is that the trial court erred in permitting the plaintiff to have six peremptory challenges when the jury was empaneled. With reference to this point it is to be observed that at the time of the last trial there were two actions pending in behalf — the plaintiff upon policies of insurance on the life of her husband—one against the present defendant and the other against the Mutual Life Insurance Company of New York—both of which actions involved the same issue as to whether her husband was dead or alive. Originally there had been three such actions, one against the New York Life Insurance Company, but the latter action had been compromised prior to the last trial. The trial judge ruled that if the two actions which remained to be tried had not already been consolidated for trial under existing orders he would order their consolidation, as the issue in each case was the same and the trial thereof would be exceedingly lengthy. It goes without saying that such order of consolidation was within the discretionary power of the trial judge, and we have no doubt that in the present instance the power was wisely exercised. At all events, it affords no ground for a successful complaint on writ of error. Mutual Life Ins. Co. v. Hillmon, 145 U. S., 285, 293. It is urged, however, by learned counsel for the defendant that as the two actions were consolidated for trial the plaintiff was only entitled to three peremptory challenges. It is to be observed that when this case was before the Supreme Court and was under consideration in the case last cited (145 U. S., 285) that court held that when actions are consolidated such an order does not operate to deprive either defendant of the right to challenge as many jurors peremptorily as he would have been entitled to challenge if the cases had been tried separately, and the former judgment in favor of the plaintiff was reversed because each defendant to the consolidated cause was not allowed three peremptory challenges. If this rule is applied to the defendants—that is to say, if consolidated causes are treated separately, so far as the defendants are concerned, for the purpose of preserving to them their respective rights of challenge—we perceive no reason why the same rule should not be applied to the plaintiff, so as to entitle her to the same number of challenges which she would have been entitled to had the cases been tried separately. The learned judge of the trial court acted in accordance with this view, and in so doing we think that he committed no error. It certainly does not appear that the defendant company was prejudiced by permitting the plaintiff to have six peremptory challenges and the defendants three challenges each, or six in all.

There are some other assignments of error which have been discussed by counsel for the defendant company, all of which have been carefully considered and found to be without merit. None of them, we think, are entitled to as much consideration as the various assignments already considered. This case has been pending, as heretofore stated, for more than twenty-one years, and it would be a

matter of great regret and a reproach to our method of administrating justice, if, after six laborious and lengthy trials, an error had crept into the record of such consequence as to require a reversal. We are satisfied that no such error was committed and it is accordingly ordered that the judgment below be affirmed.

SANBORN, circuit judge, dissenting:

Within six months after the alleged death of Hillmon, John H. Brown, who was with Hillmon when the person, whoever he was, whose body was claimed to be that of Hillmon, was killed, made an affidavit that this body was not Hillmon's, that it was the corpse of another man whom Hillmon had killed, that Hillmon was still living and that this cadaver was produced to enable the plaintiff below to collect the $25,000 insurance on Hillmon's life pursuant to a conspiracy which Baldwin, Hillmon and Brown had formed to accomplish that end. On the trial of this action the plaintiff offered this affidavit in evidence and it was received without objection. She also offered in evidence Brown's deposition taken at a later date than the affidavit, in which he testified that Hillmon was dead and that it was his corpse and not that of another person which was produced by him and Baldwin in March, 1879. At the close of the trial counsel for the defendant requested the court to charge the jury that Brown's affidavit might "be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness." To this request the court responded in its charge in these words: "The oral declarations of said Brown not under oath and the statement signed and sworn to by him are not affirmative evidence of the truth of any matter therein contained or mentioned and they should not be considered by you except as affecting the credibility of the evidence of the said Brown in his deposition" and refused to grant the request. The defendant excepted to the refusal but did not except to the charge.

A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This it seems to me was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue. The argument that the question whether or not the affidavit was evidence of the facts it recited was not presented because the request asserted that the affidavit was evidence with like effect as the deposition seems to me to be too technical and critical. The meaning of the words "with like effect" in this request was that

the affidavit was evidence of the facts which it recited subject to the right of the jury to question, believe or disbelieve its statements in the same way that the deposition was evidence of the facts it related subject to the same right of the jury, and not that the jury must believe the affidavit just as much as they should believe the deposition. The court below had this understanding of the issue which this request presented. It clearly understood that it was an invitation to charge that the affidavit was evidence not only of the lack of credibility of Brown, but also of the facts which it recited and when it came to rule upon the issue it refused the request and directly contradicted the declaration that the affidavit was evidence of the facts it related while it conceded that it might be considered upon the question of the credibility of the witness. The request and the charge seem to me to fairly present one and only one question which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request, the question whether or not the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited because the defendant relied, and had the right to rely upon it for that purpose and because the plaintiff having introduced it was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. Walton *v.* Chicago, St. P., M. & O. R'y Co., 56 Fed., 1006, 1008; 6 C. C. A., 223, 225; 12 U. S. App., 511, 513; National Loan & Investment Co. *v.* Rockland, 94 Fed., 335, 337; 36 C. C. A., 370, 372. The affidavit was persuasive telling evidence upon the crucial questions in the case, upon the identity of the corpse and upon the conspiracy to defraud the defendant and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony that in my opinion it ought not to be disregarded.

2. Sufficient evidence of a conspiracy between Baldwin, Hillmon

and Brown to obtain the insurance upon the life of Hillmon and to produce the body of some other person and collect the insurance was produced at the trial to induce the court to submit this evidence to the jury upon the question whether or not the body produced by Brown and Baldwin was that of Hillmon. In this state of the case the testimony of Phillips that Baldwin inquired of him about insurance, how long it would take a dead body to decompose and said that it would be a good scheme to get insurance and go down South and get the body of a greaser and collect it, the testimony of Blythe, a lawyer, that Baldwin told him that a friend of his wanted to get insurance and inquired of him what companies were good, the testimony of Crew that in February or March, 1879, Baldwin said that his indebtedness to the bank had arisen because he had furnished money to pay the premium on Hillmon's insurance and that he expected to have $10,000 of the insurance money, and the testimony of Carr that about March 10, 1879, Baldwin told him that he and Hillmon had a scheme under "brogue" and that if it worked out right he was all right was offered in evidence. Several of these conversations were had after the insurance on Hillmon's life had been secured and before the killing on March 17, 1879. They were had while Baldwin was engaged in carrying on and working out the conspiracy. All this testimony was rejected by the court. In my opinion this testimony detailed verbal acts and declarations of Baldwin, one of the conspirators, while they were engaged in executing the conspiracy and upon that ground it was competent evidence essential to the maintenance of the case of the defendant. Drake *v.* Stewart, 76 Fed., 140; 22 C. C. A., 104; 40 U. S. App., 173; Smith *v.* National Benefit Society, 123 N. Y., 85; Mutual Life Ins. Co. *v.* Hillmon, 145 U. S., 285, 296, 298.

The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed and the policy was obtained by John W. Hillmon, one of the conspirators, in pursuance of a plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect and any evidence competent to show that it was originally obtained by fraud must be competent against any one who holds it for the policy still has that defect in the hands of the assignee or beneficiary. National Life Ins. Co. *v.* Minch, 53 N. Y., 144; Carpenter *v.* Ins. Co., 1 Story, 57; Burruss *v.* National Life Ass'n, 32 S. E., 49; 1 Biddle on Ins., 448-'9. For these reasons the judgment below should in my opinion be reversed and the case should be remanded to the court below for another trial.

Filed April 3, 1901.

(*Judgment.*)

And on the third day of April, A. D. 1901, in the record of the proceddings of said United States circuit court of appeals, is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1900.

WEDNESDAY, *April* 3, 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error, *vs.* SALLIE E. HILLMON. } No. 1451.

In error to the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that Sallie E. Hillmon have and recover against the Connecticut Mutual Life Insurance Company the sum of twenty dollars for her costs herein and have execution therefor.

April 3, 1901.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing twenty-five pages, numbered from one to twenty-five, inclusive, contain full, true, and complete copies of the motion as to bill of exceptions and the certified copy of the order of the circuit court as to the original exhibits attached thereto, the order of Judge Thayer as to the bill of exceptions and original exhibits, the appearance of Mr. J. W. Green for plaintiff in error, the appearance of Messrs. Seddon and Blair for plaintiff in error, the certified copy of bond on writ of error, the appearance of Mr. Edward S. Isham for plaintiff in error, the appearance of Messrs. Wheat, Atwood, and Hutchings for defendant in error, the appearance of Mr. J. E. McKeighan for plaintiff in error, record entry of December 7, 1900, order of submission, opinion of the United States circuit court of appeals, and judgment of the United States circuit court of appeals, and that the papers, orders, and proceedings above mentioned constitute all the orders, papers, and proceedings in said circuit court of appeals excepting the transcript of record in said cause from the

circuit court of the United States for the district of Kansas, and excepting also the original exhibits mentioned in the certified copy of the order entered in the said circuit court above mentioned in the case of The Connecticut Mutual Life Insurance Company, plaintiff in error, *vs.* Sallie E. Hillmon, No. 1451, December term, 1900, as full, true, and complete as the same remain on file and of record in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Paul, Minnesota, this fourth day of May, A. D. 1901.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals
for the Eighth Circuit.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which The Connecticut Mutual Life Insurance Company is plaintiff in error and Sallie E. Hillmon is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Kansas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of May, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 18147. Supreme Court of the United States. No. 662, October term, 1900. The Connecticut Mutual Life Insurance Co. *vs.* Sallie E. Hillmon. Writ of certiorari.

Supreme Court of the United States, October Term, 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Petitioner, *v.* SALLIE E. HILLMON. } No. 316.

On consideration of the motion that one of the printed copies of the record in this cause from the circuit court of the United States for the district of Kansas as printed under the supervision and direction of the clerk of the circuit court of appeals and presented on the application for the writ of certiorari, together with the transcript now on file of the proceedings had in the circuit court of appeals, may be taken and stand as a return to the writ of certiorari issued herein, and of the argument of counsel thereupon had, as well in support of as against the same,

It is now here ordered by the court that said motion be, and the same is hereby, granted without prejudice.

December 2, 1901.

Office Supreme Court U.
FILED
MAY 10 1901
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
SALLIE E. HILLMON.
Respondent.

663

PETITION FOR CERTIORARI.

GILBERT E. PORTER.
WILLIAM G. BEALE.
JAMES W. GREEN.
EDWARD S. ISHAM.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

THE CONNECTCIUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SALLIE E. HILLMON.
Respondent.

PETITION FOR CERTIORARI.

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, the Connecticut Mutual Life Insurance Company, a corporation organized under the laws of the State of Connecticut, respectfully represents unto your Honors as follows:

1.

Statement.

On the 13th day of July, 1880, the respondent filed, on the law side of the Circuit Court of the United States for the District of Kansas, her certain petition seeking

to recover from your petitioner the sum of $5,000 upon a policy of insurance No. 153,614 alleged in said petition to have been issued by your petitioner on March 4, 1879, upon the life of John W. Hillmon, the husband of the respondent, in which she was named as beneficiary. The respondent in her petition further alleged that both she and the insured had fully complied with all of the terms of the policy, and that the insured had died on the 17th day of March, 1879, and that due proofs of death had been forwarded to the company.

In defense to said suit your petitioner first denied the allegations set forth in respondent's petition; and as a second defense charged as follows:

> "2nd. Said defendant further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons, to the defendant unknown, unlawfully and fraudulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to-wit, in the New York Life Insurance Company, by its policy numbered 134,418 and dated November 30th, 1878, for the sum of ten thousand dollars; in the Mutual Life Insurance Company of New York, by its policy numbered 195,132 and dated Dec. 10th, 1878, for the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy numbered 153,614 and dated March 4th, 1881, for the sum of five thousand dollars.
>
> That thereafter and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin did falsely and fraudulently pretend and represent unto this defendant and others that said Hillmon was dead and did, on or about the months of March and April, A. D. 1879, and thereafter, for the purpose of securing the payment of

said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid." (*Rec.*, 18.)

As a third defense petitioner set up a release by respondent of all claims against petitioner under said policy.

Respondent, in reply, denied the allegations in petitioner's amended answer and charged that the release aforesaid had been obtained by fraud and without consideration, and was void.

Shortly before the issuance of said policy by your petitioner, the New York Life Insurance Company and the Mutual Life Insurance Company of New York each issued a policy for ten thousand dollars upon the life of said John W. Hillmon, made payable to respondent as beneficiary, and after the alleged death of the insured, and at about the time of the institution of this suit, the respondent began separate actions at law in the Circuit Court of the United States for the District of Kansas against each of said Insurance Companies to recover upon the policies aforesaid. Thereafter, on the 14th day of June, 1882, an order was entered in each of the three suits consolidating them for trial, to which action of the court the petitioner and each of the other defendants excepted. (*Rec.*, 25.) Two trials of the three consolidated causes

resulted in disagreements by the jury. On the 29th day of February, 1888, judgments in each were rendered for the plaintiff, which upon writs of error were reversed by the Supreme Court of the United States, and the cases were remanded for new trial (145 U. S., 285). After two more trials of the consolidated causes each resulting in a disagreement by the jury, a compromise was effected between the plaintiff and the New York Life Insurance Company, which resulted in a dismissal of the suit against that company. (*Rec.*, 61.) Thereafter, on the 16th day of October, 1899, an order previously entered consolidating the two remaining suits for trial was continued in force over the objection of each defendant (*Rec.*, 70), and the consolidated causes again came on for trial, resulting in separate judgments for plaintiff against the Mutual Life Insurance Company of New York, and against petitioner. To reverse this latter judgment petitioner sued out a writ of error from the United States Circuit Court of Appeals for the Eighth Judicial Circuit, and upon a hearing in that court before Judges CALDWELL, SANBORN and THAYER the judgment was, on the 2nd day of April, 1901, affirmed by a divided court, Judge SANBORN rendering a dissenting opinion.

2.

Right of Challenge.

At the trial of 1888, after the three causes had by order of court again been consolidated for trial, each defendant upon the impaneling of a jury claimed the right to challenge three persons peremptorily, which claim was, however, denied, and the court ruled that but three per-

emptory challenges could be exercised by the three defendants as a whole. (*Rec.*, 41.) Thus was presented the question which upon writ of error was adjudged by this court in the cases of *Insurance Cos.* v. *Hillmon*, 145 U. S., 285, and the judgments in favor of the plaintiff below were reversed. In delivering the court's opinion Mr. Justice Gray said:

> "But although the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately. Section 819 of the Revised Statutes provides that in all civil cases 'each party shall be entitled to three peremptory challenges; and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section.' Under this provision, defendants sued together upon one cause of action would be entitled to only three peremptory challenges in all. But defendants in different actions cannot be deprived of their several challenges, by the order of the court, made for the prompt and convenient administration of justice, that the three cases shall be tried together. The denial of the right of challenge, secured to the defendants by the statute, entitles them to a new trial."

Upon the impaneling of a jury at the last trial, after the court had renewed the order consolidating this suit with the suit instituted by respondent against the Mutual Life Insurance Company of New York over the objection of each defendant, the following appears in the record:

> "And thereupon, in the progress of the impaneling of the jury, when twelve men had taken their

seats in the jury, who were qualified to serve as jurors in the trial of said causes, the court said: 'It is my opinion that the plaintiff has six peremptory challenges and each of the defendants three.'

To which statement and ruling of the court the defendants and each of them then and there duly excepted.

And thereupon the parties proceeded to exercise their peremptory challenges." (*Rec.*, 136.)

There being two cases, the plaintiff thereupon demanded and was allowed to exercise over the objection of the defendant six peremptory challenges to the one single jury to which the defendant in each case was allowed but three, so that in the present instance the petitioner, The Connecticut Mutual Life Insurance Company, was compelled to try its separate case before a jury to which it was given the right of but three peremptory challenges, while the plaintiff was given the right of six peremptory challenges to the same jury. Judge THAYER, in delivering the opinion of the Court of Appeals upon this branch of the case, said:

"It is urged, however, by learned counsel for the defendant, that as the two actions were consolidated for trial the plaintiff was only entitled to three peremptory challenges. It is to be observed that when this case was before the Supreme Court and was under consideration in the case last cited (145 U. S., 285) that court held that when actions are consolidated such an order does not operate to deprive either defendant of the right to challenge as many jurors peremptorily as he would have been entitled to challenge if the cases had been tried separately, and the former judgment in favor of the plaintiff was reversed because each defendant to the consolidated cause was not allowed three peremptory challenges. If this rule is applied to the defendants, that is to say, if consolidated causes are treated separately so far as the defendants are concerned for the purpose

of preserving to them their respective rights of challenge, we perceive no reason why the same rule should not be applied to the plaintiff so as to entitle her to the same number of challenges which she would have been entitled to had the cases been tried separately. The learned judge of the trial court acted in accordance with this view, and in so doing we think that he committed no error. It certainly does not appear that the defendant company was prejudiced by permitting the plaintiff to have six peremptory challenges and the defendants three challenges each or six in all."

The Circuit Court in permitting plaintiff to exercise to the same jury twice as many peremptory challenges as the defendant in either case, and the Court of Appeals in affirming that decision, have misconstrued and have failed to give proper effect to the decision rendered by this court upon the former hearing of this case, and by consolidating the two suits over the objection of defendant, and by permitting plaintiff to exercise six peremptory challenges, the Circuit Court conferred upon the plaintiff a right and privilege which she could not have enjoyed if a separate trial had been permitted defendant, and at the same time subjected the defendant to a disadvantage which it would not have incurred if it had been allowed a separate trial, upon which alternative it insisted. *Under the foregoing judgment of this court, no single party in any of the consolidated causes is given more than the stututory number of challenges to the same jury.* Petitioner insists that the rulings of the courts below are inconsistent with the principles recognized and established by this court in that judgment, and by the entire body of adjudications touching the subject, the citations of which are presented in the argument submitted in support of this petition. For these reasons, and because a part of

this general question has already been before and received the consideration of this court, and because the rulings of the courts below seem not to be in conformity with the principles by this court established, and because the question itself is one of general application and of great gravity, your petitioner is advised by counsel, and believes, that the decision of the Circuit Court of Appeals ought to be reviewed and said question be finally settled by this court through a writ of *certiorari* herein to said Court of Appeals.

3.

Defense of Conspiracy and Fraud.

The pleadings of the defendant were *designed* to present three defenses, with two of which we are now specially engaged; *one* a general traverse which included a denial that Hillmon *was dead*, and a denial that the corpse presented was his. The *other* a charge of conspiracy to defraud the defendant, which included the procurement of the insurance upon Hillmon for the benefit of his wife, with the *undisclosed purpose* of collecting the insurance by a false pretense of the death of Hillmon and the presentation of a fictitious body as his.

(1) The first defense involved the identity of the body presented as Hillmon's; and the *fact of a conspiracy would have bearing as evidence on that*, for if the identity were otherwise uncertain, the existence of such conspiracy and purpose would increase the probability that the corpse was fictitious.

(2) The subject-matter of the second plea, namely the charge of conspiracy to defraud the defendant, and

the various proceedings in execution of that fraudulent purpose and conspiracy, were associated with a specific provision of the contract of insurance which is given below.* The assignments of error accordingly presented the subject-matter of this second plea in their assertion of its legal effect in at least three aspects, differing from each other merely in their scope and in modifications of outline. They insist:

(*a*) That the existence of the fraudulent purpose and conspiracy, averred by the second defense, and the procurement, receipt and acceptance of the contract as steps in execution of that purpose, in legal effect made the contract void *ab initio*, so that no recovery could be had thereon by anyone claiming thereunder. (Assignment 89. *Rec.*, 1998.)

(*b*) That if, after the procurement of the contract of insurance under the conditions and with the purpose aforesaid, the parties *entered upon the execution* of the fraudulent scheme, the said contract was void for the fraud, and no right of action could be based nor any recovery had thereon, even if it should be true that while actually engaged in the prosecution of the fraudulent and unlawful purpose, or in preparation therefor, the insured did in fact come to his death. (Assignments 88, 92; *Rec.*, 1997, 1999.)

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* "1st. That the contract between this company and the insured is wholly expressed and contained in this policy, and the application therefor, which is a part of said contract, and a copy whereof is hereto annexed, and that the several answers contained in or endorsed upon the said application, are warranted by the insured and assured to be true in all respects, and *that if this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void.*" (*Rec.*, 6.)

(c) That if before the institution of this suit the plaintiff below came to know that the policies of insurance had been so fraudulently procured and with such intent and purpose, and that they had been received and accepted in execution to that extent of such fraudulent design, and that the persons so conspiring together proceeded further in execution of said design, and that the corpse presented was falsely represented to be the body of Hillmon, then by the institution of this suit she thereby adopted and made in legal effect her own all the acts performed by the conspirators in furtherance of the unlawful conspiracy with like legal effect as to her as if she had been one of the parties originally conspiring. (Assignments 87,91. *Rec.*, 1997, 1999.)

It is obvious, therefore, that in legitimate support of the defenses presented by the pleadings, it was important to the defendants in the several cases to establish the unlawful and fraudulent purpose and the conspiracy therefor averred in their plea.

That a *prima facie* case of fraud and conspiracy was established by the evidence offered was recognized by the Circuit Court in its charge to the jury. It instructed them that they might consider the evidence bearing upon the fact of such conspiracy; but it limited the application by the jury of the *fact* of such a conspiracy, if it should find one from the evidence, to its bearing upon the identity of the corpse presented, as tending to increase the probability that the corpse so presented was fictitious. The charge to the jury contained the following:

> "If you believe from the evidence that John W. Hillmon, Brown and Baldwin did conspire as charged by the defendants and, pursuant to such combina-

tion, the policies of insurance were obtained, and that Hillmon did not die in March, 1879; that is to say, that it was not the body of Hillmon that was brought to Lawrence in the early days of April, 1879, then your verdicts should be for the defendants. Even if you should find that there was no lawful conspiracy or fraud or fraudulent intent as charged by the defendants, but should further find that the body brought to Lawrence as aforesaid was not the body of Hillmon, your verdicts in such event should be for the defendants. In other words, it is not necessary for defendants to prove a conspiracy or fraud or fraudulent intent in order to defeat a recovery. On the other hand, even if you should find that there was a conspiracy between the three men, as charged by the defendants, but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdicts in such event should be for the plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in the case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, then it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse." (*Rec.*, 1921.)

The opinion of the Circuit Court of Appeals upon this question will be found in the appendix at pages 33–38 *post*.

By effect of this language in its charge, and its r
to give the instructions upon this subject speci
to each of which exceptions were taken by the defendant (Rec.)
asked by the defendant, the Circuit Court denie
excluded from the case the defense presented by th
ond plea of the defendant, as stated in the three specifi-

cations above given. The subject-matter of the second plea, namely, the fact of fraudulent purpose and conspiracy as a defense to the contract of insurance making it void, was excluded by the Circuit Court and by the Circuit Court of Appeals, and apparently upon these two grounds: first, that plaintiff, the beneficiary under the policy, was not affirmatively charged in pleading as one of the co-conspirators, and second, because the plea inadequately presented as a defense the combination to procure the policy for the undisclosed purpose of fraud, and was insufficient to advise the plaintiff that she would meet defense of that character. The assignments of error involved your petitioner's claim of right to present the fraudulent purpose and conspiracy, charged in said second plea, as a substantial defense to said contract of insurance making it void for fraud.

Your petitioner is advised by counsel that the above ruling by the Circuit Court and by the Circuit Court of Appeals in effect deprives your petitioner and all other insurance companies of the right to interpose the defense of fraud in the procurement of a policy, unless the beneficiary named in said policy is charged and can be proved to have participated therein. Your petitioner avers that such ruling is in conflict with former decisions of this court, and with decisions of the Circuit Court of Appeals for other circuits, the citations of which will be found in the argument filed in support of this petition, and that the question is one of general jurisprudence, and of such gravity, importance and frequent occurrence as to justify a review of the decision of said Circuit Court of Appeals by this court.

4.

Exclusion of Conspiracy Evidence.

If it was the right of the defendant to establish in legitimate support of its defenses the unlawful purpose and conspiracy alleged in the plea against the plaintiff *at all*, which cannot be doubtful, and is for one purpose conceded, it was then its right in doing so to proceed under all the rules of evidence applicable to the introduction of proof upon that subject. Having established in the court below a *prima facie* case of conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin, defendant offered to prove by the witnesses E. D. F. Phillips, J. H. Blythe, James S. Crew and Alexander Carr certain acts and declarations of Baldwin, one of the alleged co-conspirators, in contemplation of and preparation for the fraudulent purpose and the conspiracy for its consummation, and some of them in furtherance of its execution. (*Rec.*, 1603–1619, 1809.) Because the plaintiff was not charged as a co-conspirator, the Circuit Court excluded the evidence, and in that connection said:

> "The acts and the declarations of the conspirators are not admissible for the purpose of establishing the conspiracy; but the conspiracy having been established and a *prima facie* case made, then the declarations or the acts of one conspirator are admissible, *not against a party who is not a party to that conspiracy, but as against each other*, and that upon the theory that the acts and declarations of one of the conspirators are pursuant to the conspiracy, and they must be within those lines; they must be in aid of the conspiracy; then the acts and the declarations of one conspirator in aid of the carrying out of the conspiracy are evidence against the others, *and the application of that would be confined*

necessarily to a proceeding against one of the conspirators, or a proceeding in which one of the conspirators was a party. Consequently I believe that the declarations of Levi Baldwin have no proper place in this case." (*Rec.*, 1611.)

Judge THAYER, in delivering the opinion of the Court of Appeals, said:

"But for other reasons as well the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by originial participation in the scheme or by subsequently adopting it, and in the absence of any such averment we are of opinion that it would have been erroneous to have admitted as against *her* such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown and Baldwin, to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead but was concealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hillmon was accidentally killed at the time and place alleged in the complaint."

And upon the same subject Judge SANBORN, in his dissenting opinion, said:

"The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed and the policy was obtained by John W. Hillmon, one of the conspirators, in pursuance of a

plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect, and any evidence competent to show that it was originally obtained by fraud must be competent against anyone who holds it, for the policy still has that defect in the hands of the assignee or beneficiary. *National Life Ins. Co.* v. *Minch*, 53 N. Y., 144; *Carpenter* v. *Ins. Co.*, 1 Story, 57; *Burruss* v. *National Life Ass'n.*, 32 S. E., 49; 1 Biddle on Ins., 448–9."

It was conceded by the Circuit Court that the alleged conspiracy might be proved so as to be used as evidence against the plaintiff as bearing upon the identity of the corpse presented. Evidence sufficient to make the *prima facie* case, which is a preliminary condition to the admission of the independent acts or declarations of co-conspirators against each other, was supplied to the satisfaction of the trial court. The right to supplement and reinforce the evidence already in followed of necessity. The proof, sufficient in the mind of the court to make the *prima facie* case, might not dispense in the minds of the jury with the importance of the confirmatory evidence which the defendant had become entitled to introduce. It was the fact of the conspiracy that was admissible in evidence against her, and the fact of the conspiracy itself being admissible against her involved the subordinate conclusion that all lawful evidence establishing that fact was of necessity equally admissible. The evidence offered and rejected was evidence of the fact of the conspiracy, which was itself the fact held admissible against the plaintiff. Acts and declarations, therefore, admissible to establish the conspiracy between the co-conspirators were admissible in establishing the *fact* which was admissible against the plaintiff. Whether these matters of evidence were admissible against the plaintiff or not was logically

involved in the prior determination that the fact of conspiracy was admissible against her at all. A jury not convinced by the *prima facie* case recognized by the court might well have been convinced by the evidence that was excluded of the acts and declarations of one of the co-conspirators.

Your petitioner is advised by counsel that the decision of the Circuit Court in excluding this evidence, and the affirmance of that decision by the Circuit Court of Appeals, are not in accordance with the decisions of the Supreme Court of the United States, and particularly the rulings of this court in the former case between these parties, reported in 145 U. S., 285, or of the Supreme Court of Kansas, and the universally established rules of evidence upon this question, as stated in the argument filed in support of this petition, and for these reasons, and because the question itself is one of general jurisprudence and of gravity and importance, your petitioner is advised by counsel, and believes, that the decision of the Circuit Court of Appeals ought to be reviewed by this court.

5.

Brown Affidavit.

After the supposed death of John W. Hillmon, John H. Brown, one of the alleged conspirators, on the 4th day of September, 1879, made a sworn statement in writing, in which he stated that he, with John W. Hillmon and Levi Baldwin, had conspired to defraud the Insurance Companies by procuring insurance policies upon Hillmon's life, with the view to collecting said insurance by palming off upon the Insurance Companies a dead

body, falsely pretending it to be that of Hillmon; and that the body presented in these cases by the plaintiff was not the body of Hillmon, but a false body procured and presented in pursuance of that conspiracy. (*Rec.*, 1284–6.)

The plaintiff on the trial below read in evidence the deposition of John H. Brown, wherein he stated, in substance, that the above affidavit made by him was false. Subsequently, during the cross-examination of a witness called by defendant, the plaintiff offered this affidavit in evidence, generally and without any limitations upon its scope, and it was so admitted without objection from defendant. (*Rec.*, 1284.)

The defendant below requested the court to give the following instruction:

> "No. 44. The jury are instructed that the statement signed and sworn to by John Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness." (*Rec.*, 1914.)

The court refused to give this instruction, to which refusal defendant duly excepted (*Rec.*, 1914), and in lieu thereof instructed the jury as follows (*Rec.*, 1923):

> "The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you. The oral declarations of said Brown not under oath, and the statement signed and sworn to by him, are

> not affirmative evidence of the truth of any matter therein contained or mentioned, and they should not be considered by you excepting as affecting the credibility of the evidence of the said Brown given in his deposition, and in determining this matter of credibility you should consider the testimony of both sides, showing the circumstances under which Brown made said declarations and statement, as well as all other evidence bearing on that question."

After having requested the court below to give the above instruction embodying what the defendant deemed to be a correct application of the law to the question of the weight to be given the Brown affidavit, so offered in evidence by the plaintiff herself, and after having duly excepted to the court's refusal to give the same, it was not necessary for the defendant, in order to preserve the exception, to again except to that portion of the court's charge which embodied a contrary statement of the law. Such had been the rule of the Circuit Court of Appeals for the Eighth Circuit announced in the case of *Long-Bell Lumber Company* v. *Stump*, 86 Fed., 574; 30 C. C. A., 260.

Judge THAYER, in delivering the opinion of the Court of Appeals, said, with reference to the objection sought to be raised in that court by the petitioner:

> "We are *relieved, however, of the necessity of deciding* whether there was anything misleading in the excerpt from the charge which has been quoted above, by the fact *that no exception was taken thereto*, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not '*affirmative evidence*,' etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury."

In the case of *Long-Bell Lumber Co.* v. *Stump*, *supra*, the majority of the court, viz., Judges SANBORN and PHILLIPS, concurred in a rule directly opposed to the rule asserted by the majority of the court, viz., Judges CALDWELL and THAYER, in the present case, Judge SANBORN adhering to his opinion in the former case, and dissenting in the present case. It is thus apparent that if by any contingency, as might well have happened through illness or otherwise, out of the various judges entitled to sit in and compose the appellate court, there had been a single change in its constitution [as, for instance, if Judge PHILLIPS had been sitting in the place of Judge CALDWELL or Judge THAYER] the decision would probably have been different.

In his dissenting opinion upon this point Judge SANBORN said:

> "A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This, it seems to me was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue.
>
> * * * * *
>
> The request and the charge seem to me to fairly present one and only one question which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request, the question whether or not

the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiesence in the introduction of testimony and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited because the defendant relied, and had the right to rely upon it for that purpose and because the plaintiff having introduced it was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. *Walton* v. *Chicago, St. P., M. & O. Ry. Co.*, 56 Fed., 1006, 1008; 6 C. C. A., 223, 225; 12 U. S. App., 511, 513; *National Loan & Investment Co.* v. *Rockland*, 94 Fed., 335, 337; 36 C. C. A., 370, 372. The affidavit was peruasive telling evidence upon the crucial questions in the case, upon the identity of the corpse and upon the conspiracy to defraud the defendant, and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony that in my opinion it ought not to be disregarded."

It is obvious, therefore, that upon this subject the rule of procedure in the Eighth Circuit is unsettled and uncertain. We do not understand the suggestion that exception to the language of the charge was omitted because the matter "was not deemed to be of much importance or as liable to mislead." The importance of the issue to the plaintiff is vividly illustrated by the language in the dissenting opinion just quoted; and the point had been under the rules of the court then in force effectively preserved by the careful request of an instruction and exception to its refusal. It is obvious that whether one rule of procedure or the other should determine the right of your petitioner has depended not upon any principle or rule settled in that circuit, but upon mere hap and chance in the composition of the court; so that the rule announced one day upon which litigants are presumed to rely is announced to be otherwise on another day, and they are caught in a situation where their gravest interests are involved and overturned and into which they are presumably led by following a path declared by the court to be legitimate and correct.

Your petitioner is advised by counsel that the Circuit Court of Appeals, in refusing to consider and adjudicate the question thus presented by that portion of the charge of the Circuit Court above set forth, has failed to observe a rule of practice which had been established by a former decision of that court; and because the petitioner has been drawn into its present position by its conformity to the rule in force at the time of the trial, and because the decision in this case has made that rule of practice uncertain in that circuit, your petitioner believes that the decision of the Circuit Court of Appeals ought to be reviewed and that the question so presented should be adjudicated by this court.

6.

Impeachment of the Release.

After the alleged death of John W. Hillmon on March 17, 1879, and after the beneficiary under the policy had seen the corpse produced as the body of the insured and had been informed by John H. Brown that he had made the sworn statement, known as the "Brown affidavit" (which is the document already referred to in paragraph 5), the beneficiary executed and caused to be delivered to your petitioner in Kansas the following release (*Rec.*, 585):

> "LEAVENWORTH, Kansas, Sept, 15, 1879.
>
> In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the Connecticut Mutual Life Insurance Company by reason of policy No. 153,614, issued by said company, dated March 4th, 1881, and for the sum of five thousand dollars, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full, and order the dismissal of any and all suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.
>
> (Signed) SALLIE E. HILLMON."

Attest:
W. J. BUCHAN,
JOHN H. BROWN.

This release was specifically pleaded by defendant as a defense in the court below. Plaintiff, in her reply, alleged that the release was void for want of consideration and because obtained through fraudulent inducement and representations. (*Rec.*, 18–19, 20–22.) Upon the trial below, in the course of the direct examination of J. W. Green, one of the witnesses called by plaintiff, the release

was offered in evidence by the plaintiff herself without any limitation of purpose and was admitted without objection from defendant. Nevertheless both before and after the actual offer of the instrument in evidence, the plaintiff sought to introduce testimony to avoid and impeach the release for asserted want of consideration and for fraud in procuring it. To the introduction of such evidence the defendant repeatedly and persistently interposed objections on the ground that the evidence was *incompetent*, irrelevant and immaterial. (*Rec.*, 576–580.) After these repeated objections had again and again been overruled by the court, and in order not to unnecessarily encumber the record, the defendant interposed a general objection to all evidence of this character in the following manner:

> "Q. Now, then, I will get you to state to the jury what conversation there was at that time between you and Mr. Munn and Mr. Buchan as to giving him this kind of an instrument?
>
> The defendants object to the question as *incompetent*, irrelevant and immaterial, and desire it understood that all testimony upon this subject is under their objection. The court overruled the objection, to which action and ruling of the court the defendants at the time duly excepted and still except." (*Rec.*, 580.)

This release was executed and delivered in the State of Kansas, and the following are sections of chapter 21 of the Statutes of Kansas of 1868, at page 183:

> "Section 6. The use of private seals in written contracts (except the seals of corporations) is abolished, and the addition of a private seal to an instrument of writing shall not affect its character in any respect.
>
> Section 7. *All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, shall import a consideration.*

> Section 8. The want or failure, in the whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

By force of this statute the contract of release executed by the plaintiff below imported a consideration and became in legal effect, under the law of Kansas, the equivalent of a contract under seal, at common law, as shown in the argument filed in support of this petition.

The rule of law is well settled by this court that in an action upon a sealed instrument *in a Federal court of law*, the defense of failure of consideration or of fraud in the consideration for the purpose of avoiding the obligation, is not admissible as between parties and privies to the deed. Such defense is equitable in character, and, to be made available against an instrument under seal, that is, an instrument importing a consideration, resort must be had to the courts of equity. The law is equally well-settled by this court that state statutes like section 8 of that of Kansas above referred to, which authorize such an equitable defense to be interposed in an action *in the state courts* upon any contract executed in that state, do not confer such power upon the courts of the United States as is shown in the argument filed in support of this petition.

In spite of these well-established principles of law, the Circuit Court permitted the plaintiff to introduce evidence over the objection of defendant for the purpose of impeaching for fraud and want of consideration an instrument which, by the Kansas statute, is made equivalent to a contract under seal, at common law, and which could only be attacked in the Federal courts by a proceeding in equity.

Your petitioner assigned as error in the Court of Appeals the admission of this evidence by the Circuit Court, and argued the question in full both orally and in its brief, but the objection of your petitioner was overruled. Such ruling by the Circuit Court and its affirmation by the Court of Appeals are a direct impalement upon one horn or the other of a dilemma created by the decisions of this court, for they either hold that a contract importing a consideration may be impeached and avoided in a Federal court of law for want of consideration or because obtained by fraudulent inducement, which is in full contravention of direct adjudications of this court upon that point; or they hold that state statutes conferring such power upon state courts operate equally to confer it upon Federal courts sitting in such states, which is equally in full contravention of direct adjudications of this court upon that point. It is submitted that after the plaintiff in the Circuit Court had admitted the execution of the instrument by her pleading, and had herself voluntarily introduced it in evidence and had testified that she had executed and delivered it, she was absolutely concluded thereby in this action at law, and could set up no claim of right as against it; and the court should not have admitted any evidence impeaching the release, and at the conclusion of the plaintiff's case should have sustained the demurrer of the defendant to the evidence (*Rec.*, 836, 854), and, as requested by the defendant, should in its charge have instructed the jury to find a verdict for the defendant (*Rec.*, 1910).

Your petitioner is advised by counsel that the Circuit Court, in admitting this evidence over the objection of defendant, and the Court of Appeals in affirming the judgment, appear to have proceeded in direct contravention of

the decisions of this court, and the rules of law established thereby, as above set forth, and as shown in the argument filed in support of this petition, and for these reasons your petitioner believes that the decision of the Circuit Court of Appeals ought to be reviewed by this court.

7.

Lapse of Time not Evidence.

Hillmon paid the first premium upon the policy when issued, and this kept it alive for a certain period when by its terms the insurance would expire for non-payment of further premium. (*Rec.*, 147, 153.) Plaintiff had no right of action upon the policy unless Hillmon died before that date. Proof of his prior death was an essential and vital element of her case. In her pleading she alleged that he died March 17, 1879, at Crooked Creek from a gunshot wound inflicted by John H. Brown (*Rec.*, 15), and at the trial it was not contended that, if dead at all, he died at any other time or in any other manner. It was conceded that a man was killed by a gunshot wound at the time and place alleged, but it was denied that Hillmon was that man, and upon this branch of the case the question to be tried by the jury was one of identity. Plaintiff produced evidence tending to show that the man killed was Hillmon, and that it was his corpse which was found at Crooked Creek. Defendants on the other hand produced a volume of evidence tending to show that the man killed was *not* Hillmon, and that the corpse was not his, but was that of a man murdered by him *in pursuance of the fraudulent scheme* against the insurance companies. In this state of the evidence, the circumstance that Hill-

mon had not been seen nor heard from since March 17, 1879, became entirely immaterial as an evidentiary fact bearing upon the identity of the man killed at Crooked Creek. It no more tended to prove that he was dead than it tended to *prove his voluntary concealment because of his guilt and participation in the conspiracy;* for the absence was abundantly explained by the evidence of his fraudulent scheme against the insurance companies. The continued absence had no evidentiary weight one way or the other upon the question whether it was Hillmon or a victim of Hillmon's fraudulent scheme who was killed at Crooked Creek. It should have been given no weight in favor of either hypothesis. Defendants, therefore, asked the Circuit Court to give the jury the following instruction:

> "No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case, for the reason that the real question in this case is, whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown, at Barber County, on the 17th day of March, 1879." (*Rec.*, 1909.)

The court refused to do so, to which refusal the defendants duly excepted (*Rec.*, 1909), and charged the jury on this point as follows:

> "As bearing upon the question whether John W. Hillmon died as claimed by the plaintiff and whether it was his corpse that was brought to Lawrence, you are entitled to consider the fact, if it be one, that he has not been seen nor heard from alive since the 17th or 18th of March, 1879, at which time it is claimed he was killed. The unexplained absence of a person from his home and friends without being heard from, if continued for a sufficient length of time, may become evidence tending to show that he is dead, and it may be taken in connection with other evidence tending to show that he died at a certain

time and place. For some purposes, such as the settlement of estates and the like, the law adopts the presumption that an unexplained absence of seven years without tidings being received from the absent one is evidence of his death. The weight to be given to such continued absence depends upon circumstances. If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death." (*Rec.*, 1920.)

Your petitioner assigned as error in the Court of Appeals the refusal of the Circuit Court to give this instruction, and argued the question in full both orally and in its brief. By that portion of its charge above quoted the Circuit Court in effect told the jury that Hillmon's continued absence since March 17, 1879, constituted evidence (to be considered in connection with the other evidence upon the point) tending to establish the essential fact that Hillmon died at *that particular time*, and that the motive, if any, for voluntary concealment was to be considered only in determining its *weight* as such evidence. Your petitioner is advised that the action of the Circuit Court in so charging the jury and in refusing to give the instruction above set forth, and the action of the Circuit Court of Appeals in affirming the judgment, were repugnant to the previous decision of said Circuit Court of Appeals in the case of *Northwestern Mutual Life Ins. Co.* v. *Stevens*, 71 Fed. Rep., 258, and to the decision of this court in *Davis* v. *Briggs*, 97 U. S., 628, and for this reason and because the question itself is one of gravity and general importance, your petitioner believes that the decision of the Circuit Court of Appeals ought to be reviewed and said question finally settled by this court.

* * *

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this court, a full and complete transcript of the record, and of all proceedings of the said Circuit Court of Appeals in the said case therein, entitled *The Connecticut Mutual Life Insurance Company* v. *Sallie E. Hillmon*, No. 1,451, to the end that the said case may be reviewed and determined by this court, and that the said judgment of the said Circuit Court and the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court.

Your petitioner also prays that in case such writ be granted an order may be entered that the transcript of the record of the Circuit Court of Appeals herewith filed shall be taken and considered as a return to the writ.

And your petitioner will ever pray, etc.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,

By GILBERT E. PORTER,
EDWARD S. ISHAM.
Its Attorneys.

GILBERT E. PORTER,
WILLIAM G. BEALE,
JAMES W. GREEN,
EDWARD S. ISHAM,
Of Counsel.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS, } ss.
COUNTY OF COOK.

Buell McKeever, being duly sworn, says that he is one of the attorneys and the agent in this behalf for the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof, and that the same is true in substance and in fact, except as to the matters which are therein stated to be upon information and belief, and that as to those matters he believes said petition to be true.

BUELL MCKEEVER.

Subscribed and sworn to before me this fourth day of May, A. D. 1901.

WALTER J. GUNTHORP,
Notary Public.

[NOTARIAL SEAL.]

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS.

Eighth Circuit.

No. 1,451.—December term, A. D. 1900.

The Connecticut Mutual Life Insurance Company, *Plaintiff in Error*, vs. Sallie E. Hillmon, *Defendant in Error*. } In Error to the Circuit Court of the United States for the District of Kansas.

Mr. J. E. McKeighan and Mr. Edward S. Isham (Mr. Buell McKeever, Mr. J. W. Green, Hon. Shepard Barclay and Mr. M. F. Watts were with them on the brief) for the plaintiff in error.

Mr. C. F. Hutchings and Mr. L. B. Wheat (Mr. John H. Atwood was with them on the brief) for the defendant in error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges

This is an action on a policy of life insurance in the sum of $5,000, which was issued March 4, 1879, on the life of John W. Hillmon, for the sole use and benefit of his wife, Sallie E. Hillmon, the plaintiff below and the defendant in error here. The case has had an eventful history. John W. Hillmon was killed, as it is claimed, on March 17, 1879, by the accidental discharge of a gun at a camp near Medicine Lodge, in a portion of Kansas which was then sparsely settled. The defendant company alleged fraud and refused to pay the policy, claim-

ing that Hillmon was still living and that the body produced as being his, was the corpse of another man, who had either been murdered by Hillmon or was a *cadaver* that had been found by him somewhere on the plains of Southwestern Kansas. The action was brought on August 19, 1879, and has been tried, as we are advised, six times before as many different judges and juries, resulting in a mistrial on each occasion except the last and a trial which took place in 1888, on both of which occasions the plaintiff below prevailed.

The defense to the action that was relied upon principally on the last trial is set forth in the defendant's answer, after a general denial of all of the allegations of the complaint, in the following language:

"2nd. Said defendant further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons, to the defendant unknown, unlawfuly and fraudulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to-wit: in the New York Life Insurance Company, * * * the sum of ten thousand dollars; in the Mutual Life Insurance Company of New York, * * * the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy, * * * the sum of five thousand dollars.

"That thereafter, and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin, did falsely and fraudulently pretend and represent unto this defendant and others that said Hillmon was dead, and did, on or about the months of March and April, A. D. 1879, and thereafter for the purpose of securing the pay-

ment of said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid."

In addition to the foregoing plea, the answer contained another plea to the effect that the plaintiff had released the cause of action sued upon, for a sufficient consideration, by a writing which was executed by her on March 4, 1881. To the plea of release the plaintiff replied, in substance, that it was obtained without consideration by fraud; and the facts constituting the fraud were specifically set forth.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

During the progress of the trial and in its final charge to the jury, the lower court ruled, in substance, that the defendant company had not averred in its answer that Sallie E. Hillmon, the sole beneficiary in the policy, was a party to the alleged conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin to defraud it and other life insurance companies; that as her connection with the conspiracy had not been averred it could not be claimed that she was a party thereto; that the substantive defense which was pleaded in the answer was, that Hillmon was not dead, for which reason no liability had accrued on the policy when the suit was filed; that the principal ques-

tion in the case was whether John W. Hillmon died, as claimed by the plaintiff, in consequence of a gunshot wound inflicted on March 17, 1879, and that the existence of the alleged conspiracy between Hillmon, Brown and Baldwin was only relevant to strengthen the probability that Hillmon was still living. In various ways exceptions were reserved to these rulings, which will collectively form the first subject for consideration.

It is manifest, we think, from an inspection of the answer, that the trial court was right in holding that the defendant had not pleaded that Mrs. Hillmon was a party to the alleged conspiracy between the three persons last above named, and such seems to have been the view that was entertained at the trial, by counsel for the defendant company, for, in his opening statement to the jury, after alluding to a remark which had been made by the plaintiff's attorney in his opening address, to the effect that the defendant had never claimed that Mrs. Hillmon was a party to any conspiracy—he said: "What evidence will be deduced on that point is for you gentlemen to determine; what we say on *paper* is that John W. Hillmon, Levi Baldwin and John H. Brown did conspire to defraud these insurance companies." This was an admission that the defendant had only charged in its answer that the three parties last named had conspired to defraud the company and that it had not ventured to commit itself to the statement that Mrs. Hillmon had ever participated therein.

It is further manifest that the trial court was right in holding that the fact that John W. Hillmon was not dead when the action was brought, but was concealing himself somewhere, constituted the substantial defense pleaded in that part of the answer which is quoted above; that

the issue tendered by the plea was whether he was dead or alive, and that such issue presented the principal question of fact for the consideration of the jury. It will not be presumed that the second plea contained in the answer was intended to state more than one defense, for which reason the first paragraph thereof, which alleges in effect that Hillmon, Brown and Baldwin had entered into a conspiracy to defraud certain insurance companies, among others the defendant, cannot be regarded as stating a substantive defense to the plaintiff's cause of action, but that averment must be treated as being merely introductory to the fact afterwards alleged that Hillmon was not dead. As we construe the plea, this latter allegation constitutes the defense on which the pleader intended to rely. We do not perceive, therefore, that the lower court committed any error in the several rulings last aforesaid, or in making the statement that the existence of the conspiracy between the parties named in the plea was not a controlling issue, but at most was only relevant in so far as its existence, if shown, might tend to strengthen the probability that Hillmon was still living. It was not only *not* alleged that Mrs. Hillmon ever became a party to the conspiracy, but, as we understand the contention of defendant's counsel, the evidence upon which they now rely to show her possible connection with the conspiracy is the fact that she saw the remains of the man who was shot near Medicine Lodge after they had been exhumed and brought back to Lawrence, Kansas, where the plaintiff resided. The argument is that as she saw the remains of the person who had been shot, not immediately after the occurrence, but at Lawrence, Kansas, some weeks after the alleged shooting, she *probably* discovered that they were not the remains of her

husband, and that by suing on the policy after she had made such discovery, she attempted to avail herself of the fruits of an existing conspiracy, and by so doing became a party thereto. It is obvious, however, that if she did make the supposed discovery, as counsel assume, and if the jury had been satisfied of that fact (*as they evidently were not*), then, as John W. Hillmon was *not* dead, her right to recover on the policy was defeated by the very evidence, and the only tangible evidence, as it seems, which is now depended upon to show that she adopted the conspiracy and became a party thereto after it was partially executed. The trial court was requested, however, to instruct the jury, in substance, that if the alleged conspiracy between Hillmon, Brown and Baldwin was entered into, and if Mrs. Hillmon was advised of that fact when the alleged body of Hillmon was brought back to Lawrence and she discovered that it was not the body of her husband, and if she thereafter brought the present action, then she adopted the conspiracy; and one complaint which is made by the defendant is that this instruction was not given. For reasons already sufficiently indicated no error was committed in refusing the request, however correct it may have been as an abstract proposition of law. The crucial question whether the body last above mentioned was the dead body of the plaintiff's husband or that of some other person *was* submitted to the jury, and the plaintiff's right to recover, so far as the second plea was concerned, was made to turn upon the finding upon that issue. The finding was against the defendant, the jury being satisfied, after listening to the testimoey of a multitude of witnesses, that Hillmon was dead and that the body which was returned to Lawrence was his body. Such being the

state of the case, it is obvious, we think, that as the material issue presented by the request was submitted, the defendant has no cause to complain of the refusal to submit the issue in the proposed form.

It is urged in behalf of the defendant, and an instruction embodying the proposition was refused by the trial judge, that if the policy in suit was taken out in pursuance of the alleged conspiracy between Hillmon, Brown and Baldwin, and if Hillmon was afterwards accidentally killed in the manner alleged by the plaintiff, while he was engaged in hunting for the corpse of some other person on the plains of Southwestern Kansas—then there could be no recovery. One good and sufficient reason why such an instruction ought not to have been given is that no such defense was pleaded in the answer. We have already expressed the opinion that the defense made by the second plea was in substance and legal effect that Hillmon was not dead and that the plea cannot be construed as containing dual defenses. Manifestly it ought not to be construed as containing two defenses which are inconsistent, the one denying that Hillmon was killed on March 17, 1879, and averring that he was still alive, and the other admitting that he was accidentally shot, as alleged. It is not necessary to assert that the two defenses were so utterly irreconcilable that they could not have been embodied in the same answer, but it is clear, we think, that if the defendant intended to rely on the defense which it actually pleaded and also on the one which was outlined in its instruction, they should have been pleaded separately so as to advise the plaintiff of the precise issues which she would be compelled to meet. A pleading, however skillfully framed, will never be construed by the courts, so as to mislead the unwary, but

will be interpreted according to its obvious sense and meaning. This action at the time of the last trial had been pending for more than twenty years, and if the long lapse of time and the fact that Hillmon had not been unearthed, had led the defendant company to suspect that he was in fact killed at the time and place alleged, then it should have amended its answer if it desired to avail itself of the defense which is suggested by the refused instruction—namely, that the policy was void because it was taken out originally in pursuance of a fraudulent purpose. We can not regard its second plea as embodying any such defense, or as having been framed by counsel with a view of presenting any such defense when the answer was filed. Aside from this view of the case we very much doubt, although it is unnecessary to express a definite opinion on the point, whether the fact that the policy was solicited in pursuance of the alleged conspiracy and with intent at some time in the future to make a fraudulent claim thereunder, would constitute a defense to the action brought by Mrs. Hillmon, who was not alleged to have been a party to the conspiracy when the policy was solicited or to have been in anywise concerned therein. The contract of insurance was founded upon a valuable consideration. It was not an unlawful contract. Mrs. Hillmon had a well-recognized insurable interest in the insured life, and it is not claimed that the policy was issued in consequence of any false or fraudulent representations. Under these circumstances it is not apparent that a mere intention on the part of John W. Hillmon to make a fraudulent claim thereunder, which was never in fact made, could impair the beneficiary's right of recovery. But, be this as it may, the instruction above referred to was properly refused.

This brings us to a consideration of some of the exceptions to the admission and exclusion of testimony. The defendant company offered to show by four witnesses, namely; Phillips, Blythe, Crew and Carr, certain statements which had been made to them by Baldwin at various times between the fall of 1878 and the spring of 1879, when the policy in suit was issued. One of these offers was a statement by Baldwin to Crew that he had borrowed money from a certain bank to pay Hillmon's life insurance premium; another was a statement by Baldwin to Carr that "he and Hillmon had a scheme under brogue," and if it worked out "he (Baldwin) was all right;" another was a conversation between Baldwin and Phillips, in which Baldwin inquired, in substance, either in jest or in earnest, *if it would'n't be a good scheme to get insurance on one's life in a large sum and go south and get the body of a Greaser and palm it off as your own body;* and another was a request made by Baldwin to Blythe to recommend to him some good insurance companies as he had a friend who wanted to take out some insurance.

These several statements were excluded, and, as we think, properly excluded. Even when there is sufficient evidence in a case to warrant a finding that a conspiracy was entered into by certain of the *parties* to the action to do some wrongful act, it does not follow that any and every declaration which may have been made by one of the conspirators is admissible even as against his associates in the scheme. Declarations made by one conspirator are not admissible against the others to prove the existence of the conspiracy, if such statements are not made in the others' presence. Neither are mere admissions or narrations of what has already taken place admissible,

which have no tendency to promote the objects of the conspiracy—the rule being that declarations by individual conspirators to be admissible against their associates must be made in furtherance of the common design while it is under way or in process of execution so as to form properly a part of the *res gestæ*. *State* v. *Johnson*, 40 Kan., 266, 268; *People* v. *McQuade*, 110 N. Y., 284, 307; *People* v. *Kief*, 126 N. Y., 661, 662; Greenleaf on Evidence, Vol. 3, Sec. 94, 15th Ed., and cases there cited. Tested by this rule some of the statements mentioned above, particularly those to Crew and Carr, were merely narrative of past transactions and not admissible for that reason. But for other reasons as well the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by original participation in the scheme or by subsequently adopting it, and in the absence of any such averment we are of opinion that it would have been erroneous to have admitted as against *her* such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown and Baldwin to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead but was concealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hill-

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mon was accidentally killed at the time and place alleged in the complaint.

Further complaint is made by the defendant because the trial court refused to permit it to show by certain oral testimony and by reading one section of the Criminal Code of the State of Texas, that in the early part of the year 1878, Hillmon had committed an offense against the laws of the State of Texas by removing out of that state certain personal property which he had bought and mortgaged, with an intent to defraud the mortgagor. The admissibility of this evidence is urged upon the ground that if admitted it would have disclosed a motive for Hillmon's "disappearance and continued absence." We are of opinion, however, that the evidence was unnecessary for this purpose, as a sufficient motive was disclosed for his disappearance and continued absence, and no further evidence in that behalf was needed, if the defendant's theory of the case was right, that Hillmon was not dead when the suit was brought but was merely hiding to enable his wife to collect certain insurance upon his life. The trial court did permit the defendant to show the purchase of the personal property in question and the reasons given by Hillmon for its purchase and the fact that it had been removed and not paid for, and that the property was subsequently sold, this latter testimony being admitted, as we infer, upon the theory that the defendant had the right to trace all of Hillmon's movements and to exploit his actions for some months before the policy in suit was taken out, for the light it might possibly shed on his subsequent conduct. The introduction of the Criminal Statute of Texas and the other evidence was unnecessary to establish a motive for Hillmon's dis-

appearance and the exclusion thereof cannot be regarded as a material error.

A further complaint is made because the trial judge said in his charge with reference to a written statement that had been made by John H. Brown, one of the alleged conspirators, whose deposition had also been taken and read by the plaintiff, that said statement was "not *affirmative evidence* of the truth of any matter therein contained and * * * should not be considered * * * except as affecting the credibility of the evidence of said Brown given in his deposition." The statement of Brown which was thus mentioned and his deposition were entirely irreconcilable as respects the question whether Hillmon was killed on March 17, 1879, or whether the person killed was another man. The direction which the court gave to consider Brown's statement as affecting the credence which should be given to his deposition was in effect, therefore, a direction to the jury to determine on which occasion Brown had told the truth; whether when his deposition was taken or when an ex parte statement was obtained from him by a lawyer by the name of Buchan, who seems to have been in the employ of the defendant company, or at least to have been acting in its behalf and in its interest. We are relieved, however, of the necessity of deciding whether there was anything misleading in the excerpt from the charge which has been quoted above, by the fact that no exception was taken thereto, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not "*affirmative evidence*," etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury.

In behalf of the defendant company an instruction was asked, which was refused, to the effect that Brown's sworn statement which was in conflict with his deposition might "be considered in connection with the deposition * * * as evidence of the facts therein stated * * * *with like effect* as the deposition of John H. Brown, and may also be considered as affecting the credibility of said Brown." We think that this instruction was faulty and fully as liable to mislead, as the court's charge on the subject, inasmuch as it required the jury to attach as much weight to the one document as to the other, irrespective of the circumstances under which the two documents had been obtained. There was evidence in the case which tended to show that the ex parte statement had been obtained from Brown on September 4, 1879, by much persuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action upon the policy in suit without consideration. On the other hand, Brown's deposition had been taken at a later date in the usual way and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement and asserted that the statements therein contained to the effect that Hillmon was not dead and that another man had been killed were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide, in view of all the circumstances tending to show how the ex parte statement had been obtained and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the

plaintiff, not as credible testimony, but merely for the purpose of discrediting it—whether they would treat it "*with like effect*" or consider it as entitled to the same credence as Brown's deposition. If the court had given the defendant's instruction it might well be said, we think, that it had invaded the province of the jury.

Complaint is made in behalf of the defendant company because the trial court did not give an instruction to the effect that proof had been offered which had not been disputed, that the corpse brought back from Medicine Lodge to Lawrence, Kansas, had a perfect set of teeth and that the jury should return a verdict for the defendant if they found from a preponderance of evidence that Hillmon in his lifetime had lost a tooth or had imperfect teeth.

This instruction was in the nature of a commentary on one feature of the evidence which the court, in our judgment, was not required to make, inasmuch as it appears that there was considerable conflict in the evidence as to the kind of teeth which Hillmon had. Some persons, as it would seem from the testimony, might regard him as having good teeth, and some as having teeth that were imperfect. Besides, this instruction singled out one fact bearing upon the question whether the corpse that was brought back to Lawrence was Hillmon's body, and gave it undue prominence, inasmuch as there were many other facts and circumstances in evidence which had an immediate bearing on the same question, and might be regarded as very persuasive evidence that the body returned was Hillmon's dead body. This issue as to whether it was Hillmon's body or the body of some other person was fairly submitted to the jury by the court's charge, and we do not perceive that a

reversible error was committed in the refusal of the defendant's instruction.

Another contention on the part of the defendant company is, that the trial court erred in permitting the plaintiff to have six peremptory challenges when the jury was empaneled. With reference to this point it is to be observed that at the time of the last trial there were two actions pending in behalf of the plaintiff upon policies of insurance on the life of her husband, one against the present defendant and the other against the Mutual Life Insurance Company of New York, both of which actions involved the same issue as to whether her husband was dead or alive. Originally there had been three such actions, one against the New York Life Insurance Company, but the latter action had been compromised prior to the last trial. The trial judge ruled that if the two actions which remained to be tried had not already been consolidated for trial under existing orders, he would order their consolidation, as the issue in each case was the same, and the trial thereof would be exceedingly lengthy. It goes without saying that such order of consolidation was within the discretionary power of the trial judge, and we have no doubt that in the present instance the power was wisely exercised. At all events, it affords no ground for a successful complaint on writ of error. *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S., 285, 293. It is urged, however, by learned counsel for the defendant, that as the two actions were consolidated for trial the plaintiff was only entitled to three peremptory challenges. It is to be observed that when this case was before the Supreme Court and was under consideration in the case last cited (145 U. S., 285), that court held that when actions are consolidated such an order does not operate to

deprive either defendant of the right to challenge as many jurors peremptorily as he would have been entitled to challenge if the cases had been tried separately, and the former judgment in favor of the plaintiff was reversed because each defendant to the consolidated cause was not allowed three peremptory challenges. If this rule is applied to the defendants; that is to say, if consolidated causes are treated separately so far as the defendants are concerned for the purpose of preserving to them their respective rights of challenge, we perceive no reason why the same rule should not be applied to the plaintiff so as to entitle her to the same number of challenges which she would have been entitled to had the cases been tried separately. The learned judge of the trial court acted in accordance with this view, and in so doing we think that he committed no error. It certainly does not appear that the defendant company was prejudiced by permitting the plaintiff to have six peremptory challenges and the defendants three challenges each, or six in all.

There are some other assignments of error which have been discussed by counsel for the defendant company, all of which have been carefully considered and found to be without merit. None of them, we think, are entitled to as much consideration as the various assignments already considered. This case has been pending, as heretofore stated, for more than twenty-one years, and it would be a matter of great regret and a reproach to our method of administering justice, if, after six laborious and lengthy trials, an error had crept into the record of such consequence as to require a reversal. We are satisfied that no such error was committed and it is accordingly ordered that the judgment below be

Affirmed.

SANBORN, Circuit Judge, dissenting.

Within six months after the alleged death of Hillmon, John H. Brown, who was with Hillmon when the person, whoever he was, whose body was claimed to be that of Hillmon, was killed, made an affidavit that this body was not Hillmon's, that it was the corpse of another man whom Hillmon had killed, that Hillmon was still living and that this cadaver was produced to enable the plaintiff below to collect the $25,000 insurance on Hillmon's life pursuant to a conspiracy which Baldwin, Hillmon and Brown had formed to accomplish that end. On the trial of this action the plaintiff offered this affidavit in evidence and it was received without objection. She also offered in evidence Brown's deposition taken at a later date than the affidavit, in which he testified that Hillmon was dead and that it was his corpse and not that of another person which was produced by him and Baldwin in March, 1879. At the close of the trial counsel for the defendant requested the court to charge the jury that Brown's affidavit might "be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness." To this request the court responded in its charge in these words: "The oral declarations of said Brown not under oath and the statement signed and sworn to by him are not affirmative evidence of the truth of any matter therein contained or mentioned and they should not be considered by you except as affecting the credibility of the evidence of the said Brown in his deposition," and refused to grant the request. The defendant excepted to the refusal but did not except to the charge.

A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This, it seems to me, was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue. The argument that the question whether or not the affidavit was evidence of the facts it recited was not presented because the request asserted that the affidavit was evidence with like effect as the deposition seems to me to be too technical and critical. The meaning of the words "with like effect" in this request was that the affidavit was evidence of the facts which it recited subject to the right of the jury to question, believe or disbelieve its statements in the same way that the deposition was evidence of the facts it related subject to the same right of the jury, and not that the jury must believe the affidavit just as much as they should believe the deposition. The court below had this understanding of the issue which this request presented. It clearly understood that it was an invitation to charge that the affidavit was evidence not only of the lack of credibility of Brown, but also of the facts which it recited and when it came to rule upon the issue it refused the request and directly contradicted the declaration that the affidavit was evidence

of the facts it related while it conceded that it might be considered upon the question of the credibility of the witness. The request and the charge seem to me to fairly present one and only one question which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request, the question whether or not the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited because the defendant relied, and had the right to rely upon it for that purpose and because the plaintiff having

introduced it was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. *Walton* v. *Chicago, St. P., M. & O. Ry. Co.*, 56 Fed. 1006, 1008, 6 C. C. A. 223, 225, 12 U. S. App. 511, 513; *National Loan & Investment Co.* v. *Rockland*, 94 Fed. 335, 337, 36 C. C. A. 370, 372. The affidavit was persuasive telling evidence upon the crucial questions in the case, upon the identity of the corpse and upon the conspiracy to defraud the defendant and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony that in my opinion it ought not to be disregarded.

2. Sufficient evidence of a conspiracy between Baldwin, Hillmon and Brown to obtain the insurance upon the life of Hillmon and to produce the body of some other person and collect the insurance was produced at the trial to induce the court to submit this evidence to the jury upon the question whether or not the body produced by Brown and Balwin was that of Hillmon. In this state of the case the testimony of Phillips that Baldwin inquired of him about insurance, how long it would take a dead body to decompose and said that it would be a good scheme to get insurance and go down south and get the body of a greaser and collect it, the testimony of Blythe, a lawyer, that Baldwin told him that a friend of his wanted to get insurance and inquired of him what companies were good, the testimony of Crew that in February or March, 1879, Baldwin said that his indebtedness to the bank had arisen because he had furnished money to pay the premium on Hillmon's insurance and that he expected to have $10,000 of the insurance money, and the testimony of

Carr that about March 10, 1879, Baldwin told him that he and Hillmon had a scheme under "brogue" and that if it worked out right he was all right was offered in evidence. Several of these conversations were had after the insurance on Hillmon's life had been secured and before the killing on March 17, 1879. They were had while Baldwin was engaged in carrying on and working out the conspiracy. All this testimony was rejected by the court. In my opinion this testimony detailed verbal acts and declarations of Baldwin, one of the conspirators, while they were engaged in executing the conspiracy and upon that ground it was competent evidence essential to the maintenance of the case of the defendant. *Drake* v. *Stewart*, 76 Fed. 140, 22 C. C. A. 104, 40 U. S. App., 173; *Smith* v. *National Benefit Society*, 123 N. Y. 85; *Mutual Life Ins. Co.* v. *Hillmon*, 145 U. S. 285, 296, 298.

The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed and the policy was obtained by John W. Hillmon, one of the conspirators, in pursuance of a plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect and any evidence competent to show that it was originally obtained by fraud must be competent against any one who holds it for the policy still has that defect in the hands of the assignee or beneficiary. *National Life Ins. Co.* v. *Minch*, 53 N. Y. 144; *Carpenter* v. *Ins. Co.*, 1 Story 57; *Burrus* v. *National Life*

Ass'n, 32 S. E. 49; 1 Biddle on Ins. 448-9. For these reasons the judgment below should in my opinion be reversed and the case should be remanded to the court below for another trial.

Filed April 3, 1901.

A true copy.

Attest:

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals,
Eighth Circuit.

[SEAL]

No. 662 Sup. Ct. 93

Brf. of Porter, Beale, Green & Isham

For Petitioner

FILED
MAY 10 1901
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed May 10, 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,
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vs.
SALLIE E. HILLMON,
Respondent.

662

Brief in Support of Petition for Certiorari.

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WILLIAM G. BEALE.
JAMES W. GREEN.
EDWARD S. ISHAM.

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I.

Right of Challenge.

This question is presented in the record by exceptions appearing at pages 71–2, 136–7, and by Assignments of Error No. 4–7, at pages 1932–3.

The order made by the Circuit Court below consolidating the cases for trial was made under authority of Sec. 921 of the Revised Statutes, which is as follows:

> "Sec. 921. When causes of a like nature or relative to the same question are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning

> proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

As that statute was construed the effect of such consolidation of two cases for trial was to give the plaintiff six peremptory challenges to the jury, while each defendant had but three. Concerning this statute this court has declared as follows, *Insurance Co.* v. *Hillman*, 145 U. S., 285, 293:

> "Although the defendants might lawfully be compelled at the discretion of the court to try the cases together, the causes of action remained distinct and require separate verdicts and judgments; and no defendant could be deprived, *without its consent*, of any right material to its defense whether by way of challenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

The ruling of the court that the plaintiff was entitled to six challenges was in effect a contrary construction of the statute. If, as between the plaintiff and each defendant, these parties cannot, as to the same jury, be given their exact rights on the one hand and limited to their exact rights on the other, the only alternative is to sever the causes and try them separately.

Stroh v. *Hinchman*, 37 Mich., 490.
State v. *Stoughton et al.*, 51 Vert., 365.
Cruce v. *The State*, 59 Ga., 90.

At common law peremptory challenges existed as a right in criminal but not in civil cases. When an Act of Parliament declared simply that a party in a civil cause might have so many peremptory challenges, the right thus extended into civil cases found its definition and conditions

already established by law. Limitations which the statute refrained from imposing could not be imposed by the court. The court therefore in the absence of express statute had and has no more power to change the statutory number of challenges, or to *subject a defendant to new conditions in the making up of the jury*, than it has to deprive him of his jury altogether. On a former trial of these cases the Circuit Court conceived them so effectively consolidated that the defendants in all three cases were entitled only to the number of challenges allowed by statute in one case. Upon this ground the Supreme Court *reversed the judgment*, *Insurance Co.* v. *Hillmon*, 145 U. S., 285, 293, and held that the cases were joined for trial in form only while they remained radically distinct, and the right of each defendant *remained unimpaired in its own case*. In this trial the court has passed to precisely the opposite extreme. The right of *each* defendant does *not remain unimpaired in its own case* any more than in the former instance. There each *defendant* was allowed *fewer* challenges than was its right to a single jury. Here the *plaintiff* is allowed *more* challenges than was her right against *each* defendant to a single jury. It was necessary, of course, and the court ordered, that there should be a separate verdict in each case; and therefore the composition of the jury was of precisely the same practical importance to this plaintiff in error as if its case had been tried separately.

The defendant in one of the separate cases *had no common* interest with the defendant in the other such as corresponds to the single interest of several defendants in one cause, or that of the *single plaintiff* in all the causes. The two defendants here were entitled to an *aggregate* of six challenges. But if, as occurred in this case,

one defendant omitted to use one of its challenges, the other could not take it up and use it. Each defendant did use but two, but if the Mutual Life had omitted to use any of its three, the Connecticut Mutual could not have used six. Its *right* was limited to three. On the other hand the plaintiff was given six to the one jury irrespective of the number used by either defendant. So one defendant has no advantage of the unused challenges of another defendant; nor if it had could that help the matter, for the court has no power to increase the statutory number of challenges to either party by giving an equal number to the other. Under the decision of the Supreme Court no party is given more than the three statutory challenges to the one jury by which its cause is tried; nor does the statute give a plaintiff *more* challenges to the jury by which any defendant is to be tried than are given to that defendant. The court had no power, therefore, to alter the conditions as to any defendant affecting *the composition of the jury*. If it could not in this particular give each defendant a trial under the same conditions in that respect as if the cases were separately tried, the only alternative was to sever the causes and allow a separate trial. Such has always been the established rule of law. It matters little in effect whether the composition of the jury is affected prejudicially to the defendant by abridging the defendant's challenges or by according a disproportionate number to the plaintiff. A situation, *never improbable*, may easily present itself to the imagination of the court. In a forum charged with an atmosphere of social or political prejudice, where a panel is to be filled by talesmen taken from bystanders (as was done upon the trial of this case before Judge

Williams in 1896 (*Rec.*, 51), though the record is silent upon that matter in the present instance), every additional peremptory challenge makes arbitrarily a vacancy which may be filled, in spite of the defendant, by a juror inspired by such prejudice. The right of every and of each defendant that its adversary shall not have against it a disproportionate number of peremptory challenges is as absolute and as important as its right to its own full number; and one is correlative to the other. Always it has been held that the right of peremptory challenge on the part of the defendants could not be abridged by uniting cases for trial (*U. S.* v. *Marchant*, 12 Wheat., 480), and equally the conclusion has been repudiated that the peremptory challenges of the state or of a plaintiff could be multiplied by that process. The whole body of authority and of adjudication is in denial of such conclusion.

Thompson in his work on Trials says in Sec. 45:

> "Although the defendants so jointly indicted may severally be permitted the statutory number of challenges, *this does not increase the number allowed to the state* beyond the number allowed to it in the case of a single defendant."

Proffatt in his work on Jury Trials says in Sec. 164:

> "*No matter how many are tried on the same indictment the prosecuting officer is only entitled to his challenges for one and cannot claim them for all.*"

In *Savage and James* v. *The State*, 18 Fla., 909, the court said:

> "The ninth, seventeenth and eighteenth errors assigned are that the court allowed the state attorney more than five peremptory challenges.
>
> Four persons called as jurors were challenged peremptorily by the state after it had so challenged five, and the challenges were allowed by the court. The statute allows challenges as follows: 'In capital

cases the prisoner shall have twenty peremptory challenges and the state five.'

Where two are jointly indicted and tried for a capital offense each prisoner is allowed twenty peremptory challenges, but the law does not allow more than five to the state as to both. *To allow the state to challenge five for each would in effect give the state ten for each prisoner, because each challenge affects each prisoner alike.* Counsel for the plaintiffs in error cite several authorities to sustain this position.

We have found no other cases directly in point. It is unnecessary to consider this question further. It is clear that the court erred in allowing more than five peremptory challenges to the state, and an exception having been taken to the action of the court there was *material error affecting the rights of the defendants.*"

In *Wiggins* v. *The State*, 1 Lea (Tenn.), 738, the court said:

"In making up the jury for the trial of the defendants (in court below) after the state, through the attorney general, had challenged four jurors, another juror being presented was challenged by the state and accepted by the accused; but the court being of opinion that when two defendants were on trial under a joint indictment the state was entitled to double challenges, overruled the motion of the defendants that the juror should take his seat for the trial of the cause, and afterwards, the defendants having exhausted their challenges, the jury were elected.

By the act of 1875, ch. 75, 'in the trial of criminal prosecutions' of this character the state is entitled to four peremptory challenges. Under the act of 1829, ch. 55, which provided that 'in the trial of all indictments,' etc., 'the state and the defendant shall each be entitled to challenge peremptorily five jurors,' it was held that where two defendants were arraigned each had the right to the full number of challenges. (*Hill* v. *State*, 2 Yer.,

246.) The rule thus established has been followed ever since. But the court refused to extend the rule to civil cases. (*Blackburn* v. *Hays*, 4 Col., 227.) It is argued that the state should have the benefit of the construction. But the reason of the rule is, that the right is given to the defendants, and where there are several defendants, although they may be tried together, *yet the judgments may be different. Each defendant is on trial, and must stand or fall, ordinarily, as if tried alone.* It is only a natural and reasonable construction of the statute to hold that every defendant should have the benefit of its provisions. The state, however, *is not multiplied with the defendants*, and, having elected to indict and try the parties together, cannot claim beyond the fair meaning of the language used. Nor has the construction contended for ever prevailed in practice. The court erred, therefore, in its ruling."

In *Mahan* v. *The State*, 10 Ohio, 234, the court said:

"It is provided by the fifteenth section of the act, entitled, 'An Act relating to juries,' 29 Ohio Laws, 98, that every prosecuting attorney, and every defendant on the trial of an indictment, may challenge, peremptorily, two of the panel; and if any person, prosecuting in behalf of the state, shall challenge any petit juror, except as aforesaid, he shall immediately assign the cause of such challenge. It would seem to us this language can hardly admit of construction. The words themselves express the legislative intention as clearly as it could be well conveyed.

There was but *one* indictment, and, on the part of the state, *the right of peremptory challenge should have been confined to two*, while each of the defendants could, in like manner, legally object to the same number. Had the defendants been separately tried the indictment would have been separate as to each: *Bixbe* v. *The State of Ohio*, 6 Ohio Rep., 86; and on every trial the state's right to such challenge of two of the jurors would have been legal; but upon a joint trial it is otherwise.

In extending this right of peremptory challenge to *six*, as claimed by the state, it is our opinion, *the privileges which the law throws around the accused, to a certain extent, as a shield for his protection, in the selection of his triers, was clearly invaded*, and that the Court of Common Pleas, therefore, erred."

In *State* v. *Earle*, 24 La. Ann., 38, the court said:

"It appears from an inspection of the first bill of exceptions taken during the trial, that the state was allowed to challenge peremptorily *more than six jurors*, the court below deciding that each prisoner was entitled to twelve peremptory challenges and '*the state to six for each accused.*'

It is true that each defendant was entitled to twelve peremptory challenges, but it *by no means follows that the state is entitled to six for each defendant.* The state has no rights in the matter beyond those conferred by the statute, and the statute declares that 'in all criminal prosecutions wherein the defendant is allowed peremptory challenges, the state shall also be allowed to challenge without cause any number not exceeding six.' R. S. 1870, Sec. 998. This means, clearly, six in a single prosecution in the trial of a single indictment—without any reference to the number of defendants included in the prosecution or mentioned in the indictment. The language is plain; the case at bar is within its provisions, and we are, therefore, constrained to think the court erred in allowing the number of peremptory challenges by the state to exceed six."

In *Schoeffler* v. *The State*, 3 Wis., 823, the court said:

"Upon the trial of indictments for a capital offense, when there are more than one defendant, each defendant is entitled to challenge twenty-four jurors peremptorily. One or all may be found guilty, and *each one must be regarded as defending for himself.* Not so in regard to the prosecution. The state is prosecuting for one crime, and though several may be guilty of it, all may be included in the same indictment, and thus make one prosecution, or each

may be indicted separately. *If, therefore, the prosecuting officer desires to secure to himself six peremptory challenges for each defendant, he should prosecute each separately.* But, while he cannot curtail the right of any defendant whom he may choose to join in the indictment, by adopting a joint prosecution against several, he thereby makes the *state a party, one and indivisible, upon the one hand, and each of the defendants a party on the other.* The right to peremptory challenges is purely a creature of the statute, and it cannot be extended beyond its obvious purview. We are therefore of the opinion that the court below erred in allowing the prosecuting officer to challenge peremptorily the juror Fairfield, he having already been allowed six such challenges. If the statute should be so construed as to allow the prosecuting officer six challenges for each defendant, *he could multiply such challenges indefinitely by simply increasing the number of defendants.* Such a construction ought not to be allowed, *as it might defeat the very object and intent of the statute.* We do not know, of course, why the prosecution challenged the juror. It is sufficient to know that he was to all appearance competent; that he was acceptable to the defendants, and that the challenge of the prosecuting officer was unauthorized by law."

The plain result is that the number of challenges *to the same jury* cannot be *changed as to any party* by joining the cases under the statute for convenience or economy of trial.

2.

Defense of Fraud and Conspiracy.

This question is presented in the record by exceptions at pages 1911–12, 1915, 1925–6, and by Assignments of Error Nos. 87, 88, 89, 91, 92, at pages 1,997–2,000.

The third section of the petition relates to the exclusion by the court below of the defense of fraud and con-

spiracy presented by the second plea of the defendants. The scope of that defense set up by that plea is stated in the petition. The grounds upon which the entire subject-matter of that defense was excluded from the case seem contrary to rules of law well settled in this court as in all others. The court excluded the defense, apparently holding, first, that it could not be interposed against the beneficiary in the policy because she was not affirmatively charged in the pleading as one of the co-conspirators (*Rec.*, 1921; Petition, pp. 34–8), and, second, because the plea failed adequately to present as a defense the conspiracy to procure the policy for the undisclosed purpose of fraud, and that its averments were insufficient to advise the plaintiff that she would meet defense of that character. The contention of the defendant, the petitioner, is that, for the purpose of interposing that defense against the plaintiff it was not necessary to charge her with participation in the fraud or conspiracy at all; that as the beneficiary in the policy the contract was subject to that defense as against her in any event, and that it was clearly so in the present case for two special reasons, first, that the contract contained in terms this express provision, to-wit: "*If this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void*" (*Rec.*, 6); and further, that the contract itself was in actual effect not one with the plaintiff but a contract made with Hillmon for her benefit. (*Aetna Life Ins. Co.* v. *France*, 94 U. S., 561, 564.) She derived her only claim through him as a voluntary beneficiary, no consideration whatever emanating from her. The application is made and signed by Hillmon, and also in conformity to provisions on the face

of the policy signed with the name of the assured, Sallie E. Hillmon, by Hillmon himself (*Rec.*, 153–4). The contract of the Insurance Company in this case was, therefore, with Hillmon distinctly, and not with the plaintiff. To the extent to which there may be claimed to be any contract between the Insurance Company and the gratuitous beneficiary, the plaintiff, it rests upon an assumed agency of Hillmon for her, which she must and does affirm in making any claim under the policy. In any event, therefore, the result is the same; as a contract with her she is bound by its express stipulations; as a contract with Hillmon, the insured, any interest she may have under it must be subject to any fraud that would affect the contract as against Hillmon, and in claiming under such policy she adopts such fraud and makes it her own. Under these circumstances the rule of law establishes that the contract in this case is one directly between the Insurance Company and Hillmon, and the voluntary beneficiary can claim under it only subject to any defense of fraud that would affect the insured himself. Thus, in *1 Biddle on Insurance*, Sec. 449, it is said:

> "The fraud of the insured would obviously affect a third party who was a payee under the policy."

In *Veazie* v. *Williams*, 8 How., 134, the purchaser of property at an auction sale filed a bill to set the sale aside on the ground that he had been induced to pay an exorbitant price by the fraudulent acts of the auctioneer, in which the defendants, the former owners, were charged to have participated. The answer of the defendants denied that they or their agent had participated in the fraud, and the evidence failed to show that they had in fact done so.

In that connection the court on page 153 said:

> "Though no evidence is seen of fraud practiced by the respondents in person, nor by their express directions, yet a fraud was evidently perpetrated by the auctioneer, as agent for the respondents, or by him in connection with Stephen H. Williams, and the respondents have taken and still retain the benefit of it. This conclusion is indisputable, whatever obscurity or concealment may have been flung over the case by the auctioneer."

After stating that the owners were not liable for the fraud on the ground that they had personally participated in it, the court on page 157 said:

> "But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed in *statu quo;* or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury.
>
> * * * * *
>
> But the test here is, was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller*, 3 Adolph. & Ell., N. S., 68.
>
> The sale, thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering."

In *New York Life Ins. Co.* v. *Fletcher*, 117 U. S., 519, a suit brought by an executor of the insured to recover upon a policy was defended by the company upon the ground that false statements had been made in the application. It appeared that the insured, in answer to questions propounded by agents of the company, had truthfully stated his condition, but that the agents

had written false answers in the application without the knowledge of the insured.

Mr. Justice FIELD, in delivering the opinion of the court, said:

> "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. *He could not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed.* The retention of the policy was an approval of the application and of its statements. The consequences of that approval cannot after his death be avoided.
>
> The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment he was not called upon to take any steps for the cancellation of the contract. In other words, *the jury were told that the assured might take to himself the benefit of the fraud, without responsibility for it, if he did not discover it until after it was consummated—a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.*"

In *Aetna Life Insurance Co.* v. *Davey*, 122 U. S., 739, the defense of fraudulent misstatements in the application, set up by the defendant company in a suit by the wife upon a policy of insurance in which she was named as beneficiary, was entertained without question,

although the wife was not charged nor shown to have been a party to the fraudulent misstatements.

To the same effect are

Maier v. *Fidelity Mutual Life Ins. Co.*, 78 Fed., 566; 24 C. C. A. 239 (6th Cir.).

Hubbard v. *Mutual Reserve Fund Life Ass'n.*, 100 Fed., 719; 40 C. C. A. 605 (1st Cir.).

The principles thus established by express decision of this court and by the Circuit Courts of Appeal for the first and sixth circuits are the same that are recognized and illustrated by the following judgments of other tribunals:

In *Continental Insurance Co.* v. *Insurance Co. of State of Pennsylvania*, 51 Fed., 884; 2 C. C. A. 535 (2nd Cir.), the common agent of four marine insurance companies by fraudulent shifting of risks and effecting re-insurance, caused one company to bear an unfair proport on of losses, resulting in a corresponding gain to another. After discovering the fraud, the company defrauded sued the company for whose benefit the frauds had been committed, and a recovery was allowed, although the latter was in no way responsible for nor aware of the agent's frauds.

The appellate court in affirming the judgment said:

> "The case is one for the application of the rule that *he who seeks to avail himself of the advantages of the act of another, after knowledge of its fraudulent character, must be held to adopt the fraud, although at the time of the act he was ignorant of it.* The doctrine is elementary, and prevails at law as well as in equity, that a person, though innocent himself, cannot retain an advantage obtained by the fraud of another, in the absence of some consideration moving from himself."

In *Carpenter* v. *American Ins. Co.*, 1 Story, 57; 5 Fed. Cases, 105, a policy was procured from the defendant by the owners of the insured property for the benefit, however, of their mortgagee. They subsequently sold the property and assigned the policy to the plaintiff. In a suit by the plaintiff it was urged that misrepresentations made by the original owners in order to obtain the policy could not be set up in a suit in which the mortgagee was the true beneficiary and innocent of the misrepresentations. The court, by Mr. Justice STORY, said:

> "It is suggested that the misrepresentation was in fact unintentional and without any fraudulent design, and that Epenetus Reed (the mortgagee), for whose benefit the insurance was made, was entirely ignorant of the misrepresentation; and that, under such circumstances, his rights under the policy ought not to be prejudiced thereby. But this suggestion cannot avail for the plaintiff or for Reed. *The misrepresentation made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal, or not.* The ground in each case is the same. The underwriters are deceived. They execute the policy upon the faith of statements, material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract."

In *Burruss* v. *National Life Association*, 96 Va., 543, 32 S. E., 49, 50 a policy was taken out by a debtor for the benefit of his creditor. The insured made false representations unknown to the beneficiary. In a suit by the beneficiary upon the policy it was contended that the fraud of the insured could not affect the innocent beneficiary's rights. The court, by HARRISON, J., said:

> "It would hardly be contended that if the insured had taken out this policy for his own benefit his estate could recover it, in the face of the gross fraud shown to have been perpetrated by him in procuring

it. There is nothing in the circumstances of the case to place the beneficiary in any better position than the insured would have occupied had the policy been for his benefit. Where insurance is effected upon the life of a third person for the benefit of a creditor, and misrepresentations of material matters inducing the contract are made by the party whose life is insured, it will vitiate the policy, although the beneficiary was ignorant of such false representations."

In *Baker* v. *Life Insurance Co.*, 43 N. Y., 283, 286 insurance was effected by a husband for the benefit of his wife, and failure to pay upon maturity any premium notes would forfeit the policy by its terms. Without the knowledge of the beneficiary the husband failed in the payment of such a note, and in a suit upon the policy after his death recovery was denied. The court said:

"The insurance was effected by the husband for the benefit of his wife and as a provision for her in case of his death. *He was the party contracting with the defendants*, and the consideration for the agreement to insure proceeded from him, not from the wife."

Further, on page 287:

"In this case the husband agreed for the insurance and caused his wife to be named as the beneficiary in the policy. It was nevertheless *a contract with the husband*, and the terms and *conditions to which he assented* attached to and qualified the policy and determined the liability of the insurers."

And further, on pages 288–9:

"The case will not be changed, if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and, claiming the benefit of his acts, and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with

all its terms and conditions (*Elwell* v. *Chamberlain*, 31 N. Y., 611; *Bennett* v. *Judson*, 21 *id.*, 238)."

In *Maynard* v. *Rhode*, 1 Car. & Payne, 360, the judgment of the court is correctly stated in the syllabus, as follows:

> "Where an insurance is effected on the life of a third person by a creditor, and misrepresentations are made by the party whose life is insured, of the state of his health, this will vitiate the policy, though the creditor for whose benefit the policy was effected was ignorant of the representations being false, and though the party did not die of the disease he was then afflicted with."

To the same effect are:

1 Biddle on Insurance, Secs. 448–9.

Phillips on Insurance, Sec. 543.

1 May on Insurance, Sec. 122.

Bliss on Insurance, Sec. 316.

Joyce on Insurance, Vol. 1, Sec. 646; Vol. 2, Sec. 2652.

Bennett v. *Judson*, 21 N. Y., 238.

Warner v. *Warner*, 46 N. Y., 228.

Smith v. *National Benefit Society*, 123 N. Y., 85.

Estes v. *Life Insurance Co.*, 13 Sup. Ct. Rep., N. Y., 349.

Draper v. *Fire Insurance Co.*, 2 Allen, 569.

Forbes v. *Life Insurance Co.*, 151 Ind., 89; 51 N. E., 84.

Atlas Tack Co. v. *Exchange Bank*, 111 Ga., 703; 36 S. E., 939, 942.

The judgment in this case, affirmed by the Circuit Court of Appeals, that the defense of fraud and con-

spiracy alleged in the pleading cannot be interposed against the plaintiff in the case unless she is affirmatively charged as a co-conspirator and a participant in the fraud, is, therefore, conflict directly with rules of law established by this court, and by Circuit Courts of Appeal for other circuits, and which equally prevail in every forum. The interposition of this defense and its establishment was of vital interest and of the utmost importance to the defendant. If, therefore, the principles and rules announced by this court are supreme and are to prevail, the Circuit Court was wrong when it excluded that subject-matter of defense, and when it confined the application of the fact of fraud and conspiracy to its weight as evidence on the identity of the corpse brought from Medicine Lodge to Lawrence, and when it said to the jury:

> "If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, *then it is unnecessary for you to find whether there was or was not a conspiracy.* The essential point in these cases is the identity of the corpse." (*Rec.*, 1921.)

If the rulings of this court had been allowed to prevail, and in accordance therewith the fraud and conspiracy charged by the defendant held admissible as a defense against the plaintiff, though not charged with actual participation, then quite apart from the question of identity of the corpse brought to Lawrence it *would* have been necessary for the jury "*to find whether there was or was not a conspiracy.*" There would have *remained* a deeper and more important question than that of the identity of that corpse, namely, the question of the fraud that might make the contract void *ab initio* against the plaintiff, even if the body were that of Hillmon. It was insisted in the Circuit Court as well as in the Circuit Court

of Appeals—and one hardly knows where to begin the argument of a proposition seemingly so self-evident as this—that if the contract of insurance was procured from the insurance companies not in good faith but by conspiracy and collusion for the covert and undisclosed purpose of defrauding the company by the process alleged, and the insured lost his life in the actual effort, with his confederates, to carry out and accomplish the fraud, *no representative of his* could turn about and support an action for indemnity upon that contract. Upon this point we have sought to supply an illustration. Suppose under the circumstances alleged Hillmon and Brown had been at night robbing a graveyard to procure a body to be substituted for and presented to the insurance company as that of the insured, and that while engaged in this exploit Hillmon had been shot and killed by the watchman or guard of the cemetery, could it possibly be imagined that the insurance company had ever in legal effect *contracted to pay* under such conditions, or that Hillmon ever *understood* that it had done so? If not, then even if the body produced was that of Hillmon it *was* "*necessary*" for the jury to find whether there was a conspiracy for the fraud or not; and the statement to the jury was not true that if the body was Hillmon's they must find for the plaintiff whether there was such a conspiracy or not. So broad a proposition as that of the court,—that if the jury found a contract of insurance expressed in the policy and that the insured was dead, they need look no further; that no fraud or deceit, illegality or crime in inducing the contract, or in the issuance of it, or in the conduct of the parties insured or interested under it, could possibly make the contract void or bar their rights to enforce it, finds no support in any principle ever yet announced by this court.

In *Smith* v. *National Benefit Society*, 123 N. Y., 85, in an action upon a policy the defense was that the insured *in pursuance of a scheme to defraud* the defendant and other insurance companies, procured a large amount of insurance upon his life and then committed suicide. It was held that the contract of insurance was procured, and that the death of the insured occurred, in the execution of a scheme of deliberate fraud upon the insurance companies. The scheme was "to secure a large insurance upon his life appropriate to the payment of his *creditors* and the comfort and support of his *relatives*," and to reach the result by suicide. The scheme was carried out and the insured *died in the act of executing the original fraudulent purpose.* It was held that the contract was void for the fraud, although the plaintiff was a creditor and payee of the policy, and that the suicide was itself an act of fraud upon the defendant; judgment was rendered for the defendant and this judgment was affirmed in the Court of Appeals. In that case also the court had before it a contract of insurance; the insured was dead and there was no dispute as to his identity; but that court did not instruct the jury that it need inquire no further and that fraud upon the insurance company was an immaterial issue. We cite this case again upon another proposition.

In *Patterson* v. *Nat'l Premium Mut. Life Ins. Co.*, 100 Wis., 118; 75 N. W., 980, a suit was instituted by the children of the insured upon a policy issued by the defendant upon the life of their father, made payable to his estate and by him assigned to them. One of the defenses interposed was that the insured had "*fraudulently procured the issuance of the policy with intent to commit suicide as a part of a scheme*

to defraud the defendant out of the sum of $3,000 for the benefit of his children," and that in furtherance of the scheme he had committed suicide. *The beneficiaries were not charged as a party to this fraud.* In passing upon this element of the case, the court said:

> "But it is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide, and defrauding the company for the benefit of his children. Doubtless this would be a good defense, if shown, unless it be cut off by the 'incontestable clause.' It should be a defense not based on the suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury."

In *Parker* v. *Des Moines Life Ass'n*, 108 Ia., 117; 78 N. W., 826, an action was instituted by a wife upon a policy of insurance issued by the defendant upon the life of her husband in which she was named as beneficiary. The sixth defense interposed by the defendant was that the insured had "*applied for and procured the policy in suit with the fraudulent intent to commit suicide.*" Upon this branch of the case the court said:

> "6. The sixth division of the answer set up fraud on the part of Parker in procuring the policy. It was alleged that he secured the same with the intent at the time to commit suicide. It needs no argument to show that *a secret intent of this kind would amount to a fraud;* and, as fraud vitiates all contracts, this defense, if established, *would defeat a recovery* on the policy. Being void in its inception, no rights would accrue under the contract to *any person. Patterson* v. *Insurance Co., supra.*"

We desire to call the court's attention to the following additional cases:

Insurance Co. v. *Armstrong*, 117 U. S., 591.

Ritter v. *Insurance Co.*, 169 U. S., 539.

Church v. *Proctor*, 66 Fed., 240, 244–5; 30 C. C. A., 446.

Kingsbury v. *Fleming*, 66 N. C., 524.

Cowen v. *Milbourn*, L. R. 2 Exch., 230.

Nor does it seem possible that the plaintiff should not have been adequately advised by the plea of defendant that she was likely to be met by the contention that there could be no recovery upon this contract of insurance because of the fraud and conspiracy with which it was associated. She brought suit upon a contract of insurance made with Hillmon for her benefit, which expressly provided that if the policy had been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same should be absolutely null and void, and she was met by a plea, among others, which charged that Hillmon, together with Brown and Levi Baldwin, and others unknown, "*procured*" the insurance, "*fraudulently conspiring to defraud the defendant.*" The plea also averred "that thereafter in pursuance of the said conspiracy they falsely and fraudulently pretended that Hillmon was dead, and that a certain dead body which they had procured, and had, was the body of the said Hillmon * * *." The first plea expressly traversed the averments of the plaintiff's petition, and the sole object of the second plea must have been to interpose as an additional defense the fraudulent scheme and purpose which it charged. With such specific language in the plea it

seems impossible to imagine that the plaintiff was not forewarned and advised that the defendant would prove, in support of its plea, the facts thus charged, to-wit: the fraudulent scheme and purpose for which the insurance was procured; the unlawful combination and conspiracy of Hillmon and his associates to procure it for that fraudulent purpose; that in pursuance of that conspiracy and purpose they procured the policies, and then proceeded to carry the fraudulent purpose into effect by seeking for a body to be presented as that of Hillmon, the insured. Following upon this plea, the facts were that evidence was adduced by the defendant which the charge of the court itself shows to have been sufficient to establish *prima facie* the fraudulent purpose and the conspiracy alleged by the plea. Of the subject of all this evidence she was adequately forewarned by the terms of the plea, so that no element of surprise to that point is conceivable, and these are the very facts and this the evidence upon which the instruction (*Rec.*, 1911–12) was called for by the defendant and refused by the court. The defendant insisted that these facts being proven, there could be no recovery upon the contract even if the plea charged also additional facts in the course of the consummation of the same scheme of fraud which (for the sake of the argument only, and by no means conceding it), it is assumed were not also proven. The failure (even if there had been such) to also establish those additional facts can hardly be such a surprise to the plaintiff as to entitle her to the protection of the court against so much as was proved, and to a judgment upon the contract in the face of the abundantly established fraud and criminal conspiracy with which it was tainted.

3.

Exclusion of Conspiracy Evidence.

This question is presented by exceptions appearing in the record at pages 1602–20, 1809, and by Assignments of Error No.'s 64–72, on pages 1978–84.

In section four of the petition it is insisted that if it was the right of the defendant in legitimate support of its defenses to prove against the plaintiff at all the fraudulent purpose and unlawful conspiracy charged in the plea, it was then entitled to the admission of all evidence applicable under the rules governing that subject. The defendant's right to prove the conspiracy was conceded by the Circuit Court for its bearing as evidence upon the identity of the body brought to Lawrence. (*Rec.*, 1921.) The defendant claimed equally the right to prove that conspracy to establish the fraud charged in the second plea, affecting the validity of the contract. In both of these cases, if the right to prove the conspiracy existed, the means and the mode of proof would be governed by the same rules of evidence. Having established in the Circuit Court, by evidence sufficient in the judgment of that court to be submitted to the jury, the necessary *prima facie* case of conspiracy between Hillmon and Brown and Levi Baldwin, the defendant offered to prove certain acts and declarations of Baldwin in contemplation of, and preparation for the fraudulent scheme and its consummation.

To show acts of Levi Baldwin to be taken in connection with other independent circumstances and with acts of other persons to prove that he, and Hillmon, and Brown were acting together in the prosecution of a common pur-

pose, the defendant offered (*Rec.*, 1619, 1809) to prove the following facts:

That Levi Baldwin had a conversation with Dr. Phillips in October, 1878, in which Baldwin said he was thinking of taking out some insurance, and asked if certain insurance companies were safe; and how long it would take before a dead body would decompose after it was buried; and said, "wouldn't it be a good scheme to get a large amount of insurance on your life and go down south and get the body of some 'greaser' and palm it off as your body and get the money." (*Rec.*, 1606.)

That Levi Baldwin had a conversation with J. H. Blythe, an insurance agent, in which Baldwin asked him about life insurance, saying that a relative or connection of his wanted to get some insurance, and wanted Blythe to recommend some good company to him. The court had already permitted plaintiff in error to show by the same witness a conversation between Baldwin, Hillmon and the witness, upon the same subject, a few days later. (*Rec.*, 1613.)

That Levi Baldwin, in the latter part of February, 1879, had a conversation with James S. Crew, who, as receiver of the Simpson Bank, held for collection some notes past due against Baldwin, two of which were secured by mortgage on real estate and one by chattel mortgage on live stock. During this conversation, Baldwin said that a part of the money represented by this indebtedness had been furnished to insure Hillmon's life. Crew further testified that he had heard of Hillmon's death in the latter part of March, and that shortly thereafter Baldwin came in hurriedly and told him to let his matter rest, as he was then on his way west after Hillmon's body, and that he had arranged for a portion of

the life insurance on Hillmon's life, and that as soon as he got it he would be able to straighten up all his affairs; that he was to have $10,000 of the insurance money. (*Rec.*, 1616–17.)

That, shortly after the 10th of March, Levi Baldwin had a conversation with Alexander Carr, during the course of which Baldwin said that "he and Hillmon had a scheme under brogue, and he said that if that worked out all right that he was all right." (*Rec.*, 1619.) All this evidence was excluded, and the exclusion is assigned for error.

The excluded testimony of all the witnesses in question shows *motive and inducement* in the state of Hillmon's and of Baldwin's affairs; *preparation* in pondering upon and devising a scheme of relief, and in providing money for the payment of premiums; and shows also what was occupying the mind of the dominant man and principal conspirator.

The rule applicable to evidence of this sort, as stated in 1 Greenleaf on Evidence, Sec. 184a, is universally recognized by all authority.

> "The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence against each of them. It makes no difference at what time any one entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design."

Under this rule all evidence is relevant and admissible, which tends to show motive and preparation for what was done or furnishes indications of what was passing in the party's mind upon that subject.

Stephen's Digest of Insurance, p. 19.

Concurrently with this runs this principle in most cases, that the statements or other utterances are offered where the *material point* is, that under the circumstances *the statement was made*, and not that in itself it was true or false. Greenleaf, 101. *Mut. Life* v. *Hillmon*, 145 U. S., 296, 298. In that case this court said:

> "Such declarations are regarded as *verbal acts*, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury. *Insurance Co.* v. *Mosley*, 8 Wall., 397, 404, 405.' * * * 'So it is uniformly held that the previous declarations of the testator, offered to prove the *mental facts* involved, are competent. * * * Statements and declarations, when the state of the mind is the fact to be shown, are, therefore, received as mental acts or *conduct*. 99 Mass., 120.' * * * 'Wherever it is material to prove the state of a person's mind or *what was passing in it*, and what were *his intentions*, there you may prove what he said, because that is the only means by which you can find out what his intentions were. 1 P. D., 451.'"

The rules of evidence affecting the admissibility of acts and declarations of co-conspirators are in general the same in civil and criminal cases.

Nudd v. *Barrows*, 91 U. S., 426, 438.

In *Lincoln* v. *Claflin*, 7 Wall., 132, Mr. Justice FIELD defined the rule of evidence applicable to co-conspirators as follows:

> "The declarations of each defendant relating to

the transaction under consideration were evidence against the other though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs."

In *Wiborg* v. *U. S.*, 163 U. S., 632, 657–8, Mr. Chief Justice FULLER, in discussing the question of evidence applicable to a conspiracy, said:

"There was other evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: 'If these men were in combination to do an unlawful act, what was said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition,' and to this an exception was taken. The general rule was stated in *American Fur Co.* v. *United States*, 2 Pet., 358, 365, by Mr. Justice Washington, speaking for the court, that 'where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others.' The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestæ* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive and intention, *declarations* of those engaged in it *explanatory of acts done in furtherance of its object* came within the general rule and were competent."

In *State* v. *Johnson*, 40 Kan., 266; 19 Pac., 749, the court in defining the rules applicable to the proof of conspiracy, after stating that mere narrations of accomplished facts were not competent, said:

"Instances where a narrative of past events may be admissible can be imagined; but the narrative it-

self must tend in some way to promote the general purpose of the criminal enterprise. An illustration of such a declaration is given in *Cortez* v. *State*, *supra*, where it is said: 'A. will perform the part allotted to him when B. shall do a certain thing to be performed by him. B. acts, does that which is required of him, and writes to or verbally informs A. that the thing has been done. This is a narrative of a past event, but it is also in furtherance of a common design, and hence admissible. The general rule is that, to be admissible, the conspiracy must be pending, and the acts or declarations must be in furtherance of the conspiracy—the common design.'"

To the same effect are:

Cuyler v. *McCartney*, 40 N. Y., 221, 229, 243–4.

Smith v. *National Benefit Society*, 123 N. Y., 85.

State v. *Thompson*, 69 Conn., 720; 38 Atl., 868, 870.

State v. *Spalding*, 19 Conn., 237.

People v. *Bentley*, 75 Cal., 407; 17 Pac., 436.

State v. *Walker*, 98 Mo., 95; 9 S. W., 646.

Hart v. *Hicks*, 129 Mo., 99; 31 S. W., 351.

State v. *Winner*, 17 Kan., 298.

State v. *Rogers*, 54 Kan., 683; 39 Pac., 219.

Spies v. *People*, 122 Ill., 1, 229.

It is sufficient to say that this conspiracy is still pending, and will so continue as long as these suits to enforce the fraudulent contract are being prosecuted by this plaintiff.

Under legitimate application of the rule, the joint par-

ticipation of all the persons charged may be shown by a number of independent circumstances, each apparently isolated, disconnected and without significance until, when grouped together, they disclose the common purpose which has brought them all into existence. An unlawful combination is more generally proved by isolated and distinct circumstances, and, as said by the court, in *State* v. *Spalding*, *supra:* "In such case, it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination; but, when it is seen in connection with other acts, its true nature may be discovered." Clearly the true nature of these acts can never be discovered if each of them may be individually excluded because its relevancy is not immediately apparent. The principle and importance of the rule is not its advantage to one side or the other in making acts and declarations of one evidence against others, but in that it lets a number of apparently disconnected and detached facts fall into their true relations to each other; enables them to throw light and explanation upon each other; and to show *whether* they *are* detached or are *parts of a combined effort for a common purpose.* The acts of one person alone might not possibly produce the result actually seen, and the acts or declarations of one alone might be apparently without significance and unintelligible, but taken in connection with other acts or declarations of others they become clear, systematic and efficient in relation to the actual event. The evidence here under consideration was relevant and should have been admitted against the plaintiff, under the legitimate operation of the rule established by this court.

4.

Brown Affidavit.

This question is presented in the record at pages 1284–6, 1914, 1923, and by Assignment of Error No. 105, on page 2006.

The fifth section of the petition relates to the character, as evidence, of the affidavit or sworn statement of John H. Brown, which has in many aspects been always so important a factor in this case. Designated at different times by various names, namely the "affidavit," the "sworn statement," the "confession" of John H. Brown, it is found in its connection with the present question at page 1284 of the record. This sworn statement, executed on the 4th of September, 1879, was but the repetition in writing of a statement made orally by Brown to his attorney some months before at Lexington, in Missouri. (*Rec.*, 1230–8.) This statement of Brown was an acknowledgment verified by his oath that he and Levi Baldwin together with Hillmon had conspired to defraud the insurance companies by procuring policies upon Hillmon's life, with the purpose of collecting said insurance by falsely pretending the death of Hillmon and fraudulently presenting a fictitious body to the insurance companies, and that the body brought from Medicine Lodge to Lawrence and presented as the body of Hillmon was not the body of Hillmon, but a body falsely pretended to be his, in pursuance of that conspiracy. Subsequently, the same John H. Brown made a deposition, which the plaintiff read in evidence on the trial below, where he stated in substance that the above affidavit which had been made by him was untrue; and later in

the trial, during the cross-examination of a witness called by defendant, the *plaintiff offered* in evidence this affidavit or sworn statement, *generally and without any limitations upon its scope*, and it was so admitted without objection from defendant. (*Rec.*, 1284.)

In due time the defendant requested the court to give to the jury the instruction referred to in the petition. The court refused to give the instruction, to which refusal the plaintiff duly excepted (*Rec.*, 1914), and assigned error thereon in the Circuit Court of Appeals. (Assignment, 105; *Rec.*, 2006.) Having refused said instruction, the court instructed the jury in the language which is set forth in the petition on pages 17–18. A reference to the instruction requested, and to the charge, will show at a glance that both are upon the same identical subject, and are in direct opposition to each other, in that the *one* asks instruction to the jury that the affidavit *having been introduced in evidence by the plaintiff* should be considered evidence against her of the facts therein stated, and the *other*, namely the charge, instructed the jury that the statement was *not affirmative evidence* of the truth of any matter therein contained. The defendant having caref ully reserved exception to the ruling of the court in refusing the instruction asked for upon this subject, it was not then necessary by express decision of the Circuit Court of Appeals for the Eighth Circuit for the defendant to again except to that portion of the charge which embodied a contrary statement of the law. This rule had then been announced by express decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Long-Bell Lumber Company* v. *Stump*, 30 C. C. A., 260; 86 Fed., 574 582. In that case the opinion of the court, delivered by Judge PHILLIPS, with whom concurred Judge SANBORN, declared as follows:

"In *Evans* v. *Clark* (Ind. T.), 40 S. W., 771, it is held that where the applicant requested the giving of a proper instruction, which was refused, it is not necessary, in order to insist upon error of such refusal, that the party should have excepted to an inconsistent instruction given by the court. The court said:

'Where a party takes proper exception to any matter in the record, it is not necessary to take other exception, if the exception thus taken covers the matter in issue.'

While this is the language of the court of appeals of the Indian Territory, it is nevertheless valuable for the force of the reason assigned. See, also, *Guinard* v. *Knapp, Stout & Co.* (Wis.), 70 N. W., 671, where the court lays down the rule to be that the refusal to give a correct instruction is reversible error, unless it appears that the same was substantially given in the general charge. Having requested the court to give a proper declaration of law, and the court, by its refusal, having declared that it held the law to be otherwise, to which exception was duly taken, why should counsel be required again to except to the converse or modified declaration given by the court? It would be but a repetition of the objection already expressed in the first exception. And, so far from the silence of counsel at the first reassertion of the error by the court evidencing a waiver of the first error, it but evinces a respectful deportment by counsel towards the court, in refraining from repetitious objections at the ruling of the court, after having once taken exception involving in effect the same principle which would be represented in the second exception."

In the above case Judge THAYER dissented but without specific reference to the point in question. In the present case a precisely opposite position is taken by the majority of the court upon this subject. In its opinion the court said:

"We are *relieved, however, of the necessity of*

> *deciding* whether there was anything misleading in the excerpt from the charge which has been quoted above, *by the fact that no exception was taken* thereto, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not '*affirmative evidence*,' etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury."

While it is plain that the language of the court in its instruction to the jury is in direct opposition to the rule of law asserted in the instruction refused by the Circuit Court, the Court of Appeals refused to consider the objection of the defendant to the rule of law expressed in the charge because separate and independent exception had not been taken to the charge itself. We submit that any criticism of language which would make the instruction asked by the defendants and the charge presented by the court otherwise than the precise antitheses of each other is verbal and without substantial foundation. The interpretation of the language of that instruction presented by Judge SANBORN in his dissenting opinion, and quoted in the petition, we submit to be correct and to state the manifest purport of the language employed. To the further considerations in this connection, which are fully presented in the petition, it is not necessary to recur in this argument.

5.

Impeachment of the Releases.

This question is presented in the record by exceptions appearing at pages 546, 576–581, 585, and by Assignments of Error Nos. 27–32, on pages 1945–1948.

A ruling of the court below, which seems to be opposed to the uniform decisions of this court, is presented by the SIXTH section of the petition.

The subject of this sixth section is the admission by the court below of evidence offered by the plaintiff to destroy the legal effect of certain releases to the defendant of the plaintiff's claims under the policies sued on, and which the plaintiff herself introduced in evidence. These releases were executed by the plaintiff at Leavenworth, upon full deliberation, in September, 1879, and the plaintiff went with them herself to the office of her counsel to procure the policies for surrender to the defendant (*Rec.*, 777, 825, 826, 830, 1244–6), and delivery of the policies to her was refused by her counsel on account of his own claim of interest in them, but she herself subsequently ratified and confirmed the releases. The releases on their face recited a consideration, and by the law of Kansas in their legal effect import a consideration. Section 7 of chapter 21 of the statutes of Kansas of 1868, then in force, provided as follows:

> "All contracts in writing, signed by the party bound thereby, or by his authorized agent or attorney, *shall import a consideration.*"

By construction of this statute by the Supreme Court of Kansas, the legal effect of instruments thus executed, in respect of their import of a consideration, is held to be the equivalent of that of bonds and other instruments under seal at common law.

Northern Kas. Town Co. v. *Oswald*, 18 Kas., 336, 339.

Sprague v. *Mo. Pac. Ry. Co.*, 34 Kas., 347, 353.

Vandervelden v. *Chi. & N. W. Ry. Co.*, 61 Fed., 54.

We cite the following from the opinion of Judge SHIRAS, in the case last cited:

> "The point presented for decision by the first ground of objection is whether, in an action at law, a written release of the character of that introduced in evidence can be impeached for fraud not inhering in the execution thereof, but which only goes to the extent of the consideration. * * * By sections 2112 and 2113 of the Code of Iowa, the use of private seals in written contracts, except in case of corporations, is abolished, and it is declared that all contracts in writing, signed by the party to be bound or his agent or attorney, shall import a consideration. Practically, the distinction existing at common law between instruments under seal and those not under seal is thus abrogated in Iowa. The execution of the release being admitted in the pleadings, no evidence is required on part of the defendant to sustain the defense based thereon. Being in writing, and its execution by the plaintiff being admitted, it imports a consideration, and therefore at law its validity is established."

Of this rule there can be no doubt nor any more that the court itself in the immediate connection had the subject and the rule definitely in mind, for in his charge to the jury he said:

> "While under the law the execution of the written instruments of release by the plaintiff *imports a consideration* therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration." (Rec., 1921.)

By the Supreme Court of the United States the rule is established: "That in an action upon a sealed instrument in a court of *law*, failure of consideration or fraud in the consideration for the purpose of avoiding the obligation is not admissible as between parties and privies to the deed." *Hartshorn* v. *Day*, 19 How., 211.

George v. *Tate*, 102 U. S., 564. In both of these cases the question came before this court upon *objection to the admission of evidence* As the objection goes to the very power of the court to entertain such a defense, it may be raised at any stage of the proceedings, and equally by demurrer or by objections to evidence, and such is the settled practice in the State of Kansas. *Goodrich* v. *Comm'rs. of Atchison County*, 47 Kan., 355, 357–8.

The defendant below, claiming the release executed at Leavenworth to be legally valid and effective, set it up in defense by pleading. The plaintiff, to avoid the effect of the release thus pleaded, deemed the burden of overcoming it to be upon her, and thereupon *offered it in evidence*, and in the same connection sought to impeach its legal effect. Repeated objections to testimony of this character offered by the plaintiff were overruled and the testimony admitted subject to numerous exceptions. Having once excepted to the court's ruling, it was "not desirable nor seemly for counsel to continually repeat their objections to the same class of testimony." *Salt Lake City* v. *Smith*, 104 Fed., 457, 470 (C. C. A., 8th Cir.)

Among the objections interposed was always the one of *incompetency*. At no time was there any ambiguity or uncertainty of any character as to the precise nature and kind of testimony against which this objection of incompetency was levelled. In more than one instance the inquiry of the court caused the plaintiff's counsel to state explicitly for what purpose the evidence was being offered (*Rec.*, 546, 576–80), and it was in connection with such explicit statements of the purpose of the plaintiff in offering the evidence and with specific objection of the defendants that the record shows the following:

"The defendants object to the question as *incom-*

> *petent*, irrelevant and immaterial, and *desire it understood that all testimony upon this subject is under their objection.* The court overruled the objection, to which action of the court the defendants at the time duly excepted and still except." (*Rec.*, 580.)

Although the record shows that there could have been no possible obscurity in the minds of either the court or of counsel as to the ground of objection and the particular character of testimony objected to as incompetent, it was urged in argument in the Court of Appeals that objection to evidence on the ground that it was incompetent, immaterial and irrelevant was not adequately definite to present the point that want of consideration and fraudulent inducement in procuring the execution of a sealed instrument, or of one in legal effect importing a consideration, are incompetent to be shown in a court of law.

In *Noonan* v. *Caledonia Mining Co.*, 121 U. S., 393, 400, Mr. Justice FIELD, discussing this general form of objection "immaterial, irrelevant and incompetent," stated the criticism which is suggested, and also its limitation. He said:

> "The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, *unless it be of such a character that it could not have been obviated at the trial.* The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time *if, under any circumstances, that can be done.*"

Accordingly in *Chapman* v. *Reynolds*, 77 Fed., 274, First Circuit, the court said:

> "Evidence objected to may sometimes be con-

sidered on appeal, although the objections were only generally expressed, if *in no event it could be made relevant*, and if, also, the objections to it are *not of a character which could have been obviated* if they had been stated."

It is obvious, therefore, that under the decisions of this court above cited (*Hartshorn* v. *Day*, 19 How, 211; *George* v. *Tate*, 102 U. S., 564), the ground of the objection was "*of such a charater that it could not have been obviated at the trial.*" That ground of objection was the subject-matter of the evidence—its inherent nature—and no "opportunity to obviate" the difficulty in this case could have availed the plaintiff under any circumstances.

Nor could the situation of the plaintiff in that respect be changed or helped by the provision, section 8, of the statute of Kansas, set out in the petition, p. 24. The following is the section:

> "Section 8. The want or failure, in the whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

The law is well settled by this court that state statutes like this of Kansas, which may authorize equitable defenses to be interposed in actions at law in the state courts upon contracts executed in that state, do not extend to the courts of the United States nor confer such power upon them. A statute of Kansas cannot confer upon the courts of the United States power to entertain equitable defenses in an action at law.

Northern Pacific Railroad v. *Paine*, 119 U. S., 561.

Scott v. *Neely*, 140 U. S., 106, 110–111.

Scott v. *Armstrong*, 146 U. S., 499, 512.
Vandervelden v. *Chi. & N. W. Ry. Co.*, 61 Fed., 54.
Hill v. *Northern Pacific Ry. Co.*, 104 Fed., 754.

It seems inevitable, therefore, that the judgment of the courts below upon this subject must be in direct contravention of the decisions of this court.

6.

Lapse of Time as Evidence.

This question is presented in the record by an exception appearing at pages 1909–10, and by Assignment of Error No. 99, at page 2003.

The seventh section of the petition relates to the refusal of the Circuit Court to instruct the jury that the lapse of time since the alleged death of Hillmon was an immaterial matter in the case, and to the action of the court in charging the jury contrarywise, as quoted in the petition on pages 27 and 28.

The unexplained absence of a man from home and friends for more than seven years, during which no tidings of him have been received by those who if he had been living would naturally have heard from him, gives rise to the legal presumptions that the absentee continued to live during the first seven years of the absence, and that after that time he was dead. The presumption of death will sometimes arise upon a shorter absence, such as when at the time of disappearance the absentee was in desperate state of health, or was in imminent peril of his

life; *but in no case is there any legal presumption as to the particular time of death.* Moreover the presumption of death is a mere limitation of the presumption of the continuance of life, and can only arise in a case where there is an entire absence and dearth of proof upon the subject. Where there are facts and circumstances shown, sufficient in themselves to account for the absence, there is no basis for any legal presumption, and none arises, and the party asserting the death must establish it by affirmative proof. And apart from legal presumptions, it would seem to be clear that where evi dence is produced which standing alone exhibits a powerful motive for voluntary disappearance and concealment, no inference of fact as to death can be drawn from the absence. In such case there is no more basis for an inference of fact than for the presumption of law. *Then* the negative circumstance of absence has no probative force whatever—no logical or evidential value—upon the question whether that absence should be ascribed to death on the one hand or to the motive for concealment on the other. In the present case the only direct evidence of the killing of Hillmon on March 17, 1879, came from the mouth of Brown, who testified that he accidentally shot Hillmon; but Brown had previously made affidavit that it was not Hillmon at all who was killed, but that it was a man Hillmon had murdered with intent to have the body presented to the insurance companies as the body of Hillmon; and it was evident to all concerned in the trial that he, Brown, was not entitled to the slightest credence. Eliminating his testimony, all the evidence produced by the plaintiff tending to show that Hillmon died at the time and place alleged in her pleading, bore upon the *identity of the corpse* found at Crooked

Creek. In opposition to this the company not only introduced a mass of evidence which of itself was clearly sufficient to establish that the corpse was *not* that of Hillmon, but also gave evidence sufficient in itself to establish that the corpse was that of a man murdered by Hillmon in furtherance of the fraudulent conspiracy set up in the pleading. Upon plaintiff's evidence, standing alone, it appeared that Hillmon was killed as alleged; upon defendant's evidence, standing alone, it was indubitable that he was *not* killed as alleged, and that when last seen he was engaged in carrying out a criminal fraud, to consummate which murder and concealment were necessary. In this state of the proofs, the fact that Hillmon had not been seen nor heard from since March 17, 1879, could not serve as cumulative evidence in favor of either contention, for it was perfectly consistent with both. It became entirely immaterial upon the question of the identity of the corpse. It lent no more weight to plaintiff's assertion that Hillmon died at Crooked Creek than to defendant's theory that he was in that voluntary concealment which was necessary to the consummation of the fraud and conspiracy proved against him, and which was also necessary to avoid punishment for the murder done there by him.

In its charge upon this point (Petition for Certiorari, pp. 27, 28) the Circuit Court called the jury's attention to the legal presumption arising from seven years *unexplained* absence, though such a presumption was entirely foreign to the facts of the case, which exhibit no *unexplained* absence. The court then told the jury in the same connection that Hillmon's absence might be considered with the other evidence relating to his death as tending to show that he died at the time and place alleged by the plaintiff, subject to be weakened by

a motive, if any, for a voluntary concealment. The charge in effect asserted that the absence constituted evidence of the death as claimed, adding its weight to the sum total of plaintiff's evidence upon the point to be overcome by the defendant. The jury must have taken it to mean, especially in view of the misleading and unnecessary reference to legal presumptions, that the mere fact of absence was to be given a value and weight in favor of plaintiff's contention and against that of defendant, which it obviously did not have, and this in the minds of the jury may have turned the scales of the evidence and given the preponderance to plaintiff. The charge embodied a statement of law directly contrary to that contained in the instruction requested by the defendant, which was refused and duly excepted to (*Rec.*, 1909), and under the decision of the Court of Appeals in the Eighth Circuit of *Long-Bell Lumber Co.* v. *Stump*, 86 Fed., 574, it became unnecessary to except to the charge as given. It is submitted that the following authorities support the proposition that the requested instruction should have been given, and that the instruction as given was erroneous:

Davie v. *Briggs*, 97 U. S., 628.

N. W Mutual Life Ins. Co. v. *Stevens*, 71 Fed. Rep., 258; 18 C. C. A., 107.

Montgomery v. *Bevans*, 1 Sawyer, 660; 17 Fed. Cas., 628 (by Mr. Justice FIELD).

Cone v. *Dunham*, 59 Conn., 145.

Ray v. *Mut. Benefit Co.*, 174 Pa. St., 1; 34 Atl. Rep., 283.

Schaub v. *Griffin*, 84 Md., 557; 36 Atl. Rep., 443.

Whitely v. *Equitable Life Society*, 72 Mo., 170; 39 N. W. Rep., 369.

Seeds v. *Grand Lodge*, 93 Ia., 175; 61 N. W. Rep., 411.

In re Phene's Trust, L. R. 5; Chan. App., 139.

1 Taylor. on Evidence, Sec. 200.

1 Greenleaf on Evidence, Sec. 41.

Lawson on Presumptive Ev., pp. 251–298.

It is respectfully submitted that the Petition for Certiorari should be granted and the judgment of the Circuit Court of Appeals and of the Circuit Court be reviewed.

GILBERT E. PORTER,
WILLIAM G. BEALE,
JAMES W. GREEN,
EDWARD S. ISHAM,
Counsel for Petitioner.

No. 93

Mot. of Porter, Green & Isham for Petitioner (on mo.)

FILED
NOV 16 1901
JAMES H. McKENNEY, Clerk

IN THE

Supreme Court of the United States.

Filed Nov. 16, 1901.

OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*, vs. SALLIE E. HILLMON, *Respondent*.	No. 316.

MOTION AND SUGGESTIONS IN SUPPORT THEREOF.

GILBERT E. PORTER,
JAMES W. GREEN,
EDWARD S. ISHAM,
COUNSEL FOR PETITIONER.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*, vs. SALLIE E. HILLMON, *Respondent*.	No. 316.

MOTION.

And now comes the Connecticut Mutual Life Insurance Company, petitioner in the above entitled cause, and moves the court for an order—

First. Directing that the transcript of the entire record of said cause in the Circuit Court of Appeals for the Eighth Circuit, heretofore filed with the clerk of this court and considered by the court upon petitioner's application for a writ of certiorari, be taken and stand as a due return to the writ of certiorari granted herein; or,

Second. Directing the clerk of the Circuit Court of Appeals for the Eighth Circuit to certify to this court one of the printed copies of the record of said cause in the Circuit Court of the United States for the District of Kansas

which were printed under his direction and supervision for use in said Court of Appeals, without charge therefor to this petitioner, except the charge of $1 for making and attaching his certificate to such printed copy, and that such printed copy when so certified, together with the transcript now on file of the proceedings of said cause had in the Circuit Court of Appeals, be taken and stand as a due return to the writ of certiorari heretofore granted herein.

GILBERT E. PORTER,
J. W. GREEN,
EDWARD S. ISHAM,
Counsel for Petitioner.

STATEMENT OF FACTS UPON WHICH MOTION IS BASED.

A judgment for $11,034 was entered, on November 18, 1899, in the Circuit Court of the United States for the District of Kansas, against this petitioner and in favor of respondent herein, to reverse which a writ of error was sued out of the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit by this petitioner. Upon the filing in that court of a transcript of the record in the Circuit Court, the clerk of the Circuit Court of Appeals caused said transcript to be printed, under his supervision and direction, in accordance with the rules of that court, and copies of the transcript so printed were used by that court in the consideration of the cause. Petitioner deposited with said clerk, as required by the rules of said Circuit Court of Appeals, to cover the expense of printing said transcript, the sum of three thousand and twenty-five dollars ($3,025).

The judgment of the Circuit Court was affirmed by the Circuit Court of Appeals, whereupon counsel for this petitioner, desiring to present to this court a petition for a writ of certiorari, requested the clerk of the Circuit Court of Appeals to prepare for petitioner a transcript of the entire record in that court and to incorporate therein one of said printed volumes in his possession, without requiring petitioner to pay the cost of a reproduction of such printed volume. The clerk, while consenting to use one of said printed volumes as requested, declined to prepare and furnish to petitioner such a transcript except upon payment to him of $1,628 (which sum included the charge of twenty

cents per folio for about 8,000 folios of matter in said printed volume), stating that he was obliged to make such charge under that rule of this court which requires him to exact a charge for "entering any rule, or making or copying any record or other paper, for each one hundred words, 20 cents." (169 U. S., 740, item 6.) Counsel for petitioner thereupon requested the clerk to prepare and send to them a transcript of the record of said cause in the Circuit Court of Appeals, omitting therefrom the transcript of the record in the Circuit Court, and also requested the clerk to forward directly to the clerk of this court eleven of the printed copies of the transcript of the record in the Circuit Court. Upon the receipt of such partial transcript, for which this petitioner paid to the clerk the sum of nineteen dollars ($19), this petitioner filed the same in this court, and that transcript, together with one of the printed copies of the record in the Circuit Court, forwarded by the clerk of the Circuit Court of Appeals to the clerk of this court and verified by the affidavit of one of petitioner's counsel, constituted the entire record of the cause upon which this court granted petitioner's application for a writ of certiorari.

After the issuance of the writ by this court on the 21st day of May, 1901, this petitioner requested counsel for the respondent herein to stipulate that the transcripts theretofore filed herein, constituting the record upon which the writ was issued, should be taken and stand as a return by the clerk of the Circuit Court of Appeals to said writ, but counsel for respondent declined to so stipulate. In a reply to a written request to enter into such stipulation this petitioner's counsel received from C. F. Hutchings, Esq., one of the counsel for respondent, the following letter:

(Letter-head omitted.)

"Kansas City, Kans., July 17, 1901.

"Messrs. Isham, Lincoln & Beale,
718 The Temple,
LaSalle & Monroe Sts.,
Chicago, Illinois.

Gentlemen:

Connecticut Mutual Life Insurance Co. *vs.* Hillmon.

Replying to yours of the 16th inst., in relation to stipulating that the record filed in the Supreme Court of the United States in support of the application for a writ of certiorari may stand as a return to the writ.

Personally I can see no objection to so stipulating and I think it the proper practice. I submitted the matter, however, to Mr. Wheat, who is senior counsel in the case, but he, with the concurrence of Mr. Atwood, declines to make the stipulation. I notified Mr. Green, by letter, of the conclusions my colleagues had come to.

Very respectfully yours,

Dict. C. F. HUTCHINGS."

State of Illinois, } ss.
County of Cook. }

Buell McKeever, being first duly sworn, deposes and says that he is one of the attorneys for the Connecticut Mutual Life Insurance Company, petitioner in the above entitled cause; that he has read the foregoing statement of facts and is familiar with the matters therein set forth, and that the said statement is true to the best of his knowledge and belief.

BUELL MCKEEVER.

Subscribed and sworn to before me this 6th day of November, A. D. 1901.

WALDO F. TOBEY,
Notary Public.

[NOTARIAL SEAL]

SUGGESTIONS IN SUPPORT OF MOTION.

This motion is, in effect, a request by petitioner for the application to the situation presented in this cause of the rule of procedure adopted by this court in the recent case of *Toledo, St. Louis & Kansas City Railroad Co.* v. *Continental Trust Co.*, 176 U. S., 219. In this case as in that the transcript of the record from the Circuit Court was duly certified by the clerk of the Circuit Court, was filed in the Circuit Court of Appeals and thereafter was printed under the supervision, direction and control of the clerk of the Circuit Court of Appeals under and pursuant to the rules of that court, and copies thereof were distributed by him. These copies were known to him to be accurate transcripts of the record from the Circuit Court, and eleven of them were, at the request of petitioner's attorneys, forwarded directly from his possession to the clerk of this court and filed herein. In his certificate attached to the transcript of the proceedings had in the Circuit Court of Appeals the clerk of that court certifies, in effect, that said transcript exhibits a complete record of the cause in that court excepting certain original exhibits and the record in the Circuit Court.

Petitioner's counsel filed herein, with the petition for a writ of certiorari, an affidavit stating that the printed copy of the transcript of the record filed with the petition was a true copy of the transcript of record of the proceedings in the Circuit Court for the District of Kansas on which the case was heard in the United States Circuit Court of Appeals for the Eighth Circuit, without alteration, addition or diminution. These two transcripts, with the original exhibits, when filed, constitute a true record of the

entire cause in the Circuit Court of Appeals, and it is respectfully submitted that the clerk of the Circuit Court of Appeals has no right under the rules of this court to exact from this petitioner the sum of sixteen hundred dollars ($1,600) for certifying as correct a printed volume of a record which was printed under his direction and supervision for which service he has already been paid by this petitioner, and that, therefore, one of the orders in petitioner's motion should be entered.

GILBERT E. PORTER,
J. W. GREEN,
EDWARD S. ISHAM,
Counsel for Petitioner.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*, vs. SALLIE E. HILLMON, *Respondent*.	No. 318.

STATE OF KANSAS, COUNTY OF DOUGLAS. } ss.

James W. Green, being first duly sworn, deposes and says that he has served the foregoing notice of motion upon Messrs. C. F. Hutchings and L. B. Wheat, by delivering to each of them on the 8th day of November, A. D. 1901, a copy of said notice, together with a copy of the foregoing motion, statement of facts, and the suggestions in support of said motion; and served said notice on J. H. Atwood on the same day by leaving a copy thereof, with copy of motion and statement of facts, at his law office with Mr. Hooper, who is associated with him in business.

J. W. GREEN.

Subscribed and sworn to before me this 9th day of November, A. D. 1901.

MINA P. DIAS,
Notary Public.

[NOTARIAL SEAL]

My commission expires October 11, 1904.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 316.

THE CONNECTICUT MUTUAL LIFE INSURANCE CO., PETITIONER,

vs.

SALLIE E. HILLMON, RESPONDENT.

Reply to Objections of Respondent to Motion of Petitioner in Regard to Record.

A sufficient reply to the objections presented by respondent is that if the preliminary requirement as to costs of the clerk of the circuit court of appeals were complied with, the only possible return he could make to the writ of certiorari would be the sending up of the identical record already laid before this court as the one upon which the circuit court of appeals rendered its judgment, and upon which this court ordered its writ to issue. No other return is possible in obedience to that writ.

The only question now involved is whether the clerk may demand certain costs of the petitioner as a condition of sending up, in obedience to the writ, a transcript of the

record upon which the court below heard the cause and rendered judgment on the merits. If all his demands were complied with, the only possible obedience to the writ would be the return of this identical record.

Whether that record was one upon which the court below might properly proceed to hear and determine the cause is not a question to be tried on this application. The writ here requires the clerk to send to this court the record upon which the court below did in fact proceed to hear and determine the cause upon its merits, that its judgment may be reviewed. Whatever that record may be, it is the one on which a judgment on the merits in favor of the objectors on this present motion was rendered in the court below. To the order of this court, that the actual record be sent up to it for review of the judgment rendered thereon, it is no answer to say that the record was irregular and faulty, and that for that reason this court may not see it or review the judgment.

Nevertheless it seems plain that the matters of objection adduced are without foundation, either here or in the court below, where some of them were in fact presented and overruled; for, notwithstanding them, the court proceeded to hear and decide the case upon the merits. This is shown by the statement on page 5 of respondent's brief filed in objection to this motion. Obviously they were all met there, as they are here, by the order of that court shown on page 2012 of the printed record filed with the petition for the writ of certiorari.

That the printed transcript of the entire record in this cause in the circuit court of appeals for the eighth circuit,

which was filed in this court upon petitioner's application for the writ of certiorari, is a true copy of that record, and that the printed copy of the transcript of the record of said cause in the circuit court of the United States for the district of Kansas, which is incorporated therein, is a true copy of that transcript of the record on which said cause was heard in the circuit court of appeals, is not disputed at all. On the presentation of the petition for certiorari, that record was verified by the affidavit of counsel for petitioner as being the record on which the case was heard below, and upon that there is no question made. That record was printed under the direction and supervision of the clerk of the circuit court of appeals for use in that court on the hearing of the cause, and there is on file in the office of the clerk of this court a letter to him, dated May 7, 1901, from the clerk of the circuit court of appeals, transmitting certain copies of this printed record for use in this cause, in which he says: "I will state that these records have not been out of my possession since the same were printed."

As we have already stated, if the requirement as to fees of the clerk of the circuit court of appeals, to whom this writ of certiorari is directed, were complied with, he must obey the writ and make his return thereto in regular form; and no other return is possible, in the nature of the case, but to certify up to this court the identical record which is now before it.

GILBERT E. PORTER,
J. W. GREEN,
EDWARD S. ISHAM,
Counsel for Petitioner.

No. 94.

Brief of Porter, Green & Beale for Petitioners.

Office Supreme Court U. S.
FILED
NOV 11 1902
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

Filed Nov. 11, 1902.

OCTOBER TERM, A. D. 1902.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
SALLIE E. EILLMON,
Respondent.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF WILLIAM G. BEALE, FOR PETITIONER.

BUELL McKEEVER,
GILBERT E. PORTER,
JAMES W. GREEN,
WILLIAM G. BEALE,
OF COUNSEL.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

SALLIE E. HILLMON,
Respondent.

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT OF WILLIAM G. BEALE, FOR PETITIONER.

BUELL McKEEVER,
GILBERT E. PORTER,
JAMES W. GREEN,
WILLIAM G. BEALE,
OF COUNSEL.

CHICAGO:
THE GUNTHORP-WARREN PRINTING CO.,
116-118 Randolph Street,
1902.

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STATEMENT OF THE CASE.

On the 13th day of July, 1880, Sallie E. Hillmon filed, on the law side of the Circuit Court of the United States for the District of Kansas, a petition seeking to recover from the Connecticut Mutual Life Insurance Company the sum of $5,000 and interest upon a policy of insurance, not under seal, alleged in said petition to have been issued for her benefit by the insurance company on March 4, 1879, upon the life of John W. Hillmon, her husband. In her petition she further alleged that both she and the insured had fully complied with all of the terms of the policy; that the insured had died on the 17th day of March, 1879; that due proofs of death had been forwarded to the company, and that the company refused payment of the policy. (*Rec.*, 3-5.)

In defense to the action the insurance company answered (by an amended answer), as follows:

> "1st. The defendant, the Connecticut Mutual Life Insurance Company, for its first defense represents and shows to the court that it denies all and singular the allegations and averments contained and set forth in said plaintiff's petition, filed herein.
>
> 2nd. Said defendant further answering, says that on and before the 30th day of November, A. D. 1878, one John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons to the defendant unknown, unlawfully and fraudulently confederating, conspiring, contriving and intending to cheat and defraud this defendant, procured a large amount of insurance to be taken on the life of the said John W. Hillmon, to-wit, in the New York Life Insurance Company, by its policy numbered 134,418 and dated November 30th, 1878, for the sum of ten thou-

sand dollars; in the Mutual Life Insurance Company of New York, by its policy numbered 195,132 and dated Dec. 10th, 1878, for the sum of ten thousand dollars; and in the Connecticut Mutual Life Insurance Company, by its policy numbered 153,614 and dated March 4th, 1881, for the sum of five thousand dollars.

That thereafter and in pursuance of said conspiracy, and with said intent, said Hillmon, Brown and Baldwin did falsely and fraudulently pretend and represent unto this defendant and others that said Hilmon was dead, and did, on or about the months of March and April, A. D. 1879, and thereafter, for the purpose of securing the payment of said policies and obtaining the money thereon, falsely and fraudulently claim, pretend and represent unto this defendant that the said John W. Hillmon was dead, and that a certain dead body which they had procured and had was the dead body of the said John W. Hillmon; whereas said John W. Hillmon was not and is not dead; that since said time the said Hillmon has kept himself concealed, and has and is keeping himself concealed under assumed names, for the purpose of consummating the conspiracy entered into as aforesaid.

That no premium or payment of any kind has ever been made on or on acount of said policy, and that said policy is void.

3rd. Said defendant, further answering, says that on or about the .... day of ....., A. D. 1879, a dispute, difference and controversy subsisted between said plaintiff and defendant in this, to wit, said plaintiff claimed that one John W. Hillmon, the person mentioned in the policy of insurance, set forth in said plaintiff's petition, died near Medicine Lodge, in Barbour County, State of Kansas, on or about the .... day of ....., A. D. 1879, from a gunshot wound then and there accidentally discharged by one John S. Brown and that by reason thereof a cause of action had accrued to her, this plaintiff; while the said defendant denied that the said John W. Hillmon was dead and that any cause of action had accrued to said plaintiff.

That for the purpose of ending said dispute and con-

troversy said plaintiff for a good and valuable consideration to her by said defendant paid, made, executed and delivered to said defendant her certain release and satisfaction in writing, of which the following is a true copy, to wit:

'LEAVENWORTH, Kansas, Sept. 15, 1879.

In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the Connecticut Mutual Life Insurance Company by reason of policy No. 153614, issued by said Company, dated March 4, 1881, and for the sum of five thousand dollars, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full and order the dismissal of any and all suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.

(Signed) SALLIE E. HILLMON.

Attest:
W. J. BUCHAN,
JOHN H. BROWN.'

Wherefore defendant asks judgment that said policy be declared null and void," etc.

The plaintiff, in reply, denied the allegations in the amended answer, and charged that the release above pleaded had been obtained by fraud and without consideration, and was void.

On November 30th and December 10th, respectively, 1878, the New York Life Insurance Company issued two policies of insurance for $5,000 each, and on December 10th, 1878, the Mutual Life Insurance Company of New York issued a policy of insurance for $10,000,—all upon the life of said John W. Hillmon, and all being made payable to respondent as beneficiary. At the time of the institution of this action the respondent also began separate actions at law in the same court against each of the other two insurance

companies to recover upon the policies respectively issued by them. On the 14th of June, 1882, an order was entered in each of the three actions consolidating them for trial. (*Rec.*, 25.) Two trials of the consolidated causes resulted in disagreements by the jury. On the 29th day of February, 1888, judgments in each were rendered for respondent, which upon writs of error were reversed by this court, and the cases were remanded for new trial. (145 U. S., 285.) After two more trials of the consolidated causes, each resulting in a disagreement by the jury, a compromise was effected between respondent and the New York Life Insurance Company, which was followed by a dismissal of the suit against that company. (*Rec.*, 61.) Thereafter, on the 16th day of October, 1899, an order previously entered consolidating the two remaining suits for trial was continued in force over the objection of each defendant (*Rec.*, 70), and the consolidated causes again came on for trial, resulting in separate judgments November 18th, 1899, for respondent against the Mutual Life Insurance Company of New York, and against petitioner. To reverse this latter judgment petitioner sued out a writ of error from the Circuit Court of Appeals for the Eighth Circuit, and upon a hearing in that court before Judges CALDWELL, SANBORN and THAYER the judgment against petitioner for $11,034 was, on the 2nd day of April, 1901, affirmed, Judge SANBORN rendering a dissenting opinion. (*Rec.*, 2018.) The Mutual Life Insurance Company of New York sued out a similar writ of error, but compromised and settled its case before any hearing in the Circuit Court of Appeals.

Before each and every trial the several defendants asked that the order of consolidation might be set aside, and that the cases might be tried separately, but all these applications were denied and exceptions were duly taken. After

the three causes had already been tried five times, before five different judges, respondent and the New York Life Insurance Company effected a settlement out of court, and a stipulation was made (*Rec.*, 69) between the defendants in the other two cases and the respondent that the order of consolidation theretofore made should be set aside, and that each defendant should be entitled to have and should have a separate trial. Upon the ground, among others, of this stipulation, petitioner renewed its application for a vacation of the order consolidating the cases, but this application was again refused, the order of consolidation was renewed (*Rec.*, 70 and 135), and the impaneling of a jury proceeded, petitioner excepting.

During the impaneling of the jury, when twelve men had taken their seats in the jury box, the Circuit Court said: "It is my opinion that the plaintiff has six peremptory challenges, and each of the defendants three" (*Rec.*, 136), to which statement and ruling of the court the defendants and each of them duly excepted.

There being two cases, respondent thereupon demanded and was allowed to exercise over the objection of each defendant six peremptory challenges to the one single jury, while the defendant in each case was allowed but three, so that petitioner was compelled to try its separate case before a jury to which it was given the right of but three peremptory challenges, while respondent was given the right of six peremptory challenges to the same jury. To the rulings of the court in allowing six peremptory challenges to respondent exceptions were duly taken, and they are also the subject of specific assignments of error.

At the trial, which occupied a month, the two insurance companies remaining defendants contended and adduced

evidence to show that the body of the person who came to his death in the camp at Crooked Creek on the evening of March 17, 1879, which was claimed by respondent to be the body of her husband, was not the body of John W. Hillmon; that Hillmon, John H. Brown and Levi Baldwin confederated together for the purpose of defrauding the insurance companies by procuring insurance upon the life of Hillmon, and by falsely pretending that Hillmon was dead and that this dead body was his, and by demanding payment of the policies, although in fact Hillmon was still alive after the alleged date of his death; and that the claims of respondent against the insurance companies had been completely released and extinguished.

There was conflict in the evidence, as was to be expected, particularly on the question of identity submitted to the jury. There was also some remarkable testimony. For instance, in the deposition of Hezekiah Covey, a teamster, taken for the fourth trial in 1895,—Covey himself not being within the jurisdiction of the court at the last trial,—he told with great particularity how he had examined the body on three different occasions and had recognized it by a certain mole on the back of the left shoulder; yet it curiously appeared that Covey had not even been called as a witness until the second trial of the case, before Mr. Justice Brewer, in 1885; that at this second trial, and at the third trial, in 1888, he had in his testimony made no mention of the mole, or of more than one examination of the body; that until after the third trial he had not even said to respondent's counsel anything about his knowledge of this mole; and that at the third trial, in response to a specific question in cross-examination whether there was any peculiarity about Hillmon by which he could recognize him he had responded, "not particularly; no marks that I knowed of."

(*Rec.*, 264, 301, 1727-1731.) So, likewise, the respondent (now married to a man named Smith, but frequently in the case still called Mrs. Hillmon from convenience and long association) distinguished herself by statements flatly contradicting upon one point or another, or contradicted by, more than a dozen people.*

But eccentricities of testimony like the foregoing are not subject to review in this court, and we have no thought of asking consideration to the weight of the evidence.

The questions presented for argument here relate to the decision of the Circuit Court of Appeals affirming the action of the Circuit Court in consolidating the two

---

*Mrs. Geo. A. Nichols (*Rec.*, 1118-19) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

Geo. A. Nichols (*Rec.*, 1137) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

W. W. Nichols (*Rec.*, 1157-8) contradicted by Sallie Smith. (*Rec.*, 1884-5, 828.)

Mrs. Maggie J. Nixon (*Rec.*, 1172-3) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

Samuel D. Nixon (*Rec.*, 1184) contradicted by Sallie Smith. (*Rec.*, 1891-2.)

A. L. Seelig (*Rec.*, 1503-4) contradicted by Sallie Smith. (*Rec.*, 1886, 1892-3.)

G. W. E. Griffith (*Rec.*, 1481) contradicted by Sallie Smith. (*Rec.*, 1886, 1892-3.)

E. B. Good (*Rec.*, 1465-6) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

O. D. Pickens (*Rec.*, 1473) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

W. O. Hubbell (*Rec.*, 1595-6) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

James W. Adams (*Rec.*, 1029-30) contradicted by Sallie Smith. (*Rec.*, 1886-7, 1894.)

Buchan (*Rec.*, 1240-3) contradicted by Sallie Smith. (*Rec.*, 771-2-4, 820.)

Nettles (*Rec.*, 1809-10) contradicted by Sallie Smith. (*Rec.*, 833.)

remaining cases for trial, and in allowing as a result of the consolidation six peremptory challenges to the plaintiff as against three to the defendant Insurance Company, petitioner here; in the admission and the rejection of evidence; in the giving and the refusing of instructions; and in the denial of petitioner's motion to discharge the jury on account of certain remarks made by the court in the presence of the jury during the course of the trial.

Material details of fact not deemed necessary to be set forth in this statement will be found distinctly outlined in connection with the specifications of error relied upon, and more fully presented in the "Argument," *post*.

The Bill of Exceptions.

A preliminary question may possibly be raised in this court on behalf of the respondent in reference to the bill of exceptions (*Rec.*, 129-1926), as it has heretofore been the subject of persistent attack by her counsel. Objections having already been made to it in this court, in opposition to the granting of the writ of *certiorari*, it may properly receive some attention at this point. The record shows exactly what was done. At the conclusion of the trial the two defendants prepared separate bills of exceptions, which were settled and signed in the two causes (*Rec.*, 125, 127), and these bills as settled and allowed were identical in their substance. Both defendants sued out writs of error, and made application to the Circuit Court of Appeals for an order directing that only *one* copy, instead of *two* copies, of these identical bills need be transmitted by the clerk of the Circuit Court, and that such one copy, and also the original exhibits used on the trial and sent up by order of the Circuit Court, should be treated as if actually incorpo-

rated into both records. This was a reasonable application and it was granted. (*Rec.*, 2009-2013.) Although counsel for respondent have made a great outcry over somebody's trivial mistake (we do not know whose), whereby the conclusion of the *copy* of the bill of exceptions in this record (*Rec.*, 1926), reads as if it were the bill actually settled in this case, we are not aware that any one has ever pretended that such was the fact, or that it was anything else than the copy of the bill filed in the other case and used in this one pursuant to the order of the Circuit Court of Appeals. That order merely prevented the useless duplication of a bill of exceptions embracing nearly 1,800 printed pages; it was as proper and lawful upon that subject as it manifestly was in respect to the use of the single set of original exhibits in both cases; and it was conclusive under the circumstances shown.

Anticipating here, also, a continuance of criticisms by counsel for respondent upon the magnitude of this record, a word upon that subject may be justifiable. The record was no larger than was required in the Circuit Court of Appeals for the presentation of the questions taken there for review. It was necessary that the bill of exceptions contain all the evidence and the entire charge of the court in view of repeated decisions of various Circuit Courts of Appeals, and particularly of the Circuit Court of Appeals for the Eighth Circuit. In the case of *City of Milwaukee* v. *Shailer & Schniglau Co.*, 91 Fed., 726 (C. C. A., 7th Circ.), Woods, J., delivering the opinion of the court, said:

> "The first, second, third and fourth specifications of error, which alone are relied upon in the brief for the plaintiff in error, have relation to the admission and exclusion of evidence and to instructions refused and given. . . . An insuperable obstacle to a consideration of any of the questions discussed is that the

bill of exceptions does not purport to contain all the evidence in the case, and clearly does not contain all that was important touching those questions, though it is certified by the judge of the court below that it 'contains all the material evidence offered by either party on the trial.' "

Reference may also be made to the following cases:

U. S. v. *Patrick,* 73 Fed., 800, 806 (8th Circ.).

Lincoln, etc., Safe Deposit Co. v. *Allen,* 82 Fed., 148, 150 (8th Circ.).

Jefferson v. *Burhans,* 85 Fed., 924, 927 (8th Circ.).

Yates v. *U. S.,* 90 Fed., 57, 62 (9th Circ.).

Case v. *Hall,* 94 Fed., 300, 302 (8th Cir.).

Myers v. *Sternheim,* 97 Fed., 625, 626 (9th Cir.).

The entire charge of the Circuit Court was incorporated into the bill of exceptions, by express order of that court. (*Rec.,* 1915.)

SPECIFICATIONS OF ERROR.

Petitioner specifies the following errors of the Circuit Court, affirmed in the Circuit Court of Appeals, which it urges in support of its prayer that the judgment against it should be reversed:

Specification 1.

The court erred in consolidating this cause for trial with the cause entitled *Sallie E. Hillmon* v. *Mutual Life Insurance Company of New York,* in the face of the express stipulation signed by the plaintiff and by all the defendants that the causes should be tried separately.

(Assignments 2 and 3; *Rec.,* 1931-2, 68-70, 133-5.)

Specification 2.

The court in the impaneling of the jury erred in permitting the respondent to exercise more than three peremptory challenges.

(Assignments 4, 5, 6 and 7; *Rec.,* 1932-3, 71-2, 136-7.)

Specification 3.

The court, after a *prima facie* case of conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin had been established, as alleged in the pleadings, and which the court submitted to the jury (*Rec.,* 1921), erred in not permitting petitioner to show by the witnesses E. D. F. Phillips, J. H. Blythe, James S. Crew and Alexander Carr,

the other acts performed and declarations made by the alleged co-conspirators in furtherance of such conspiracy, which would have been shown by the testimony of said witnesses as indicated below. ("A," "B," "C" and "D.")

(Assignment 72; *Rec.*, 1984, 1809.)

A.

The witness Phillips had been called to the house of Levi Baldwin as a physician to re-set a dislocated elbow of Baldwin's son, and after the operation had been performed the conversation set forth in the following answer took place:

> "Q. Now, you may state what the conversation was, so far as it relates to any inquiries he (Levi Baldwin) made of you of the effect of death upon bodies?"

To which the witness Phillips would have replied in substance:

> "He asked me if I had an insurance, and whether I knew about certain insurance companies, whether they were safe or not; he said he had been thinking about taking out some insurance; and in the same conversation, or at the same time, he asked me how long a dead body would—how long a dead body would decompose after it was buried. I said it would depend on whether decomposition had set in before the body was buried or not; and it would depend on the condition of the body when buried. He said, wouldn't—in connection with the conversation of insurance—he said wouldn't it be a good scheme to get a good insurance on your life and go South and get the body of a Greaser and pass it off as your body—wouldn't it be a good scheme to go down South to get the body of a Greaser, or get a large amount of insurance on your life and go down South and get the body of some Greaser and pawn it off as your body and get the money."

"Q. I will ask you this question then: At that time was inquiry made of you by Levi Baldwin in regard to the length of time which would be required for a body to decompose as to become unrecognizable?"

To which the witness Phillips would have answered substantially as set forth in the answer to the preceding question. The testimony was excluded.

(Assignments 64 and 65; *Rec.*, 1978-1982, 1602-7.)

B.

The witness, Blythe, a lawyer and a fire insurance agent at Tonganoxie, testified that he knew John W. Hillmon and Levi Baldwin; that they had called at his office in the fall of 1878 and asked him concerning life insurance, how to get it, what were good companies, how they should make application, whether a person could travel in different countries without forfeiting the insurance, what proceedings were necessary to collect the insurance upon death, what length of time would be required, etc.; that a week or ten days before this conversation he had met Baldwin alone on the street. The conversation set forth in the following answer then took place:

"Q. What was said by Mr. Baldwin on that occasion?"

To which the witness Blythe would have replied:

"Mr. Baldwin on that occasion asked me if I knew anything about life insurance and about the companies; that a friend of his wanted to get some insurance, and he wanted to know if I could recommend some good company to him, and I told him how to do it."

"Q. Did he say a friend?"

To which the witness Blythe would have replied:

"No, sir; not on that occasion. I think the gentleman said it was a relative of his, or connection; I don't know who it was; I didn't know Mr. Hillmon then."

"Q. That was a few days before these parties came to your office?"

To which the witness Blythe would have replied:

"Yes, sir."

The testimony was excluded.

(Assignments 66, 67, 68; *Rec.*, 1982-3, 1612-15.)

C.

The testimony of the witness James S. Crew, all of which was excluded by the court, was substantially as follows:

The witness, aged forty-nine years, was then a resident of Oakland, California; resided in the spring of 1879 in Lawrence, Kansas; was a bookseller, and at the time receiver of the Simpson Bank. Was acquainted with Mrs. Hillmon and knew Levi Baldwin for a long time prior to 1879. As receiver of the Simpson Bank he had two or more notes of Levi Baldwin for collection. They had been then due for some time. Two of the notes were secured by mortgage on real estate and one by chattel mortgage on live stock. Had talked of foreclosing mortgages, and had consultation with Baldwin both at his house and at the bank; had been unable to collect either principal or interest; had had a conversation with Baldwin with reference to how his indebtedness to the bank had arisen; that Baldwin had told him that a part of the money represented by his indebtedness had been furnished to insure the life of John

W. Hillmon; that this conversation took place somewhere between the 20th of February and the 1st of March; that he remembered the circumstance of the reputed death of John W. Hillmon; that he heard of it a few days from the time of his death in the latter part of March; that he had a conversation with Levi Baldwin in regard to the latter's indebtedness to the bank after he had heard of the reputed death of Hillmon; that the conversation took place in the morning in the witness' store; that Baldwin came in hurriedly and told him to let his (Baldwin's) matters rest as he was then on his way west after the body of John W. Hillmon; that he had arranged for a portion of the life insurance on the life of Hillmon, and that as soon as he got it would be able to straighten up all his affairs; that Baldwin stated that he was to have $10,000 of this insurance; that he had acquainted himself thoroughly with Baldwin's financial condition and found him in very straightened circumstances, having quite an amount of property, but all mortgaged and mostly mortgaged twice—first and second mortgages, and that Baldwin's indebtedness was pressing him at this time severely.

(Assignment 69; *Rec.*, 1983, 1607, 1615-17.)

D.

The witness, Alexander Carr, testified that he knew Levi Baldwin and Hillmon; that in March, 1879, he and Baldwin were out together buying stock, something after the 10th of March. The conversation set forth in the following answer then took place:

> "Q. Now you may state, if you please, what conversation, if any, you had with Mr. Baldwin in regard to any business transaction that he and Mr. Hillmon were in."

To which the witness Carr would have replied:

"I had one or two. He was talking to me a couple of times about his and John Hillmon's business—speaking about John Hillmon as much as a couple or three times."

"Q. Now you may state what he (Levi Baldwin) said."

To which the witness Carr would have replied:

"Well, he was talking one day about him and Mr. Hillmon going into a sheep ranch—talking about going into a sheep ranch together; and one day he was speaking about that he was under brogue with John W. Hillmon, and he said he and Hillmon had a scheme under brogue, and he said if that worked out all right that he was all right."

The testimony was excluded.

(Assignments 64 to 72; *Rec.*, 1978-85, 1618-19.)

Evidence of the following facts had previously been developed in the case, and established a *prima facie* case of conspiracy between Hillmon, Baldwin and Brown to rob the insurance companies. (See *Rec.*, 1979-81.)

Levi Baldwin and John W. Hillmon had known one another intimately for eight or ten years prior to 1879. Baldwin had employed Hillmon on his farm and in purchasing cattle for him. During his visits at Lawrence Hillmon generally stopped with Baldwin. John H. Brown accompanied Hillmon on many trips, and was well acquainted with Levi Baldwin. Mrs. Hillmon, then Sallie E. Quinn, was a cousin of Levi Baldwin, worked at his house, and met Hillmon there. (Testimony of Levi Baldwin, Sallie E. Smith, Claude Holliday, William Brown, Henry Clay and Lemuel Evans, *Rec.*, 691-2, 781, 992, 1017-18, 1211-12, 1301-2.) In the fall of 1878 Levi Baldwin was

in embarrassed circumstances financially, and was hard pressed by his creditors. (Testimony of J. H. Blythe, *Rec.,* 1615.) John W. Hillmon married Sallie E. Quinn, October 3rd, 1878. (*Rec.,* 1594.) At this time John W. Hillmon was insolvent, owing McKamy & Anderson about $5,000, and various other parties small sums of money, and he apparently had no assets, except some notes of Levi Baldwin. (*Rec.,* 1389-93, 1399, 1889, 13, 323.) Some time after his marriage he and his wife occupied one room in Mrs. Mary Judson's house, and did their cooking on Mrs. Judson's stove. (*Rec.,* 527, 536.) Levi Baldwin and John W. Hillmon became deeply interested in life insurance. They went to J. H. Blythe, a lawyer and fire insurance agent at Tonganoxie, to whom Baldwin introduced Hillmon, and they asked Blythe various questions about life insurance, what companies were good ones, and how to collect in case of loss. (*Rec.,* 1612-14.) They went to G. W. E. Griffith, a banker at Lawrence and a local agent for the Mutual Life Insurance Company, and questioned him about life insurance. Griffith referred them to Theodore Wiseman, an agent of the same company, and they discussed the subject with Wiseman. Baldwin inquired particularly about insurance, and later said he did not want to take out any policy, but that Hillmon did. An application was made out and a policy ultimately delivered. On February 26th, 1879, in a conversation with Wiseman on the street, Hillmon said he was going West on business [1] might get killed; he asked about proofs of death, what the widow must do in order to obtain her insurance money, and what evidence she would have to furnish if he were killed. Wiseman told Hillmon that if he were killed a coroner's inquest and verdict would be required. (Testimony of G. W. E. Griffith and Theodore Wiseman, *Rec.,* 1479-80,

856-9, 862-3.) Hillmon and Levi Baldwin went together to A. L. Selig, agent for the New York Life Insurance Company, and talked insurance with him. At the suggestion of Selig, Hillmon made application for an accident policy, but on receiving it refused to accept it on the ground that its provisions forbade his carrying firearms while herding cattle. Subsequently he took out a regular life policy. (Testimony of A. L. Selig, *Rec.*, 1496-8.) In conversation with Wiseman, Hillmon stated as a reason for taking out so much insurance that he did it to protect his relatives who had advanced money on stock that he had out West. He also drew Wiseman's attention to the fact that he had been vaccinated as required by the New York Life Insurance Company. (Testimony of Wiseman, *Rec.*, 863.) The total amount of insurance taken out was $25,000, the total annual premiums for which amounted to $600. (*Rec.*, 139, 145, 830.) John W. Hillmon and John H. Brown on their last trip passed through Wichita. While stopping at the Globe Hotel, Hillmon met H. B. Marshall, and finding that Marshall was a horseman, and understood catching wild horses, Hillmon asked Marshall to go out on the range in Western Kansas with them and offered Marshall five or six hundred dollars if he would go, with three hundred dollars down. Marshall refused the offer. (Testimony of H. B. Marshall, *Rec.*, 1403.) They also stopped with two half brothers, Michael Mesh and Ben Helda, at their shanty near Wichita, in the latter part of February, 1879. Hillmon told Mesh that he and Brown were going to buy a ranch, and offered Mesh one hundred dollars if he would accompany them. Returning from town the night before they left, Hillmon said he had been to Lawrence to be vaccinated, and he wanted Mesh to go and get vaccinated also, and then accompany them on the trip.

They offered Mesh $100.00 as a present in addition to his salary. He refused to go. Brown told Helda a similar story, and tried to get Helda to accompany them, saying that they were going into the cattle business and that they had lots of money. He refused to go. (Testimony of Michael Mesh and Ben Helda, *Rec.*, 1560-2, 1574-5.)

The news of Hillmon's alleged death came to Mrs. Hillmon and Levi Baldwin upon his bringing her from his home to Mrs. Judson's house. He and his brother Alva started the next day for Medicine Lodge, where the body was. (*Rec.*, 752, 791-2.) Levi Baldwin stated that he and his brother went there at Mrs. Hillmon's request to see the state of affairs. (*Rec.*, 687.) Alva Baldwin said that they went there for the purpose of bringing the body back to Lawrence, but that on account of the weather they concluded to fence in the grave. They met Brown there. (*Rec.*, 721-2.) They arrived at night and the next morning made their arrangements to fence the grave. (Testimony of Levi Baldwin, *Rec.*, 708.) At the grave the two Baldwins and Brown met representatives of the insurance companies, Walker, Tillinghast and others. The body was exhumed, and upon the cloth being removed from the face Alva Baldwin exclaimed, "Hell, that ain't Hillmon." (Testimony of Wiseman and Tillinghast, *Rec.*, 868, 1584.) At the coroner's inquest at Lawrence, Alva Baldwin was in town, but he was not called by Levi Baldwin or by Mrs. Hillmon to testify, and he never testified or gave his deposition at any trial before the last one. (*Rec.*, 724.)

Upon or near the conclusion of the inquest Brown left Kansas and took up his residence in Missouri. (*Rec.*, 431-4, 489, 492.) In September, 1879, after making written statements, at the request of respondent's counsel, to the effect that the dead body was that of John W. Hillmon, he

made a contrary statement to William J. Buchan, whom his father had employed, confessing that he had lied before, and that this statement to Buchan was the truth. In this statement he in substance said that he and Levi Baldwin and Hillmon had put up a job on the insurance companies to get Hillmon's life insured, and that the intention was that he and Hillmon should go Southwest somewhere and find a body which they could pass off as Hillmon's; that Hillmon was to get the policies and Baldwin was to furnish the money to pay the premiums; that in pursuance of that scheme they left Lawrence and went to Wichita and various other places in the hope of finding a frozen body on the plains, but that they failed to find any body, and Hillmon then returned to Lawrence, while he (Brown) remained at Wichita; that Hillmon came back to Wichita and they started out on another trip; that they overtook a man and asked him to ride with them; that Hillmon had been vaccinated at Lawrence, and he persuaded this fellow to let him (Hillmon) vaccinate him (the stranger) also, taking the virus from his (Hillmon's) own arm; that Hillmon during the trip traded clothes with this man; that one night while this man was lying at the fire Hillmon shot him; that Hillmon then took a valise and started off, saying that his (Hillmon's) name would be Marshall, and that Brown would hear from him from time to time; and that Brown got on his horse and rode to some of the neighbors and told them that he (Brown) had shot his partner, Hillmon, by accident. (Testimony of Buchan. *Rec.*, 1228-31, 1234, 1235.)

John H. Brown also made, signed and swore to a statement in writing, setting forth substantially the above facts. (*Rec.*, 1236-7, 1284-6.)

After making this statement, John H. Brown met Mrs.

Hillmon at Levi Baldwin's house September 12, 1879. He there informed her that he had made such a statement, and that Buchan wanted to make an appointment and see her at Leavenworth. He remained at Baldwin's that night and talked with her at length the next morning with reference to this matter, and she consented to a meeting with Buchan at Leavenworth on Monday. Levi Baldwin was at home during this conversation. On Monday Mrs. Hillmon met Buchan and Brown at Leavenworth, and Buchan told her that Brown had made this contrary statement to the effect that the body was not that of her husband, and that she must get back the policies from her attorneys, and give them up to the companies. She executed releases of the policies, and an order to her attorneys, Wheat & Clough, to deliver them to Buchan. She also accompanied Buchan to the office of her attorneys and demanded the policies. Wheat refused to give them up, claiming to have a lien for $10,000 upon them. On September 25th, 1879, she executed at Wyandotte another release to the New York Life Insurance Company to correct an error in one of the first releases. (Testimony of Brown, Sallie E. Smith and W. J. Buchan, and certain exhibits. *Rec.*, 496, 596, 768-74, 816-26, 830, 1239-1246.)

About the time John W. Hillmon and John H. Brown were in Wichita in the early part of March, 1879, letters were received at Fort Madison, Iowa, from Frederick Adolph Walters, dated at Wichita, by Alvina D. Kasten, Walters' sweetheart, C. R. Walters, his brother, Elizabeth Rieffenach, his sister, and Henry Spreen, a member of his lodge, all of them to the effect that he, Walters, had been hired by a man named John W. Hillmon to accompany him out west on a sheep ranch; that he had been promised large wages, and that he expected to start about March 5th. This

was the last letter or message of any kind received from Walters by his family and friends, and he has never been heard of by them since.

(See the testimony of Alvina D. Kasten, C. R. Walters, Elizabeth Rieffenach and Henry Spreen. *Rec.*, 1687-93, 1698, 1740-42, 1774-6, 1711-14.

Additional facts are set forth in the argument, *post*.

Specification 4.

The court erred in not giving the following instruction, requested by petitioner:

> "No. 36. The jury are instructed that if they believe from the evidence, that before the institution of this suit, the plaintiff had been told and was informed, and was thereby notified that Levi Baldwin, John H. Brown and John W. Hillmon had confederated and conspired together to procure from the defendant insurance companies the policies sued upon in these cases, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured as that of the insured, and of thereby falsely representing the said insured to be dead; and that they had accordingly in fact procured, received and accepted said policies in execution to that extent of the design and purpose aforesaid; and that the dead body presented to the defendants was one procured and presented by said persons conspiring together as aforesaid, and was falsely represented by them to be the body of the insured; then, by the institution of this suit, and by claiming therein the body so presented to be the body of the insured, she thereby availed herself of and adopted and made, in legal effect, her own, all the acts done by the said persons, and each of them, so confederating and conspiring, in aid and furtherance of the matter of said unlawful combination and conspiracy, with like legal effect as to her as if she had been one of the parties originally conspiring.

The court erred in giving to the jury the following portion of its charge:

> "In these cases the defendants allege that John W. Hillmon, John H. Brown and Levi Baldwin and divers other persons unknown, unlawfully conspired together to cheat and defraud the defendants by procuring the insurance policies, by substituting the body of another person, claiming it to be the body of Hillmon, and by thereby obtaining the money upon the policies. The objects of the conspiracy alleged to have been formed contemplate the commission of a crime, that of obtaining money by false and fraudulent pretenses, and it is claimed by the defendants that during the progress of the conspiracy it resulted in the commission of murder. Whoever alleges a conspiracy or fraud, whether as a cause of action or as a defense against the cause of action of another, is required to be definite and precise, not only in the description of the conspiracy or fraud charged, but also in respect to the persons sought to be held as conspirators or participators in the fraud, especially if they are parties to the suit in which the charge is made. In these cases, although it was known that the policies of insurance were made payable to Sallie E. Hillmon, and that no one else could obtain the money thereon without her act and consent, there is no allegation in the answers of the defendants that she was either a party to the alleged conspiracy or participated therein at any time or had any knowledge thereof. Consequently it cannot be claimed in this case that she was a party to an alleged conspiracy or had any guilty participation therein or knowledge thereof."

(Assignments 87, 91; *Rec.*, 1997, 1999.)

For relevancy, see statement annexed to specification 3, *supra*.

SPECIFICATION 5.

The court erred in not giving the following instruction requested by petitioner:

> "No. 37. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case for the purpose of, and with the intent to defraud the said defendants by procuring and presenting to the said defendants a dead body of another person than the insured, representing the same to be that of said John W. Hillmon, thereby pretending to the defendant that said insured was dead, though still living, and that they procured and accepted the said policies in pursuance and in furtherance of said unlawful scheme, and that thereafter while engaged in the prosecution of said unlawful scheme, the said John W. Hillmon actually came to his death; then the jury are instructed that no right of action against the defendants accrued and no action can lie on the said policies, even though the dead body actually presented to the defendants was really that of the said John W. Hillmon."

The court erred in giving the following portion of its charge to the jury:

> "On the other hand, even if you should find that there was a conspiracy between the three men, as charged by the defendants, but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdict in such events would be for the plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in this case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you may deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon,

it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse."

(Assignment 88, 92; *Rec.*, 1997, 1999.)

For relevancy, see statement annexed to specification 3, *supra*.

SPECIFICATION 6.

The court erred in not giving the following instructions, and each of them, requested by petitioner:

"No. 38. The jury are instructed that if they believe from the evidence that Levi Baldwin, John H. Brown and John W. Hillmon confederated and conspired together to procure from the defendant insurance companies the policies sued upon in this case, for the purpose and with the intent to procure and fraudulently present to the defendants a dead body of another person than the insured, as that of the insured, and of thereby falsely representing said insured to be dead; and that they did accordingly, in fact, procure, receive and accept said policies in execution to that extent of the design and purpose aforesaid; then and in such case the said contracts of insurance, so fraudulently and with such fraudulent intent procured and received, were never valid, but were void, and never attached to the life of John W. Hillmon, and no right of action can be founded thereon in this case, and the jury must find for the defendants."

"No. 47. The jury are instructed that if they believe from the evidence that the issuance of the policy of insurance by the defendant, the Connecticut Mutual Life Insurance Company of Hartford, Connecticut, upon the life of John W. Hillmon was fraudulently procured by the said Hillmon alone, or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then such policy is absolutely null and void, and they are to find for the defendant."

(Assignments 89, 106. *Rec.*, 1998, 2006.)

For relevancy, see statement annexed to specification 3, *supra*.

SPECIFICATION 7.

The court erred in permitting the witnesses Reuben Brown and J. W. Green to answer the following questions propounded by respondent for the purpose of attempting to impeach for fraud and want of consideration the release executed by respondent of claims under the policy issued by petitioner:

"Q. You may go on and state what conversation you had with Mr. Buchan at that time?"

To which the witness Reuben Brown replied:

"A. I found Mr. Buchan in his office, and he wanted to know if I knew where John were; I told him that I did not, but I thought I could find him. He wanted I should go and look him up; he said he had got himself into a bad scrape and my father and brother had employed him for his attorney, and he wanted to do all he could for John and wanted I should go and hunt him up immediately."

(Assignment, 27; *Rec.*, 1945-6, 546.)

"Q. You may state, if you know, who employed attorneys, if anybody, at Lawrence for the insurance companies?"

To which the witness Green replied:

"A. Mr. Alton, of the Connecticut Mutual, employed myself, and one Dr. Carney employed Mr. Barker and myself for the New York Life. I don't know who employed Mr. Barker for the Mutual Life."

(Assignment 28; *Rec.*, 1946, 576.)

"Q. I will ask you what was the subject of your interview with him (Munn) in July, and state whether it had any connection with this Hillmon matter?"

To which the witness Green replied:

"A. Among other things, we discussed this Hillmon matter."

(Assignment 29; *Rec.*, 1946, 577.)

"Q. Now, I will ask you to state what conversation you had with Mr. Buchan there on that occasion?"

To which the witness Green replied:

"A. Mr. Buchan came to the office and, among other things, he proposed or thought he could get up the policies which had been issued on the life of John W. Hillmon."

(Assignment 30; *Rec.*, 1946, 578.)

"Q. Now then, I will get you to state to the jury what conversation there was at that time between you and Mr. Munn and Mr. Buchan as to the giving him this kind of an instrument." (Referring to the Munn paper marked Exhibit 15.)

To which the witness Green replied:

"A. I do not at this late day presume to state the exact words which were used at that time, but as I stated before, Mr. Buchan proposed that he could get up the policies which had been issued by the companies on the life of Hillmon. I remember stating myself in substance I did not believe he could do any such thing, and he thought he could and wanted an opportunity to try. Mr. Munn told him that he might go ahead and try to get the policies up if he could, and if he could, that he would pay his expenses anyhow, and if he could get the policies up he would pay him liberally for so doing. Mr. Buchan then wanted authority from Mr. Munn to pay the plaintiff, Mrs. Hillmon, something for delivering up the policies. Mr. Munn refused, and said that the companies would not pay a dollar; that they believed the whole scheme was a fraud, and consequently that they would not pay a dollar for these releases, and went further and said that Mr. Buchan should not go so far as to pay any of the compensation which might be given him, or which he might receive in payment, to Mrs.

Hillmon for delivering up the policies. That was substantially the conversation, a portion of it, possibly, in the words."

(Assignment 32; *Rec.*, 1948, 580-1.)

The court erred in permitting respondent to offer in evidence the following document, marked Exhibit 15, and commonly known as the Munn paper:

"The undersigned attorney, representing the Mutual Life Insurance Company of New York, The New York Life Insurance Company of New York and the Connecticut Mutual Life Insurance Company, hereby stipulate and agree, so far as said companies are concerned, to desist from any further suit and prosecution of John W. Hillmon, John H. Brown, or any other parties in connection with the Hillmon cases, provided the respective policies are surrendered and order for their delivery executed, and all claims under the same released to said companies by said Sallie E. Hillmon, wife of John W. Hillmon, and beneficiary under said policies, and in so doing represent their officers and agents everywhere.
Lawrence, Kansas, September 6, 1879.

H. B. MUNN."

(Assignments 31 & 59; *Rec.*, 1947, 1955-8, 580, 835.)

Munn and Buchan were instrumental in procuring from respondent the releases of her claims upon the policies issued by petitioner, by the Mutual Life Insurance Company, and by the New York Life Insurance Company upon Hillmon's life. The release was a contract executed by respondent in Kansas. Section 6, of chapter 114, of the General Statutes of Kansas, 1892, provides:

"All contracts in writing, signed by the party bound thereby, or by his authorized agent or attorney, shall import a consideration."

By force of this statutory provision the release had the common law effect of a sealed instrument.

The foregoing questions were propounded and the document referred to was offered by respondent with the avowed object of impeaching for fraud and want of consideration these releases, which were subsequently offered in evidence by her. (*Rec.*, 546, 575-581, 585.)

Specification 8.

The court erred in not giving the following instruction requested by petitioner:

> "No. 44. The jury are instructed that the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness."
>
> (Assignment 105; *Rec.*, 2006.)

Instead of giving such instruction the court instructed the jury that Brown's statement signed and sworn to by him was not affirmative evidence of the truth of any matter therein contained or mentioned, and that it should not be considered by the jury excepting as affecting the credibility of the evidence of Brown in his deposition. (*Rec.*, 1923.)

The statement in question was made by Brown at Parkville, Missouri, September 4, 1879, and was offered in evidence by respondent. (*Rec.*, 1284-6.)

SPECIFICATION 9.

The court erred in not permitting petitioner to show by the witness W. N. McKamy, as one motive for Hillmon's disappearance and continued absence, that Hillmon had committed a crime in Texas in the spring of 1878, and in not permitting petitioner to read to the jury in connection with such showing the article of the Criminal Code of Texas relating to such crime, and in not giving the instructions requested by petitioner and hereinafter, in this specification, set forth.

The witness McKamy testified that at Fort Griffin, Texas, he had sold in the spring of 1878 upon credit to Hillmon and Brown a train of oxen and wagons for $3,623.90; that he had taken in payment therefor their notes, one for $900 and two for $1,361.95 each, secured by a chattel mortgage upon the oxen and wagons. (1389-1394.) The witness John H. Brown had already testified as to the purchase of the train from McKamy and that Hillmon had disposed of it at the places mentioned. (*Rec.*, 372-6.) William Hillmon had also testified in respect to it. (1097.) William Brockelsby had testified that as city marshal of Lawrence in the fall of 1878 his attention had been particularly called to Hillmon by a communication from parties at Fort Griffin, Texas. The court refused to allow petitioner to show an enclosure in that letter. (1007.) The Texas statute severely penalized a chattel mortgagor who took mortgaged property outside of the state or sold it with intent to defraud creditors. (*Rec.*, 1400.) Respondent contended at the trial below, and at her request the court instructed the jury, that the continued absence of Hillmon was evidence of his *death*. (*Rec.*, 1920.)

The following questions were propounded by petitioner to the witness McKamy:

"Q. What did Hillmon and Brown do with the oxen and wagons which they purchased from you, if you know?"

To which the witness would have replied:

"About two months after I had furnished Hillmon and Brown with these supplies I learned that they were pulling out with the teams for the Pecos river, with the intention of beating me out of these teams and supplies. The boy came into the Pease River store and told my clerk immediately that Hillmon and Brown were pulling to the other side of the plains; that one of the drivers of Hillmon and Brown had told him to leave word at the Pease River store that Hillmon and Brown were pulling to the other side of the plains with the oxen, wagons, and supplies, with the intention of beating me out of them, and that the drivers were virtually their prisoners, as they had threatened to kill any one of them who attempted to leave them or give them away."

(Assignment 61; *Rec.*, 1965, 1394.)

"Q. What, if anything, did you do towards attempting to recover these oxen and wagons?"

To which the witness would have replied:

"As soon as I heard of their running away I wrote to the chief of police at Lawrence, Kansas, to look out for them there, knowing that Hillmon was corresponding with a young lady there, and I figured that he would go there. Then I went to my Pease River store and struck out on the trail, and followed the trail to near the Pecos river. It then became evident to me that they were going up the Pecos river, and I then left the trail and went up to Las Vegas, New Mexico. At Las Vegas I received notice from the chief of police at Lawrence that the men were there, and also found a load of supplies that I had furnished them at my Pecos River store in the possession of a person to whom they had sold them. I also learned that they had traded off a portion of the oxen at Las Vegas, New Mexico, for a span of horses. I went up to Trinidad, Colorado, and on the road to Trinidad I found four yoke of the cattle which they had sold to a man who was working on the claim of the Atchison, Topeka and

Santa Fe Railroad. At Trinidad I learned that they had sold the oxen and wagons in every direction. I stopped at Trinidad, Colorado, and wrote down to Texas to have papers sent to me at Trinidad, so as to have Hillmon and Brown arrested in Kansas. Before the papers reached me I read a notice in the papers of the killing of John W. Hillmon in Barber County, Kansas, and presuming that this was correct, I returned to Texas."

(Assignment, 62; *Rec.*, 1966, 1395.)

Article 797 of the Criminal Code of the State of Texas, which plaintiff in error offered to read to the jury in connection with the testimony of W. N. McKamy, is as follows:

"Article 950 (797). Fraudulent disposition of mortgaged property. If any person has given, or shall hereafter give any mortgage deed or trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the state, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years."

(Assignment 63; *Rec.*, 1967, 1400.)

The court should have given the following instructions, and each of them, requested by petitioner:

"No. 41. If you believe that John W. Hillmon sold or disposed of mortgaged chattel property in such manner, in 1878, as to be guilty of a crime in Texas, punishable with imprisonment in the penitentiary, you are then at liberty to consider the probability that such a crime would tend to induce him to disappear or to go to unknown parts or conceal himself, and this tendency you may further consider in your deliberations as to whether the body found at Crooked Creek was the body of Hillmon."

"No. 42. You are instructed that by the laws of

the State of Texas in the year 1878, it was provided that if any person had given a mortgage in writing upon any personal or movable property, and should, during the existence of such chattel mortgage, remove the said property out of the state, or dispose of the same with intent to defraud the person having such lien; such act or acts would be criminal and the person found guilty thereof would be subject to imprisonment in the penitentiary of Texas for a term of not less than two nor more than five years."

(Assignments 103, 104; *Rec.*, 2005.)

SPECIFICATION 10.

The court erred in not giving the following instruction requested by petitioner:

"No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case, for the reason that the real question in this case is, whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown, at Barber County, on the 17th day of March, 1879."

(Assignment 99; *Rec.*, 2003.)

The court refused to give this instruction, and instead thereof in its charge instructed the jury on the same point as follows:

"As bearing upon the question whether John W. Hillmon died as claimed by the plaintiff and whether it was his corpse that was brought to Lawrence, you are entitled to consider the fact, if it be one, that he has not been seen or heard from alive since the 17th or 18th day of March, 1879, at which time it is claimed he was killed. The unexplained absence of a person from his home and friends without being heard from, if continued for a sufficient length of time, may become evidence tending to show that he is dead, and it may be taken in connection with other evidence tend-

ing to show that he died at a certain time and place. For some purposes, such as the settlement of estates and the like, the law adopts the presumption that an unexplained absence of seven years without tidings being received from the absent one is evidence of his death. The weight to be given to such continued absence depends upon circumstances. If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death." (*Rec.*, 1920.)

The *allegation* of the respondent *in pleading* is that John W. Hillmon met his death from a gunshot wound at the hands of John H. Brown at Barber County, Kansas, on the 17th day of March, 1879, and this action was commenced on July 13, 1880. (*Rec.*, 3, 10, 15.) No lapse of time gave rise at the time the action was brought to *any presumption* on that allegation.

SPECIFICATION 11.

The court erred in not giving the following instruction requested by petitioner:

"In this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon. Proof has been offered, which has not been disputed, that the corpse had a perfect set of teeth, without decay or imperfections. If it appear by a preponderance of evidence that John W. Hillmon in his lifetime had lost a tooth or that any of his teeth were imperfect, then it follows that the body at Lawrence was not the body of John W. Hillmon, but the body of some other person, and if you find from a preponderance of the evidence that John W. Hillmon in his lifetime had lost a tooth or had imperfect teeth, then you will return a verdict for the defendants. In determining the preponderance of

the evidence on this question, if the number of witnesses testifying on this question are persons of equal credibility and standing and with equal means of knowledge, then the party producing the greatest number of witnesses on that question must prevail in this case."

(Assignment 85; *Rec.*, 1996.)

The only mention of the teeth by the court in its charge is found in the record at page 1924, where the court said:

"The act of recognizing between friends and even members of the same family may not depend upon the color of the hair, the condition of the teeth, the size or shape of the nose, or any independent feature."

A model of the cadaver's teeth was made by Dr. Patterson and was offered in evidence as an exhibit.

The following witnesses examined the cadaver and testified substantially in effect that the teeth were remarkably good, very strong and unusually large and with no fillings and not decayed: Dr. Patterson (244); Dr. J. H. Stewart (925, 928, 940); Dr. V. G. Miller (1311); Claude Holliday (998); Dr. William W. Howe (1384). No other witnesses testified concerning the character of the cadaver's teeth.

The following witnesses testified substantially that Hillmon's teeth were imperfect, and that one was either missing or decayed, the witnesses differing in their remembrance as to the location of the missing tooth: Theodore Wiseman (860-1, 882, 901); Claude Holliday (994, 997); Joseph Bebout (1001, 1004-5); James Cameron (1023, 1025); Tinetta Corcadell (1036, 1038); E. Summerfelt (1046, 1048-9); Eleanor Faxon (1083); Henry Hillmon, brother of John W. (1094); William Hillmon, another brother (1095-7, 1107-9); Mrs. George A. Nichols, sister of John W. Hillmon (1117, 1120-3); George A. Nichols (1134-8,

1141); Mrs. Maggie J. Nixon (1171-2); Thomas J. Schleppy (1180); Dr. William W. Howe (1379); H. B. Marshall (1401); Samuel Walker (1065).

The following witnesses testified that John W. Hillmon had good teeth, or at least they never noticed that he had a missing tooth; Dr. N. Simmons (215); Arthur Judson (525); Mary Judson (531, 539), and Sallie Smith, formerly Sallie Hillmon, the respondent (748).

SPECIFICATION 12.

The court erred in not permitting the witnesses Mrs. Elizabeth Riffenach and Fannie Walters to answer the following questions:

"Q. Now, what was said and done at the time those pictures were shown to you?" To which the witness would have replied in substance as follows: That the two pictures referred to, marked Exhibits 29 and 30, which were pictures of the cadaver taken as it lay in the coffin, were brought home by the witness' father, Daniel Walters, and were shown to her and her sister, Fannie Walters. That the mother was present at that time, and that before she had seen the pictures their father accidentally dropped one of them on the floor; that while it was being picked up their mother saw it and exclaimed: "Oh, it is my son!" and immediately fell in a swoon.

(Assignments 75, 76 and 84; *Rec.*, 1897-8, 1778, 1795-6.)

The witnesses had previously testified that their mother was dead; that they had last heard from their brother, Frederick Adolph Walters, by letter dated at Wichita March, 1879; that the pictures in question were sent to their father early in January, 1880; that he brought them home,

and that their mother was present when he brought them into the room. (*Rec.*, 1773-8, 1795-8.)

The witness Daniel Walters had testified that after the disappearance of his son in 1879 he had been making inquiries for him at various points, and, among others, through his Lodge to Wichita, Kansas; that as a result of these inquiries he received from the master of the lodge there two photographs of the cadaver above referred to. (*Rec.*, 1620-2, 1630-2.)

The witness Wiseman had testified that upon learning by a letter from Ft. Madison, received by him through Mr. Walker, a Wichita banker, that inquiries were being made from Fort Madison concerning a Frederick Adolph Walters, he had, in December, 1879, sent to the writer at Fort Madison photographs of the cadaver similar to the photographs above referred to. (*Rec.*, 878-880.)

Specification 13.

The court erred in not permitting the following question to be propounded by petitioner to the witness Arthur Simmons for the purpose of testing the character and credibility of the witness:

> "Q. Now, I will ask you if it is not a fact that during the time that he was county attorney you paid him five hundred dollars, or some other amount, to influence his action as county attorney?"

The court erred in not permitting petitioner to prove in the cross-examination of said witness that in Leavenworth County he either testified, stated, or made an affidavit to the effect that either he had influenced or had attempted to influence the official conduct of a public officer of the State of Kansas by using or offering to use money.

The witness had previously testified that he was acquainted with one William H. Dill, who was at one time the county attorney of the county in which witness resided, and as such was engaged in the prosecution of cases there.

In connection with the refusal of the court to permit the witness to answer this question, the record shows the following (*Rec.*, 1878-9):

> "The plaintiff objects to the question as incompetent, irrelevant and immaterial.
>
> "By the Court: You know that is the height of impropriety. The objection is sustained.
>
> "By Barker offered to speak.
>
> "By the Court: I won't listen to it.
>
> "The defendants then and there excepted to the ruling of the court.
>
> "By Mr. Barker: I will submit to the court in writing what I propose to prove.
>
> "2338. By the Court: Nothing along that line will be entertained.
>
> "By Mr. Barker: I will submit in *writing* under the rule of the court at the proper time what we propose to prove by this witness.
>
> "By the Court: If you have anything further in the line of proper cross-examination, proceed.
>
> "Witness excused.
>
> "By the Court: That is so much out of the way of propriety, so much aside from the well recognized principles of law, that I cannot conceive the counsel is acting in good faith in suggesting it.
>
> "By Mr. Barker: I want to say to the court that I am acting in absolutely good faith. I think we have the right to ask him if he has ever been in jail or indicted or anything of that sort. I have in mind a line of cases where a court in New York had held that you had the right to ask a man if he had been in jail.
>
> "By the Court: There is no line of cases reported in the English language that will justify a question of that character, and the counsel ought to know it.
>
> "And thereupon the defendants offered, in writing, to prove on the cross-examination of Arthur Simmons,

that in Leavenworth County he either testified, stated or made an affidavit that he either had or attempted to influence the official conduct of a public officer of the State of Kansas, by the use or offer to use money.

"The court denied the offer; to which action of the court the defendants, and each of them, at the time duly excepted."

(The pressure of time and the great bulk of the record caused petitioner to overlook a definite assignment of error upon this subject. As the court may nevertheless be disposed to consider the error, attention is respectfully called to it.)

SPECIFICATION 14.

The court erred in not sustaining the motion of petitioner to discharge the jury and issue a new *venire*, on account of the following remarks made by the court in the presence of the jury and while the court was in session.

"By the Court: I desire to say this: There is a juror here whose conduct is very commendable, and whom I honor for it, has stated to me that a communication has been made to him, which he interpreted as preliminary to an offer to bribe. He stated to me the language that was used to him, and it looks very much to me as it did to him, but inasmuch as there might be some mistake, I think it best not to mention the name of the party who made the communication, or the name of the juror to whom it was made; but I desire to say this: that if there is any further effort made in that direction, I will have that man's name presented to the United States grand jury for indictment.

By the Court: It is no lawyer connected with this case; I do not mean to say that the effort came from either side of the case, and no counsel is called upon, it is not necessary in the mind of the court for any counsel to say anything one way or the other about it. There is no reflection cast upon any one directly con-

nected with this case, so far as I know, but I desire to say to the person that that must stop; it must proceed no further. If I can prevent it this case will not be tried with anything of that sort in it."

(Assignment 60; *Rec.*, 1958-1965, 76-7, 800-807.)

SPECIFICATION 15.

The court erred in not giving the following instruction requested by petitioner:

"No. 34. The Supreme Court of the United States in the case of *Gregg* v. *Houston*, 104 U. S., 553, speaking through Chief Justice Waite, 'If upon the evidence the jury had brought in a verdict against the defendant, it would have been the duty of the court to set it aside and grant a new trial. It is right, therefore, to direct a verdict for the defendants.' In accordance with the rule of law, which is again enunciated by the same court in the case of *Randall* v. *The B. & O. Rd. Co.*, 109 U. S., 479, being of opinion that it would be my duty in the event of a verdict for the plaintiff to set the same aside, I charge you that you must find a verdict for the defendants."

(Assignment 107; *Rec.*, 2006.)

SPECIFICATION 16.

The court erred in rendering a judgment for the respondent when judgment should have been rendered for the petitioner, according to the law of the land.

(Assignment 108; *Rec.*, 2007.)

BRIEF AND ARGUMENT.

The assignments of error, and particularly those relating to certain evidentiary facts excluded by the court, the admissibility of which depended upon a large group of correlated facts previously in evidence, make necessary some connected history of the occurrences disclosed by this record.

Before the summer of 1878, in the open country some four or five miles to the westward of Tonganoxie (*Rec.*, 1612), in Leavenworth County, Kansas, the accidents of life had thrown into association a group of less than half a dozen persons who all at once became the active figures in the issues with which we are concerned. There, in the region then largely given up to cattle ranges, had lived for several years and since 1872, a man named Levi Baldwin. (*Rec.*, 684, 691.) He had a dwelling, and land of considerable extent, and was reputed to be for the time and region a man of some means and substance. In truth, however, his affairs were involved, and petitioner offered to prove that he was embarrassed and severely pressed by his creditors. (*Rec.*, 1615, 1617.)

Living a considerable part of the time in his family and working there (*Rec.*, 691-2, 781) was a young woman named Sallie E. Quinn. Her mother was a cousin of Baldwin. (*Rec.*, 684, 692.) In 1873 her parents had taken and occupied a farm about three miles distant from that of Baldwin (*Rec.*, 745, 780), but after a few years her mother appears to have been living in the neighboring city of Lawrence. (*Rec.*, 784.) The daughter also lived in Lawrence at times in various capacities; at one time she was taking

in sewing, at another she was a waitress in a hotel, and at another a waitress in a restaurant kept by her brother—never elsewhere heard of—in the fall of 1877. But chiefly she lived and worked in the family of Levi Baldwin. (*Rec.*, 691-2, 784-5, 1217.)

John W. Hillmon in 1871 or 1872 was herding cattle for one Houston in Leavenworth County. While thus employed he lived at Baldwin's house. *Rec.*, 685.) He had previously been in the army during the last six months of the civil war, having enlisted on the 20th of September, 1864, for one year, and having been discharged in October, 1865. (*Rec.*, 1128.) After some time he went to Colorado and passed some years in or about the mines (*Rec.*, 355, 358), and afterwards lived as a cattle herder and as a hunter on the buffalo ranges. (*Rec.*, 1094, 1096.) Returning after a year or two to Baldwin's neighborhood, he seems to have attempted to buy and ship some cattle to Kansas City (*Rec.*, 685), but he presently went off again and resumed his wandering life as a buffalo hunter. (*Rec.*, 343, 363, 366, 686.) In the summer of 1878 he returned again and is found working for Baldwin on his farm. (*Rec.*, 1212.) The character of Hillmon, and the character of his occupation during the intervals of time which he spent at the mines and on the hunting ranges, is more fully exhibited in the history of his companion and associate during those periods, John H. Brown.

This John H. Brown, born at some place in Indiana, appears to have been from boyhood a restless wanderer and adventurer. By 1873 he had found his way into and through Missouri and Kansas, living short periods here and there where he found employment—into Arkansas and Texas, up the Arkansas river into Colorado and the mining regions, dwelling all his life in the camps of the unsettled,

roaming, restless and reckless people that were scattered in mines and on the ranges through the primitive frontier settlements. (*Rec.*, 349-354.) About July, 1874, he came into association with John W. Hillmon, who then appears to have been a foreman in certain mines. (*Rec.*, 355-6.) In September or October, 1874, he and Hillmon went together to Central City, Colorado, and remained there in the mines until the early summer of 1875. (*Rec.*, 359.) In 1876 he came back alone to Wyandotte County and presently fell in with Hillmon again at the railway station in Kansas City in the spring of 1876. (*Rec.*, 360.) He and Hillmon went together the same day to Lawrence, where they stayed several days, and then he went with Hillmon to Levi Baldwin's, where he first made the acquaintance of Baldwin. (*Rec.*, 361, 694.) At thi time he made an arrangement with Hillmon for an expedition into Texas. He went, as he says, in the employ of Hillmon, without definite agreement as to wages, but to hunt for buffalo and sell their hides. (*Rec.*, 363.) The next year found them in Texas on the Brazos river. (*Rec.*, 366.) In the spring of 1878 they are found at Fort Griffin, dealing with McKamy and Anderson, from whom they purchased a cattle train, consisting of eleven wagons and thirty-two yoke of oxen, and for which they gave their notes and a mortgage upon the property. This cattle train they immediately proceeded to run out of Texas into New Mexico and Colorado, selling portions of it here and there as they went. (*Rec.*, 369-381, 1093-1097; 1389-1400.) The last of it appears to have been sold in Pueblo, and Brown received his share of what remained of the money thus obtained and returned to Wyandotte, but very soon went up to Lawrence and there met Hillmon. (*Rec.*, 379.) Brown in his deposition speaks of this expedition as occurring in 1876 and 1877, but it is

quite apparent that he was referring to events of 1877 and 1878. (*Rec.*, 379.) Meanwhile parties from Fort Griffin in Texas were instituting inquiries at Lawrence as to the whereabouts of Hillmon (1007). In this connection petitioner sought to show the nature and subject of these inquiries, and offered to prove that the dealings of Hillmon and Brown with this mortgaged cattle train were a violation of the criminal laws of Texas, and offered in evidence the provisions of the Texas statute upon that subject; but this evidence was excluded by the court, and the statute was not allowed to be read. When Brown rejoined Hillmon at Lawrence they went out together to Levi Baldwin's, so that in the fall of 1878 Hillmon and Brown and Levi Baldwin (*Rec.*, 376-8, 695, 1212) were together and in close association again.

At this time, as has been said, Baldwin was financially embarrassed and was being pressed by his creditors. All at once it appears that he became deeply reflective and curious upon the subject of life insurance.

Upon this subject there is a large amount of evidence in the record, and an equally large amount of the greatest significance which was excluded by the court. In 1878 he appeared at the office of an attorney, Mr. Blythe, in Tonganoxie, consulting Blythe about life insurance. He had Hillmon with him, whom he introduced to Blythe. (*Rec.*, 1612.) They talked to me a number of times, says Mr. Blythe, about insurance; how to get it and concerning desirable companies, and how application and payments should be made, and whether one might travel in different countries and climates without forfeiture, and various questions of that kind. They asked what proceedings might be necessary to collect insurance, and what time it would take. Mr. Baldwin asked more "pertinent" questions, says Mr.

Blythe, than he would expect an ordinary man to ask; but Baldwin "was not an ordinary man." He had previously talked with Blythe alone upon this subject of life insurance, but the conversations between them alone were excluded by the court. (*Rec.*, 1613.) Subsequently he appeared actively with Hillmon in applying for and procuring the several policies of insurance for Hillmon. (*Rec.*, 857, 859, 1479, 1497.) As a result, policies of life insurance to the amount of twenty-five thousand dollars were taken out on the life of Hillmon, ten thousand in the New York Life, ten thousand in the Mutual Life, and five thousand in the Connecticut Mutual. (*Rec.*, 139, 145, 1498, 830.) On the 3rd of October, 1878, a marriage of Hillmon to Sallie Quinn, the relative of Levi Baldwin, made her available as a beneficiary in the policies. On this occasion there were present only her mother and sister, two members of the family in which she boarded at the time, and Levi Baldwin with his wife and daughter. No friends or acquaintances of Hillmon were advised of or anticipated this marriage, and no notification of it was given to his sisters and other relatives living but a few miles away. (*Rec.*, 787.) One naturally wonders at the disproportionate amount of this insurance for a man in Hillmon's circumstances. As a provision for his wife it far outran anything which she or any member of her family or of his had ever experienced. He was a man in absolute poverty, utterly insolvent, without business or resources. (*Rec.*, 536, 1393.) A little more than a year after his disappearance his wife made an affidavit that she was unable to give security for costs in this action because of her poverty. (*Rec.*, 12-13.) So large an insurance could hardly have been intended for a permanent provision, for annual premiums aggregating six hundred dollars or more (*Rec.*, 139, 145,

830) were far more than Hillmon could carry, and it serves to indicate rather some immediate and temporary purpose that could be answered by raising money enough for a single premium.

The court excluded a large amount of testimony pertinent in this connection and relevant to the defenses interposed. For example, to show acts of Levi Baldwin to be taken in connection with other independent circumstances, and with acts of other persons, to prove that he and Hillmon and Brown were acting together in the execution of a common purpose, petitioner offered (*Rec.*, 1809) to prove the following facts shown by the testimony and depositions of the same witnesses on former trials of this case:

That Levi Baldwin had a conversation with Dr. Phillips in October, 1878, in which Baldwin said he was thinking of taking out some insurance, and asked if certain insurance companies were safe; and how long it would take before a dead body would decompose after it was buried, and said, "wouldn't it be a good scheme to get a large amount of insurance on your life and go down south and get the body of some 'greaser' and palm it off as your body and get the money?" (*Rec.*, 1606.)

That Levi Baldwin had a conversation with J. H. Blythe, an insurance agent, in which Baldwin asked him about life insurance, saying that a relative or connection of his wanted to get some insurance and wanted Blythe to recommend some good company to him. The court had already permitted respondent to show by the same witness a conversation between Baldwin, Hillmon and the witness upon the same subject a few days later. (*Rec.*, 1613.)

That Levi Baldwin, in the latter part of February, 1879, had a conversation with James S. Crew, who, as receiver

of the Simpson Bank, held for collection some notes past due against Baldwin, two of which were secured by mortgage on real estate and one by chattel mortgage on live stock. During this conversation Baldwin said that a part of the money represented by this indebtedness had been furnished to insure Hillmon's life. Crew further testified that he had heard of Hillmon's death in the latter part of March, and that shortly thereafter Baldwin came in hurriedly and told him to let his matter rest as he was then on his way west after Hillmon's body, and that he had arranged for a portion of the life insurance on Hillmon's life, and that as soon as he got it he would be able to straighten up all his affairs; that he was to have $10,000 of the insurance money. (*Rec.*, 1616-17.)

That shortly after the 10th of March, Levi Baldwin had a conversation with Alexander Carr, during the course of which Baldwin said that "he and Hillmon had a scheme under brogue, and he said that if that worked out all right that he was all right." (*Rec.*, 1619.) All this offered evidence was excluded.

In this connection a special insistance of petitioner became the ground of instructions which were asked and refused, and of specific assignments of errors. An insuperable accumulation of evidence proved the combination and conspiracy for imposture and fraud through the instrumentality of these policies of insurance, which was disclosed by Brown in his statement at Lexington, and which is pleaded in defense. On this subject the same rules of evidence which apply between co-conspirators in establishing such a combination are equally applicable as to respondent, whether she may be deemed under the pleadings a co-conspirator or not, for in this suit she has appropriated and availed herself of all they have done, and with perfect

knowledge of their guilt, has adopted all their acts and assumed the prosecution of their scheme. She became subject to the rules of evidence which apply against them and between them to the same extent as if she had been charged as a participant in the original scheme of fraud and conspiracy with them.

This business of arranging for the insurance occupied these parties until December came. The premiums for six months were paid. During all this time Hillmon and Brown were in communication with each other, and from time to time with Levi Baldwin. (*Rec.*, 377-8, 384-5, 686, 695, 701, 787-8, 1212.) On the 17th of December, a few days after the policies in the New York Life and in the Mutual Life had been issued, Hillmon appeared at the office of Dr. Miller, the examiner, to correct a mistake in his declaration as to his height (*Rec.*, 1308), and immediately after this and before Christmas he and John H. Brown went off together again upon an expedition into Southwestern Kansas. Brown testified that the object of the expedition was to locate and procure, and he said, "to open up a cattle ranch" (*Rec.*, 343), and that he went under a contract of employment by Hillmon for wages that were left undetermined. Going by rail to Wichita they went from there in a wagon, pursuing a wintry journey over the plains to Medicine Lodge, Sun City, Kinsley and Larned on the Santa Fe Railroad, thence to Big Bend and to Hutchinson, returning to Wichita, where they arrived about the 18th or 20th of January. (*Rec.*, 343, 344, 386, 387.) On its face it appears to have been an aimless drifting through the country in the cold and snows of winter—a purposeless wandering from place to place—returning to Wichita, whence they started. The alleged purpose, "to open up a cattle ranch," is discredited by all the circum-

stances of the time. Neither Hillmon nor Brown had any capital for opening up a cattle ranch, nor the means to put any animals upon a ranch if they had one. The extremely impecunious condition of Hillmon is shown by the narrow circumstances under which he was living at the time of his marriage and departure, for the *res angustae domi* were never more vividly illustrated; also by his state of affairs at the time of his alleged decease, when nothing remained for the respondent but these policies of insurance; and by her own affidavits as to her complete destitution. (*Rec.*, 536, 323, 13.) Learning after his return to Wichita that without vaccination certain of the policies could not be issued, he returned to Lawrence, where he was vaccinated (*Rec.*, 863, 917-18, 1499-1500), and after the effectiveness of that operation became assured he rejoined Brown, during the latter half of February, at Wichita, where Brown had remained. While there neither he nor Brown was engaged in any business, and they seemed to be idling their time away "throwing coppers" and playing "crack loo." (*Rec.*, 391, 1426.) It develops, however, that what really engaged them was a quest for some one to go out with them on their projected expedition. Hillmon seems to have made during this interim while Brown waited at Wichita two visits to Lawrence. He arrived there the first time on the 25th of January and returned after two or three days. (*Rec.*, 389, 391, 749.) He went again to Lawrence on the 14th of February and after vaccination, as has been stated, rejoined Brown at Wichita. During each of these visits he had meetings with Baldwin. (*Rec.*, 702-3.) Upon the second one he was very curious as to what evidence his widow would have to furnish, if he were killed, and Wiseman told him a coroner's inquest would be necessary and a verdict of a coroner's jury. (*Rec.*, 862-3.)

Some singular preparations which were made for these winter journeys over the plains become conspicuous in the lights which subsequently fell upon them. During one of these returns to Lawrence he made an exchange of clothes with Levi Baldwin. He exchanged a very dark coat and vest, probably black, for a rough coat and vest, a striking pattern having large plaids. He and Baldwin were similar in form and size, for his coat and vest fitted Baldwin well and Baldwin wore them out. (*Rec.*, 703-5.) He bought a book and opened a diary which he kept for a few weeks during his first expedition into Southwestern Kansas. There is no suggestion of his ever having kept a diary before, and this one is opened and closed, rounded up, dated and signed, as if begun, prepared and ended for a special purpose. The initial and final clauses seem remarkable. They are (*Rec.*, 1327):

> "John W. Hillmon's Book. Residence, Lawrence, Kansas. Mrs. S. E. Hillmon, corner Henry and Alabam St., Lawrence, Kan. Travelling companion, J. H. Brown: Residence, Wyandotte, Kan.
>
> "My first memorandum I lost after I had been out a few days, so I replaced it with a new one. Could not recall all that I had in my first, but placed my dates correct."

He then went on to account for each day's happenings from December 18, 1878, to February 23, 1879, when he closed thus (*Rec.*, 1334):

> "I don't see as there is any good to grow out of me trying to keep track of my misdeeds. While I am as apt to err as any one and that I would be sure not to make a memorandum of and only show up the best parts as others have done before me, I do not want to be an exception to the rule or make any new ones, so to keep from answering any hard questions if any one would want to know where I spent my evenings I will say I have forgotten to make a memorandum of the

time and my memory is bad as I never charge it with anything and of course cannot answer promptly.

So ends this part at Lawrence.

February 23, '79. J. W. HILLMON."

Furthermore on the 22nd of November, 1878, he had written a letter to his sister, Mrs. Nichols, and her husband, living in Washington County, Kansas. In this letter he for the first time told them that he had been married on the 3rd of October "to a Miss Quinn of Lawrence," and asked them to forward to him his army discharge and other papers as soon as possible, saying, "I want to use some of them." These articles, previously for years put away and abandoned, were sent to him immediately (*Rec.*, 1116, 1127), and with that old diary which had been finished and given up at Lawrence, were burdensomely carried on his person on this journey and were subsequently found upon the person of the man killed at Crooked Creek. (*Rec.*, 419, 587, 595, 602, 606.) This circumstance will inevitably associate itself with the casual observation dropped by Brown in his statement at Lexington and Parkville, that Hillmon hurriedly transferred some book from his own pocket to that of the man who was shot at Crooked Creek. (*Rec.*, 1231, 1286.)

After Hillmon returned the second time from Lawrence, he and Brown went to stay with two men, half-brothers, whom Brown had known for a good many years—Michael Mesh and Ben Helda—who were living then at Wichita in the occupation of gardening. (*Rec.*, 390.) While they were there Hillmon told Michael Mesh that he was going to buy a ranch, and tried to induce Mesh to go in his employ, offering him $100 a month if he would go. The night before they left, Brown and Hillmon renewed their proposal to Mesh. Hillmon had been vaccinated at Lawrence, and they wanted Mesh "to go down and get vaccinated and

they would pay for it," and his compensation should begin from the time they started, and offered him "$100 besides for a present if he would go." (*Rec.*, 1561-2.) Brown also applied to Helda, proposing that he should sell out his interest in the garden and go with them "in the cattle business" (*Rec.*, 1573-5), but these inducements were declined. Similar proposals to others appear in the record. H. B. Marshall, a horse dealer and trainer in Wichita, was asked some time about the first of March, 1879, to accompany them on the range, and Hillmon offered to pay him $300 down, if he would go along and teach him how to catch wild horses. (*Rec.*, 1403.)

But in the early days of March Hillmon and Brown set out into the solitudes of the wilderness upon that final journey, culminating in the crime and tragedy which distinguish the record in this case.

Presently came to Lawrence the report that on the 17th of March Hillmon had been accidently shot but instantly killed by Brown in their evening camp on Crooked Creek beyond Medicine Lodge, in Southwestern Kansas, and that the body had been buried at Medicine Lodge. A singular obscurity is thrown over the receipt of the earliest tidings upon this subject. That extraordinary paralysis or atrophy of memory which sometimes distinguishes witnesses is illustrated in the case of Levi Baldwin. (*Rec.*, 715, 713, 714, 705.) Mrs. Hillmon says that she first got the tidings from Mrs. Judson, the woman who owned the house in which she occupied a room, but where Mrs. Judson got them and how they should have come first to her of all women is lost in the obscurity referred to. (*Rec.*, 752, 791-792.)

The man who was killed at Crooked Creek was shot on the night of the 17th of March. The next day came the in-

quest, and afterwards the burial in Medicine Lodge graveyard, and on the 19th John Brown undertook to communicate the intelligence to Mrs. Hillmon that he had himself shot and killed her husband. He did so by the following letter:

> "Medicine Lodge, Kansas, March the 19th, 1879.
> Mrs. S. E. Hillmon:
> I am sorrow to state the news that I have to state to you. John was shot and killed, accidentally, by a gun as I went to take it out of the wagon, about fifteen miles north of this place. I had him dressed in his best clothes and buried in Medicine Lodge graveyard. I shall wait here until Mr. Paddock hears from you. Write to me to take charge of the team; I will dispose of them the best advantage, and take the proceeds to you; and when I get back to Lawrence I will relate the sad news to you. Probably you have heard of it before you get this letter. Yours truly, John H. Brown." (*Rec.*, 481, 756.)

The volume of sympathy and almost of remorse that would naturally fill the heart of this warm-hearted and generous man find hardly such abundant expression in this letter as one might anticipate. The effort to soften and break gently this intelligence is not too apparent, but the information is sudden and abrupt as of one in haste to announce a *fait accompli*, and to have further instructions as to what he should do with "the team;" but there is no inquiry as to what she would have done with the remains of her husband. If she will instruct he will dispose of the team to the best advantage and take the proceeds to her, and then he will tell her the history of what has happened. But this was a mere note of early information before the insurance companies should get advices of the matter!

Baldwin cannot remember whether he did not testify on the second trial that he got his first tidings by a letter to him at Tonganoxie from John H. Brown (*Rec.*, 713), but there

seems to have been altogether a curious state of alertness and preparation at this time. Mrs. Hillmon was at Baldwin's house (*Rec.*, 792), and on this 24th day of March he brought her from his house to Mrs. Judson's, and the next day started for Medicine Lodge. Mrs. Hillmon says she sent them there to bring the body back to Lawrence, but Levi Baldwin makes no such pretense. He went with the utmost dispatch, but he went, as he says, "to see the state of affairs." (Rec., 687, 870.) He took with him his brother Alva, and they arrived there at least a day and a half in advance of any other parties from Lawrence. If he had any instructions to bring home the body he ignored them altogether, and acted as if he had none. He arrived in the night, met John H. Brown, made arrangements to fence the grave, and sent immediately lumber and posts to the cemetery for that purpose. (*Rec.*, 687-8, 707-8, 870, 1445-6.) There was then no purpose to disturb that body or other than to leave it to perish where it lay. But up at Lawrence some of the persons who on the part of the companies had been connected with this insurance, heard also, but more tardily, the report that Hillmon was dead. It first reached Major Wiseman on the 27th of March. (*Rec.*, 863.) Meanwhile Baldwin had left for Medicine Lodge on the 25th; and on the evening of the 29th Wiseman, with Col. Samuel Walker of Lawrence, and a Mr. Tillinghast, left Lawrence and arrived at Medicine Lodge about 11 o'clock in the morning of the last day of March. (*Rec.*, 792, 863, 864, 865.) On their arrival they found Levi Baldwin and his brother and John H. Brown, and their posts and lumber already lying at that cemetery a mile or so out of Medicine Lodge for the purpose of fencing that grave and leaving it undisturbed. (*Rec.*, 865-6.) Had that been done there could thereafter have been no earthly proof of the identity

of its occupant except the testimony of John H. Brown, and such as might spring from that diary, rounded up and finished at Lawrence, and the old army discharge, which were said to have been upon the person of the man who was shot by the camp fire at Crooked Creek, and the coat and vest of Levi Baldwin which had been stretched upon the cadaver. But on the arrival of these new parties a new phase came upon the situation. Upon their arrival the body was disinterred, and those who were acting there for the insurance companies discovered instantly then in their conviction that it was not the body of Hillmon at all. (*Rec.*, 867-70, 1065.) There is in this record the testimony of persons then standing by, given on this last and former trials, that when the face of the body was disclosed Alva Baldwin suddenly exclaimed, "Hell! that's not Hillmon," nor has that testimony ever been contradicted by Alva Baldwin until this last trial. (*Rec.*, 724, 867-8, 1583-4.) On their demand and insistence, therefore, it was borne directly to Lawrence, where Hillmon lived. Levi Baldwin and his brother took charge of it, and it was carried in a wagon to Hutchinson, and thence by railway. (*Rec.*, 347.) On the road to Hutchinson the hat and the shoes that had been upon the man who was shot disappeared and were lost. (*Rec.*, 426, 873, 1065.) Levi Baldwin telegraphed to the undertakers, Bailey & Smith, to receive the body, to buy a grave, and prepare for immediate interment, but this was thwarted on behalf of the insurance companies, who procured that the remains should be held for investigation and immediate inquest. (*Rec.*, 1505, 1527-30.) Much of the proceedings of this inquest and of the evidence presented there concerning the identity of that body is shown in this record. Both Levi Baldwin and John H. Brown testified there that it was the body of Hillmon. In the testimony of Brown occurred

a statement that a third person accompanied him and Hillmon on a part of their journey. (*Rec.*, 393, 399, 405, 443.) The respondent, the insensibility of whose demeanor at the inquest attracted attention, with some confusion and uncertainty also identified the body as that of her husband. (*Rec.*, 1029-30, 1465-9, 1472-5, 1595-7.) The body was that of a man five feet eleven inches in height or more, of a large bony and angular frame, having large feet and long bony hands with large joints. (*Rec.*, 926, 1012, 1197, 1310, 1530.) Upon his face was a light thin beard of from two to four weeks' growth. (*Rec.*, 326, 598, 611-12, 625, 635-6.) Upon him were *not* the clothes in which he had been shot. (*Rec.*, 324-5, 600, 601, 611, 621.) As previously stated, his hat and shoes were lost on the way to Lawrence. (*Rec.*, 426, 873, 1065.) The body had been re-dressed for burial at Medicine Lodge in clothes which had belonged to Hillmon, and the coat and vest were those which Hillmon had received in exchange from Levi Baldwin. (*Rec.*, 510, 703-5, 709.) The clothes were too small for the body, and they were such as Hillmon would never have exchanged for if they fitted him no better than they fitted the subject of the inquest. (*Rec.*, 924, 1321, 1197, 1529.) Some other tests of identity would seem to have been available to Mrs. Hillmon if she had cared to use them. Presumably she had garments which had belonged to him, for he would hardly have carried with him on this *winter* journey all he had in the world, and she might have tried whether they would fit this body. But it has been admitted that when he last went from Lawrence he had taken off and left with her a ring (*Rec.*, 779, 791), and it easily could have been told by the coroner and his jury if that ring would go upon the large jointed finger of him who lay before them.

Alva Baldwin, who was at the disinterment at Medicine Lodge and accompanied the body to Lawrence, and who was in Lawrence and could have testified that this was the body of Hillmon if he so believed, was not called for that purpose. (*Rec.*, 736, 1476.) The members of Hillmon's own family lived near by in Washington County, Kansas, but no notice was given to them by Mrs. Hillmon of the death of her husband, or of this inquest, nor was any opportunity given them to see the remains and identify the body of their brother (*Rec.*, 796); and yet the subject of investigation and the matter of dispute at that inquest was whether the body presented was that of John W. Hillmon.

The result of this inquest and its verdict are not shown in this record, but it does appear that in the night before they were announced John H. Brown departed from the State of Kansas, and took up his residence in Missouri under circumstances which made his departure seem a flight. He is said to have been under arrest at the time (*Rec.*, 1070); he had an extended conference with Levi Baldwin before going (*Rec.*, 432); he obtained money from Mrs. Hillmon (*Rec.*, 811, 816); and he pursued some curious wanderings in Missouri. (*Rec.*, 433-8, 489, 492.)

The account which Brown first gave of the man that was shot by the camp-fire on that night of March 17, 1879, is substantially that given in his deposition used on the trial below. (*Rec.*, 406-415; 418-424.) By that account they went into camp on Crooked creek, and in the evening of the 17th of March, Brown, riding up on horseback, notified a man living in the neighborhood of the camp that he had accidentally shot and killed his companion. The man so notified went to the camp and found a dead body having a bullet wound directly through the head, lying by the camp-fire, and said by Brown to be the body of Hillmon.

His statement was that after supper he went to the wagon for the purpose of removing some blankets, or other like material, therefrom; that a gun had been put in the wagon by Hillmon so that its muzzle projected over the side of the wagon, and that in the effort to remove the blankets they became entangled with the gun and discharged it, and thereby his companion, Hillmon, was shot through the head and instantly killed. The body was left undisturbed until the morning, when an inquest was held, and it was then removed to Medicine Lodge, where a second inquest was held, and it was then buried in the burial ground at Medicine Lodge, whence it was afterwards carried to Lawrence, Kansas.

If this was the body of Hillmon, then no witness save Brown was present in that camp when the shot that killed him was fired; and in any case the only direct testimony as to the circumstances under which the person whose body was there found came to his death, or as to his identity until after the disinterment at Medicine Lodge, comes from the lips of Brown.

Immediately after the inquest at Lawrence and the flight of Brown, his father, Robert Brown, applied to one W. J. Buchan, then a lawyer at Wyandotte, for his assistance. Robert Brown *told Mrs. Hillmon* about that time that he had employed Mr. Buchan "to take care of his son." (*Rec.*, 767, 1228, 1247, 1250.) Buchan immediately engaging in the protection of John H. Brown, and learning his whereabouts from his brother Reuben (*Rec.*, 1227, 547), had two interviews with him, the first one being in the latter part of April, 1879, or possibly the first of May, at Lexington, Missouri.

He went there accompanied by Reuben Brown, and what

occurred between them is stated in his testimony, a part of which is as follows (*Rec.*, 1228-9):

"Q. Now, you may state what took place between you and John H. Brown at that time, stating the conversation as it occurred?

A. John met us at the train at Lexington, about twelve o'clock, possibly a little after, and we went directly up to the hotel to dinner. I don't recollect any conversation that we had on the way up except as to why he hadn't met us at Orrick some time previous to that.

Q. Now, in that connection, you may state what he said in regard to why he hadn't met you at Orrick?

A. He said—I asked him why he hadn't met his father and me at Orrick quite a while before this, and he said he was a little afraid. He was a little afraid that somebody would arrest him and he didn't show up there. We then went directly to the hotel and sat down to dinner, had our dinner, and John and Reub and myself then walked out from the hotel quite a little ways and sat down upon a rock overlooking the bluff. I says, the substance of it was: 'Well, John, what is there about this business; what is it about this affair at Lawrence?' He replied, 'Well, Bill, it is bad business, it is a bad affair, and I sent for you; I want to turn state's evidence; they are hunting me; that wasn't Hillmon that was killed down there; it was another man; Hillmon has got away and they are hunting me, and I am left here in trouble and I want to get out of it; I want to turn state's evidence; I want you to see the attorneys for the insurance companies, Mr. Barker of Lawrence, and see if they will let up on hunting me if I will go on the witness stand and tell the truth about this whole affair.' That is the substance of it. He then went on—I asked him something about it. I said to him they couldn't prosecute him at Lawrence for a crime alleged to have been committed in Barber County; that he would have to be taken to Barber County and tried before a jury of that county, and then I asked him something about the coroner's jury down there; he said they were his

friends. I said, you are innocent and they would not convict you down there; it is not necessary to do that, but he said he had worried over this thing and he wanted it cleared up. He wanted it off his mind, wanted to get out of it, and wanted I should go up to Lawrence and hunt somebody connected with the insurance companies and tell them that if they would cease their attempts to prosecute him and follow him, in case any suits were brought to recover on those policies, that he would go upon the witness stand and tell the truth, and the truth was that it was not the body of Hillmon that was brought to Lawrence.

Q. Now, up to that time had you ever urged, or said anything to him about turning state's evidence?

A. Nothing.

A. I don't remember as to what was said; I explained to him. Had I said anything to him about it?

Q. Yes?

A. No, sir; I hadn't said anything more than I had merely asked what the affair was, the trouble he was in; he was very anxious to talk about it and to get it off his mind.

Q. Did he tell you—go into the details of the transaction, how it had taken place; did he state what he claimed to be the facts with reference to the transaction?

A. He recited to me the whole story, the whole transaction, of the trip from Wichita and back—two trips, I think they went from Wichita out there and back.

Q. Did he tell you whose body it was that was brought to Lawrence?

A. I asked him particularly about that, tried to find out whose it was, and he either didn't know, or didn't want to tell me; I don't know. He said it was, I think he said that it was a man by the name of Berkley, Joe Berkley, I think they called him."

The detailed history which he then gave (*Rec.*, 1230) of the two expeditions from Wichita was afterwards reduced to writing in the form of an affidavit (*Rec.*, 1237, 1284), and is set out in full hereafter. The purpose of

Buchan's employment was to procure for Brown escape from the criminal prosecution which he apprehended would be instituted by the insurance companies. (*Rec.*, 767, 1238-9.) In view of these facts the idea seems to have occurred that they might be made the basis not only of negotiations to induce the insurance companies to desist from criminal prosecution by making this evidence available to them in case of suits upon the policies, but also of procuring from Mrs. Hillmon the abandonment of such suits and the surrender of the policies. This thought cannot be deemed unnatural, and that under the circumstances it should suggest itself seems to have been almost inevitable, for she had seen the body produced at the inquest and knew perfectly well whether it was or was not the body of her husband (*Rec.*, 758, 821); and clearly the abandonment and surrender of the policies would be a matter of much value to the insurance companies. Now, it is not controverted nor sought to be obscured in the least, nor has it ever been in the history of this litigation, that at a much later time one H. B. Munn, acting for the insurance companies, with the consent of Brown agreed with Buchan to pay him for the service if he should procure the surrender and release of these policies. Brown was in a straight where he needed the active services of an attorney, but he had no money whatever with which to pay him. If Brown could be served and the attorney's compensation procured from the insurance companies, that was more to the advantage of Brown than of Buchan. Upon this subject everything was open and above board between Mr. Buchan and Brown, and was agreed upon and ordered by Brown in his own interest (*Rec.*, 591, 1247-8), and with the full knowledge of Munn, the agent of the insurance companies. (*Rec.*, 591, 1238-9.) After this interview at Lexington Buchan again

met John H. Brown at the farm and dwelling of his brother Reuben, at Parkville, Missouri. This was on or about the 4th of September, and then a written statement was prepared and was sworn to by Brown which contained in substance the history detailed by Brown at his first interview with Buchan at Lexington. (*Rec.*, 1233-8.) This history, narrated in April or May at Lexington, and afterwards in the affidavit made at Parkville in September, 1879, is as follows (*Rec.*, 1284-6):

STATE OF MISSOURI,
COUNTY OF PLATT. } ss.

John H. Brown, of lawful age, being first duly sworn according to law, deposes and says: My name is John Brown. My age, thirty years. I am acquainted with John W. Hillmon, also Mrs. Sallie E. Hillmon, and Levi Baldwin of Douglas County, Kansas; have known John W. Hillmon for about five years, have been with him a good deal for the past two years, was out with him last March at Wichita, and on the trip from there to and around Medicine Lodge in Barbour County, Kansas, where it is claimed that I killed him on the 17th of March, 1879. Along about the 10th of December, 1878, John W. Hillmon, Levi Baldwin and myself talked about and entered into a conspiracy to defraud the New York Life Insurance Company and the Mutual Life of New York out of some money to be obtained by means of effecting a policy or policies on the life of said John. W. Hillmon. Baldwin was to furnish the money to pay the premium and to keep up the policies in case they had to be renewed. Our original arrangement was to get Hillmon's life insured for fifteen thousand, but it was afterwards changed to twenty-five thousand dollars. Hillmon and myself were to go off southwest from Wichita, Kansas, ostensibly to locate a stock ranch, but in fact to in some way find a subject to pass off as the body of

John W. Hillmon, for the purpose of obtaining the insurance money aforesaid; we had no definite plan of getting the subject, but to in some manner get one, the final termination of the matter was the last idea thought of our first trip out from Wichita the last days of December, while the snow was on the ground we expected to find a subject that would appear to be Hillmon frozen to death, and *that* could not be identified only by the clothes and papers found on it, and so I could pass off as Hillmon. We went from Wichita to Medicine Lodge, then direct to Sun City, from there to Kinsley, from there to Great Bend on the Santa Fe road, then to Larned, and on to Wichita via Hutchinson. Hillmon and myself were entirely alone on this trip. Isliff of Medicine Lodge saw Hillmon on this trip; we put up at his stable. I then stayed at Wichita until the 4th of March, Hillmon in the meantime went up to Lawrence to see his wife and get some more money; he returned about the first of March, and on the 5th we left on our second trip. We went due west to Cow Skin Creek, then west to Harper City, then to Medicine Lodge on by Sun City and beyond some miles; then we turned northeast down Medicine river to a camp on Elm creek about eighteen miles north of Medicine Lodge, where Hillmon is claimed to have been killed. We got there about an hour before sun down, and stayed in camp until the next evening. We overtook a stranger on this trip out from Wichita about two or two and one-half miles from town, who Hillmon invited to get in and ride, and who he (Hillmon) proposed to hire to herd and work for him on the ranch as proposed to be located. This man was with us during all this trip. Hillmon proposed to me that this man would do for a subject to pass for him. I told him and contended with him that the man would not do to pass off for him, giving him various reasons why the man would not answer his description, and complained and objected because his proposition was to take the man's life, and I protested and said that it was going beyond what we had agreed, and something I had never before thought of and was beyond my grit

entirely. But Hillmon seemed to get more deeply determined and more and more desperate in the matter. Pains were taken not to have more than two of us seen together in the wagon. Sometimes one and then the other would be kept back out of sight. On this trip, up to Lawrence, Hillmon was vaccinated, his arm was quite bad. Hillmon kept at the man until he let him vaccinate him, which he did, taking his pocket-knife and using virus from his own arm for the purpose. He also traded clothes with him. Hillmon, first giving him a change of underclothing, then traded suits; the one he was killed in was a suit Hillmon traded with Baldwin for. This man appeared to be a stranger in the country, a sort of an easy-going fellow, not suspicious or very attentive to anything. His arm became very sore, and he got quite stupid and dull; he said his name was either Berkley or Burgess, or something sounding like that. We always called him Joe. He said he had been around Fort Scott awhile and also had worked about Wellington or Arkansas City. I don't know where he was from nor where his home or friends were. I did not see him at Wichita that I know of. I had but very little to say to the man, and less to do with him. He was taken in charge by Hillmon and yielded willingly to his will. I dreaded what I thought was to be done and kept out of having any more to do with him than possible. I frequently remonstrated with Hillmon and tried to deter him from carrying out his intentions of killing the man. The next evening after we got to the camp last named the man Joe was sitting by the fire. I was at the hind end of the wagon either putting feed in the box for the horses or taking a sack of corn out when I heard a gun go off. I looked around and saw the man was shot and Hillmon was pulling him around to keep him out of the fire. Hillmon changed a day book from his own coat to Joe's and said to me everything was all right and in shape as he wanted it and that I need not be afraid, but it would be all right. He told me to get a pony and go down to a ranch about three-quarters of a mile and get some one to come up. He took Joe's valise and started north. This was about

sun down. We had no arrangements about communicating with each other; he first proposed to do so, but I told him I did not want to know where he was, that in case I should I might find out some other way. I have never heard a word from him since. At Lawrence Mrs. Hillmon gave me to understand that she knew where Hillmon was, and that he was all right. The man over whom an inquest was held at camp, afterwards at Medicine Lodge, and at Lawrence, Kansas, was the man Joe Burgess or Berkley, killed by Hillmon as related above, and John W. Hillmon I believe to be still alive, at least he left our camp and went north, as stated above, after killing Joe. Hillmon said he would assume the name of William Marshall. Baldwin's wife and Mrs. Hillmon know all about this. In my testimony at Lawrence I stated the route taken as above described, but the man who I described as being in camp with us and who I said went off with some wagons was Joe, the man killed. I afterwards, some time in August, 1879, made four affidavits, under great importunities from Baldwin, who came after me three different times, the last time persuading me to go with him to Kansas City, where Hon. Saml. Riggs insisted on me signing them. I don't think Mr. Riggs is aware of the facts in this case, nor the other counsel in the case.

I make the above statements in the Hillmon case as the full and true facts in the case, regretting the part I have taken in the affair.

(Signed) JOHN H. BROWN.

Subscribed in my presence and sworn to before me this 4th day of September, A. D. 1879. My term expires on the 3rd day of April, 1883.

FRANCIS M. MCDONALD,
[SEAL] *Notary Public.*

This is to certify that we have this day compared the above with the original and that the same is a true and correct copy of said original.

W. J. BUCHAN,
J. W. GREEN.

LAWRENCE, Sept. 13, 1879.

At the same time that this statement was made and sworn to at Parkville, John H. Brown signed and delivered to Mr. Buchan the following authorization (*Rec.*, 591, 1237):

> "PARKVILLE, Missouri, September 4th, 1879.
>
> I hereby authorize W. J. Buchan to make arrangements, if he can, with the insurance companies, for settlement of the Hillmon cases by them stopping all pursuit and prosecution of myself and John W. Hillmon if suit for money is stopped and policies surrendered to companies.
>
> JOHN H. BROWN."

Thereupon Buchan went at once to Lawrence (*Rec.*, 1238-9, 1249), and there was given the following paper by Mr. Munn:

> "*W. J. Buchan, Esq.:*
>
> DEAR SIR: On behalf of the Mutual Life, New York, Connecticut Mutual Life I hereby authorize and employ you to procure the surrender of the policies of insurance on the life of John W. Hillmon.
>
> H. B. MUNN.
>
> KANSAS CITY, Sept. 5th, 1879."

It is certain, therefore, that any employment of Buchan for any purpose connected with these policies of insurance by the insurance companies was not earlier than the 5th and 6th of September (*Rec.*, 580, 590-592), and was long subsequent to the interview he had with John H. Brown at Lexington in April or May, and subsequent to the occasion at Parkville, when the substance of the statement made at Lexington was reduced to writing and sworn to by Brown.

II.

We are brought thus to the opening of another chapter in this history.

About noon of Friday, the 12th of September, 1879, Levi Baldwin appeared at Mrs. Judson's, where Mrs. Hillmon stayed, in Lawrence, and took her out to his house. A remarkable forgetfulness has thrown deep obscurity over the details of that journey. Baldwin had come in on horseback. The bridge over the river was down, so that he and Mrs. Hillmon were forced to cross in a boat to North Lawrence. She then rode in the wagon of some neighbor to a house about three miles nearer than Baldwin's, where Baldwin, who rode beside the wagon on horseback, left her until he should come for her, and rode on home. She had lived all her life from girlhood in that region, continually traversing that road, but she cannot remember the name of the neighbor in whose wagon she rode, nor the location of his house, nor any description of it, nor the names of its inmates. She remained there until some time in the evening, when Levi Baldwin came for her, and she arrived at his house about half-past nine. When she arrived there she found John H. Brown. She cannot recollect whether she learned from Mrs. Baldwin on her arrival that he was there, or whether Baldwin told her on the way. There Brown told her of the statement that he had made, and she made an appointment to meet him and Buchan at Leavenworth on the next Monday. She remained at Baldwin's until Monday morning, when his son took her over to the train for Leavenworth at Tonganoxie station, and at Leavenworth she met Brown and Buchan at the Planter's Hotel. (*Rec.*, 715-16, 768-9, 813-824, 1897-1900.) Finally, as the result of the conference between them, she executed re-

leases of these policies and they were witnessed by John H. Brown, and then she went herself with Mr. Buchan to the office of her principal counsel, whose residence and office were in Leavenworth, and called for the delivery of the policies. Mr. Wheat, however, refused to deliver them and claimed that the attorneys had a lien upon them for about $10,000. She returned, therefore, to the hotel without obtaining possession of her policies. (*Rec.*, 773-4, 822, 1241-3.) Certainly it seems remarkable, if she knew that the dead man at the inquest at Lawrence was her husband—*and she knew* whether he was or not—that when she was actually in the office of her principal counsel, Mr. Wheat, at Leavenworth, she should not have taken the occasion to consult with him, to inform him of the new situation that had arisen and take his counsel upon how she ought to act. Moreover, she had spent all of Saturday and Sunday at the home of her cousin, Levi Baldwin, where she had been taken for the express purpose of meeting there John H. Brown. (*Rec.*, 1239.) During those days and the quiet of that Sunday she must have pondered and discussed with him this new situation. On Monday morning she went to Leavenworth *on purpose to do there exactly what was done;* and when Buchan proposed that she should accept the statement of Brown and release these policies and abandon the claim that her husband was dead she does not seem to have cared to consult Levi Baldwin further, any more than her counsel, Mr. Wheat. No force or constraint, moral or otherwise, bore upon her, beyond her own personal knowledge of the affair. She signed the releases prepared for her and delivered them. Nor is that all, for after signing the releases she visited her sister at Ottawa for a couple of weeks, and while there received from Buchan a letter in which she stated that a mistake had been made in one of the releases

and asked her to come again to Wyandotte to sign papers. She, thereupon, went there about September 25th and signed the New York Life release. (*Rec.*, 513-19, 777, 825-6, 830, 1244-6.)

Petitioner claimed that the release thus executed at Leavenworth was valid and effective, and by pleadings set it up in defense. (*Rec.*, 14, 19.) Respondent, seeking to avoid the effect of this release, and deeming that the burden was upon her to overcome it, put it in evidence and then proceeded to impeach its legal effect upon various grounds. The right of respondent thus to impeach evidence which she had introduced, and its allowance by the court, is the basis of certain assignments of error in the admission of testimony on that subject. The court instructed the jury that the release was void particularly for want of consideration, and constituted no defense to the action. It was contended by respondent that the release was illegally obtained by petitioner by a contract to compound a felony in agreeing to refrain from the criminal prosecution of Brown and Hillmon; that it was fraudulently obtained by misrepresentation and deceit in leading respondent to believe that John H. Brown, her principal witness, would testify that the body brought from Medicine Lodge to Lawrence was falsely pretended to be that of Hillmon; and that the release was void for want of consideration. (*Rec.*, 575-586, 772-3, 821-2, 1272-6.) Reply to these contentions is not difficult. If there was agreement to compound felony, then the felony existed, and there was *no right of action* on the policies, and an admission of the felony could not be used to support the action by defeating the release. If the body presented for Hillmon's was a false one, respondent, who had seen that body, knew that fact, and she had no

legal right which was invaded to testimony in support of the fraud. The testimony related to a question of identity of a body which could be recognized and identified as being or not being Hillmon's by all who knew him, but this question of identity of the body and so whether the statement of the witness would be true or false, was one of the *fundamental and chief issues to be tried in the cause,* and could not be raised, tried and decided collaterally by the court on this question concerning the release. The release was an integral and formal contract which imported consideration, and, when specially pleaded, could not be attacked *at law* for want of consideration.

Nor does it follow that the release was void for want of consideration merely because no money was paid for it. When the plaintiff executed this release she knew with absolute certainty whether the body presented at Lawrence as that of her husband was the true or a false one. It it was true that the body was a false one and was not Hillmon's, a bill in equity might compel a release and cancellation of the policy of insurance and the avoidance of such litigation, and its expense would be a sufficient consideration. So, too, in such case the underlying moral duty to abandon and release the policy would be a good and legal consideration for the release. It is not enough in order to avoid the release merely to prove that no money was paid respondent as consideration. A money consideration assumes that the policy had some lawful value which she relinquished and gave up by compromise or exchange; but, if the facts charged in defense were true (and she knew it absolutely if they were) the policy had no lawful value, nor had she a moral or legal right to exact or be paid anything for it.

In any event, under all the conditions of deliberation on

the part of the plaintiff and of her personal knowledge of facts, the release was important evidence in the nature of an admission of her belief that the body brought from Medicine Lodge and which she had seen at the inquest at Lawrence was not the body of her husband.

The account given by Brown at the inquest in Lawrence and in his deposition read on the trial below of the man who was found dead in his camp by Crooked creek on the 17th of March, 1879, is very different from the sworn statement made at Parkville when the cold shadow of Nemesis had fallen upon him, and he was shrinking from the apprehended vengeance of the criminal law. This sworn statement, introduced on this trial by the plaintiff, was available to the court in evidence for various purposes. First and primarily, it was available to impeach and utterly destroy the credibility of Brown as a witness. John H. Brown was the only witness in the case who ever knew the exact conditions under which that man who lay dead that night by the fire on Crooked creek came to his death. No other witness knew of his own knowledge who fired that accurate and fatal shot which caused the instant death of its victim. If his testimony be eliminated from the case, there is absolutely no direct evidence in it of the circumstances under which this event befell. He has not hesitated to make at different times the most contradictory statements, of the gravest character and involving most solemn consequences, and to swear to them all without qualification or reserve. He made one statement as a witness at the inquest in Lawrence. Then waiting about in an adjoining room he watched the course of events (*Rec.*, 1232) and upon the close of the proceedings fled from the state into Missouri. There, at Lexington, he made a statement from beginning to end of the whole transaction wholly contra-

dictory of his testimony at the inquest at Lawrence. A few months later, in Missouri, at the instance of Levi Baldwin, who went to find him there for that purpose, and as he says, "under great importunities from Baldwin, who came after me three different times," he made the affidavits used for proofs of death in the actions against the insurance companies. (*Rec.*, 432, 714, 717-19, 1234-5, 1286.) Subsequently, on the 4th of September, at Parkville, he signed and swore to the statement which he had made at Lexington in April or May. (*Rec.*, 1237-8.) A little later he went to meet Mrs. Hillmon at Levi Baldwin's house, where he stayed with her a day or two and reiterated this statement that he had sworn to; afterwards he met her at Leavenworth, where he again told her of this statement he had sworn to, and that the body at Lawrence was not that of her husband and that he should stick to it; and about a year later, in December, 1881, he made the deposition upon which respondent has relied in this case. Whatever may be said of others, there need be no limitations upon the language which should characterize John H. Brown as a mendacious, conscienceless and irredeemable scoundrel. Not one word that has ever emanated from him in any account relating to this transaction is entitled to trust or credence because he uttered or swore to it. We may properly refer and need add nothing to what was said by Judge Shiras in his charge to the jury upon the third trial of this case. That charge, for some purposes, was referred to and examined by the Circuit Court on the last trial (*Rec.*, 1609), and it is a part of the record which was before this court on the former review, reported in 145 U. S., 285.*

* "For the purpose of impeaching a witness and affecting his credibility it is permitted to a party to show that the witness has at other times and places made contradictory

In another aspect this sworn statement was available as evidence. It was deliberately offered and introduced by counsel for respondent, and was admitted in evidence without objection. (*Rec.*, 1284.) John Brown was already

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statements of such a character that they are inconsistent with his evidence on material points, and it then becomes a question for the jury to determine whether any, and, if any, what, weight shall be given to the testimony of the witness whose credibility is thus impeached Juries must in such cases distinguish between mere inconsistencies in statements of past transactions, made at different times, which arise from the lapse of time and the imperfection of human memory, and those positive and material contradictions which cannot be attributed to these causes, but must have been made intentionally. The contradictory statements relied upon as impeaching the credibility of the witness Brown belong to the latter class. By no possible exercise of charity can it be supposed that the witness became honestly confused in his recollection as to the events that took place in the camp on Crooked creek. He knows whether it was Hillmon that there met his death by being shot through the head through the accidental discharge of a gun in the manner described by the witness, or whether it was another person who was intentionally shot by Hillmon himself.

"Brown himself admits making the written statement which is relied upon to impeach him, but claims that he was induced to make it by the representations made to him by one W. J. Buchan that unless he did so he, the witness, was liable to be arrested on a charge of being accessory to a murder. You have heard, gentlemen, the testimony adduced by both parties touching the circumstances under which this written statement was made, and it is for you to say what the truth is in this particular. Whether it be true that Brown voluntarily sent for Buchan, as is claimed by the latter, for the purpose of consulting with him in regard to the best method of avoiding all further trouble and preventing his arrest on a charge of murder by turning state's evidence or by making a statement which would aid in defeating a recovery on the policies of insurance on the life of Hillmon, or whether Buchan and members of Brown's

her witness. It was strenuously claimed by petitioner that being thus introduced, it was evidence for all purposes against respondent to precisely the same extent as any part of John Brown's deposition read on the trial. Instruction

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family urged Brown, as he claims, to make the statement in question in order to avoid arrest and to put a stop to any prosecution or effort to prosecute him at the instance of the insurance companies, the fact remains undisputed that he made the statement which has been read in your hearing, and which is, in its material matters, in direct contradiction to his testimony as a witness in these cases. According to his own testimony, he was willing, in order to save himself from a possible arrest and prosecution for an alleged offense, which he now testifies was not committed, to swear to a statement which, if true, would show that he was a deliberate and active participant in the murder of a third person and in the effort to palm off the body of such third person as that of John W. Hillmon for the purpose of cheating and defrauding the insurance companies, whilst, on the other hand, if the statement was untrue, the making it would probably result in cheating and defrauding Mrs. Hillmon by preventing her recovery on the policies on the life of her husband. In other words, if the matters contained in the written statement signed and sworn to by Brown are substantially true, then he confesses that he willingly and deliberately entered into a conspiracy with John W. Hillmon and Levi Baldwin to cheat and defraud the insurance companies, and in carrying on the conspiracy he became an accessory before and after the fact to a cold-blooded murder of an unoffending third person who had been induced to join *he* and Hillmon on their trip. If these statements are not true, then it appears that Brown has deliberately sworn falsely to the matters set up in the written statement, knowing that the statement would be used to defeat plaintiff's recovery on the policies of insurance, but being willing so to do in order to escape arrest and prosecution for his connection or alleged connection with the death of the person who was killed in Barbour County.

"Can any dependence be safely put on the testimony of a witness who has placed himself in the position of this man Brown?"

was asked to this effect, and its refusal is assigned for error. In any event the affidavit is evidence to prove the *fact* that he *made* it. It may be considered upon principles analogous to those upon which in this case the letters of Adolph Walters were held relevant by this court. (145 U. S., 285.) The fact that under the circumstances of the moment he *made* such a statement is as competent evidence as the fact of his flight, and is of the same character. Whether the things stated were true or not—whether some were sincere or others intended and designed to deceive—is another matter. The affidavit is available to prove the fact that he made it, even if not evidence that the things alleged in it are true; and those allegations thus made become circumstances which may derive credence from other circumstances with which they fall into connection, or may reciprocally confirm and explain and give significance to other circumstances existing and appearing independently, and in this connection the statement may be entitled to great consideration.

The application for this policy of insurance (*Rec.*, 180, 183) was subscribed to by the insured who procured it, and by respondent, through his agency. Under its terms if it was obtained from the insurance company by Hillmon, not for the ordinary and lawful purpose indicated upon the face of the transaction and stated in the application and the policy, but for other and different purposes not disclosed, and if Hillmon, by combination and conspiracy between himself and others, procured the policy with concealed designs and purposes which were fraudulent and illegal, and the insurance company was induced to issue the policy by misrepresentation and concealment of the true design and intent for which it was obtained, then the policy and the contract of insurance were void *ab initio* and could not be made a ground of cause of action by respondent under any

conditions whatever. Such instruction to the jury was asked of the court and was refused.

Such other parts of this history as are material on the present hearing will come into notice in connection with the specific assignments of error to which they are related. The record discloses the contention of petitioner, and the remarkable and conclusive evidence by which it is supported, that the man who was shot in that remote camp on the evening of March 17, 1879, whose body was buried at Medicine Lodge and afterwards taken to Lawrence, was not John W. Hillmon. The statement dropped by John H. Brown before the inquest at Lawrence that on his last expedition with Hillmon from Wichita a third person was with them some part of the time, was followed by the development of a body of evidence and of a multitude of independent circumstances which confirm and establish the conviction that the statement detailed by Brown at Lexington, and afterwards in a written form sworn to at Parkville, is substantially the true history of this entire transaction. The burden was, of course, upon respondent to prove the death of Hillmon within the conditions of the policy, and at the time and place stated in her petition. The entire burden of proof was upon her and not upon petitioner. The evidence developed, however, has been so abundant and convincing that petitioner believed it in its power to prove that Hillmon was not killed at Crooked creek, and not only that the man who was slain there was not Hillmon, but even to go farther, and to prove who he was, and that he was a young man named Frederick Adolph Walters, who had formerly lived at Fort Madison, Iowa, and had gone to Wichita, and whom Brown and Hillmon had enticed to go out with them upon that fictitious looking for a stock ranch, and had lured into that desolate camp on Crooked creek. The record reveals these men at

Wichita quietly but sedulously searching for some one to go with them into the wilderness. Hillmon sought to induce a man named Marshall to go out with him and teach him the art of catching wild horses. (*Rec.*, 1403.) He noted Hillmon's appearance with particularity—his neatness of dress, his "neat, small foot, wearing about a five and a half or six boot" (*Rec.*, 1402), his defective teeth (*Rec.*, 1401), the scar on his hand, and when on cross-examination he was asked if he had special reasons for his memory of the descriptive features of Hillmon, one is hardly surprised by the following (*Rec.*, 1406):

> "A. I should rather think I did.
>
> Q. State them? A. Well, after the occurrence came up of this man being murdered, and knowing that Hillmon was trying to get me into the same trap, it is natural for one to suppose that they would remember something about him more particular than others."

They applied to Michael Mesh and sought to induce him to go with them (*Rec.*, 1561), and they also tried to employ Ben Helda (1575). Finally they threw their net over Frederick Adolph Walters, a young cigarmaker who had wandered from Fort Madison, Iowa, and was in Wichita seeking for employment and obviously curious to travel. Letters which he wrote on the very eve of the departure of Hillmon and Brown upon their expedition show that they had succeded with him as they had not with Marshall or with Helda or with Mesh, for he had engaged to go to with them for service upon this mythical cattle ranch, which they had yet to procure and to stock without money. (*Rec.*, 1687-1690; 1713-14, 1742, 1775-6.) But they could undertake freely to pay ample wages to the one who should go with them; and they could do so with impunity, for it was obviously no part of the scheme that the day of payment should arrive immediately. This circumstance, namely,

their uniformly offering large wages to induce some one to go with them, which is related independently by each witness, is confirmed, and the truth of their testimony is confirmed by the statement of Walters occurring independently in his letter to Miss Kasten (*Rec.*, 1689-90), that Hillmon "*promised me more wages than I could make at anything else.*" An acquaintance of Walters, Healy, who lived with him at Wichita, had information of his engagement with Hillmon, and of his expectation of going with him through Medicine Lodge. He gave Walters a message to a business associate at that point, which Walters accepted to deliver, but to which no reply ever came. (*Rec.*, 1417-18, 1430.) The incidents of obscurity and concealment which in every narration attend that final journey from Wichita to Crooked creek are in accordance with and confirm the sworn statement of Brown to Buchan. The mysterious order of Hillmon to the postmaster at Wichita to deliver his mail to no one, even if one should come with an order from him (*Rec.*,1599); the curious concealment and seclusion of that camp which is described by the witnesses Frazier and Paddock (*Rec.*, 325, 1448-1451); remote from the highway and separated by a rough and broken interval; hidden in a ravine into which no one could see from any traversed portion of the surrounding country; a position where men might lie in camp for days unvisited and undiscovered; the accurate aim that brought instant death just at nightfall; the mysterious information to Baldwin and to Mrs. Hillmon, which no one can trace nor they remember; the leisurely burial at Medicine Lodge, and the defined intention to leave the body permanently there—all accord with the history and the purpose detailed by Brown. The activity and resolution of the insurance companies thwarted the purpose to leave that body to become undistinguishable in the grave at Medicine Lodge,

and caused it to be transported to Lawrence, where it was submitted for observation and for identification by anyone by whom it might be recognized. There the companies caused the remains to be photographed and preserved every possible means of identification. It is strange that in that community where Hillmon lived and was known, only Levi Baldwin and Brown and respondent and few, if any, other reputable and trustworthy witnesses ventured the opinion that that was the body of Hillmon. Respondent, as has been stated, gave no notice of its presence there to his sisters or other members of his family, but when afterwards she applied to them they with absolute unanimity declared that if the body answered the description given it was not that of Hillmon. (*Rec.*, 1118, 1136-7, 1158, 1172-3, 1184-5.) On the other hand, it was not in the slightest degree incumbent upon the defendant to prove that it was the body of Walters, but from descriptions given and from photographs all the members of his family identified it as his without hesitation or qualification, and his sisters and brothers have testified unequivocally to that effect on several trials of this case. Still it would be immaterial if it were not the body of Walters. It would have mattered nothing if Walters, living, had entered the court room and taken his place among those attending that trial. The vital question would still have remained, whether the body at Lawrence was the body of Hillmon? Still it would have remained true that it was the body of a man *like* Walters, and *not* in the least *like* Hillmon, and one that by no possibility under the evidence could have been the body of Hillmon.

FIRST SPECIFICATION.—RELATING TO THE CONSOLIDATION OF THE CAUSES.

The order made by the court below consolidating the cases for trial was made under authority of Sec. 921 of the Revised Statutes, which is as follows:

> "Sec. 921. When causes of a like nature or relative to the same question are pending before a court of the United States or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

The effect of such consolidation of the two cases for trial, according to the ruling of the Circuit Court, was to give the plaintiff six peremptory challenges to the jury, while each defendant had but three. On all former trials the plaintiff had concurred in the consolidation of the cases for trial, while the defendant had opposed the order and moved for separate trials. The stipulation between the parties, therefore (*Rec.*, 69-70), that the cases should thereafter be tried separately, *was a waiver by the plaintiff* as to each defendant of any possible right to a disproportionate number of challenges, because if the cases were tried separately the plaintiff and the defendant would each be entitled to but three peremptory challenges to the same jury. Concerning this statute this court has declared as follows, *Insurance Company* v. *Hillmon*, 145 U. S., 285, 293:

> "Although the defendants might lawfully be compelled at the discretion of the court to try the cases together, the causes of action remained distinct and required separate verdicts and judgments; and no defendant could be deprived, *without its consent*, of *any right* material to its defense, whether by way of chal-

lenge of jurors, or of objection to evidence, to which it would have been entitled if the cases had been tried separately."

The ruling of the court that the plaintiff was entitled to six challenges was in effect a contrary construction of the statute. If, as between the plaintiff and each defendant, the parties could not, as to the same jury, be given their exact rights on the one hand and limited to their exact rights on the other, the only alternative was to sever the causes and try them separately.

Stroh v. *Hinchman,* 37 Mich., 490.
State v. *Stoughton et al.,* 51 Vt., 365.
Cruce v. *The State,* 59 Ga., 90.

As to any right which a defendant would have upon a separate trial, we may recall and apply the language of BREWER, J., in *State* v. *Durein,* 29 Kas., 691, where he said:

"If one consenting to a joint trial does not waive this right, *a fortiori* one who is compelled against his will to a joint trial ought not to be deprived of it."

In its aspect as a waiver of any rights of challenge which the plaintiff could have on a joint trial which it would not have on a separate trial the stipulation should have been respected and have been given effect.

SECOND SPECIFICATION.—RELATING TO THE PEREMPTORY CHALLENGES.

At common law peremptory challenges existed as a right in criminal but not in civil cases. When an act of Parliament declared simply that a party in a civil cause might have so many peremptory challenges, the right thus extended into civil cases found its definition and conditions

already established by law. Limitations which the statute refrained from imposing could not be imposed by the court. The court therefore in the absence of express statute had and has no more power to change the statutory number of challenges, or to *subject a defendant to new conditions in the making up of the jury,* than it has to deprive him of his jury altogether. The court below was led by construction of the Federal statute to the view of its legal effect declared, and to the conclusion to which exception was taken. On a former trial of these cases the court conceived them so effectively consolidated that the defendants in all three cases were entitled only to the number of challenges allowed by statute in one case. But this court *reversed the judgment* (*Insurance Company* v. *Hillmon,* 145 U. S., 293), and held that the cases were joined for trial in form only while they remained radically distinct, and the right of each defendant *remained unimpaired in its own case*. In this trial the Circuit Court passed to precisely the opposite extreme. It regarded each defendant as *one party,* and the plaintiff as *two parties.* It gave the plaintiff *more* challenges than she would have in one case; and held that the causes of action remained distinct, and that *to one jury* the plaintiff was entitled to its full number of challenges *in each cause,* with the result that each defendant, *without its consent* and against its protest, was compelled to try its own individual cause before a jury to which it was given only one-half as many peremptory challenges as the plaintiff. The right of *each* defendant did *not remain unimpaired in its own case* any more than in the former instance. There each *defendant* was allowed *fewer* challenges than was its right to a single jury. Here the *plaintiff* is allowed *more* challenges than was her right against *each* defendant to a single jury. It was necessary,

of course,—and the court ordered,—that there should be a separate verdict in each case; and therefore the composition of the jury was of precisely the same practical importance to the petitioner as if its case had been tried separately.

The defendant in one of the separate cases *had no common* interest with the defendant in the other such as corresponds to the single interest of several defendants in one cause, or that of the *single plaintiff* in all the causes. The two defendants here were entitled to an *aggregate* of six challenges. But if, as occurred in this case, one defendant omitted to use one of its challenges, the other could not take it up and use it. Each defendant did use but two, but if the Mutual Life had omitted to use any of its three, the Connecticut Mutual could not have used six. Its *right* was limited to three. On the other hand, the plaintiff was given six to the one jury, irrespective of the number used by either defendant. Under the decision of this court no party can be given more than the three statutory challenges to the one jury by which its cause is tried; nor does the statute give a plaintiff *more* challenges to the jury by which any defendant is to be tried than are given to that defendant. The court had no power, therefore, to alter the conditions as to any defendant affecting *the composition of the jury.* If it could not in this particular give each defendant a trial under the same conditions in that respect as if the cases were separately tried, the only alternative was to sever the causes and allow separate trials. It matters little in effect whether the composition of the jury is affected prejudicially to the defendant by abridging the defendant's challenges or by according a disproportionate number to the plaintiff. A situation, *never improbable,* may easily present itself to the imagination of the court. In a forum charged with an atmosphere of social or political prejudice, where a panel is

to be filled by talesmen taken from bystanders, every additional peremptory challenge makes arbitrarily a vacancy which may be filled, in spite of the defendant, by a juror inspired by such prejudice. The right of every and of each defendant that its adversary shall *not* have *against it* a disproportionate number of peremptory challenges is as absolute and as important as its right to its own full number; and one is correlative to the other. Always it has been held that the right of peremptory challenge on the part of defendants could not be abridged by uniting cases for trial (*U. S.* v. *Marchant,* 12 Wheat., 480), and equally the conclusion has been repudiated that the peremptory challenges of the state or of a plaintiff could be multiplied by the same process. The whole body of authority and of adjudication known to us is in denial of such conclusion, except *possibly* one case based on the language of a statutory provision.

Thompson in his work on Trials says in Sec. 45:

> "Although the defendants so jointly indicted may severally be permitted the statutory number of challenges, *this does not increase the number allowed to the state* beyond the number allowed to it in the case of a single defendant."

Proffatt in his work on Jury Trials says in Sec. 164:

> *"No matter how many are tried on the same indictment the prosecuting officer is only entitled to his challenges for one and cannot claim them for all."*

In *Savage and James* v. *The State,* 18 Fla., 909, the court said:

> "The ninth, seventeenth and eighteenth errors assigned are that the court allowed the state attorney more than five peremptory challenges.
>
> Four persons called as jurors were challenged peremptorily by the state after it had so challenged five, and the challenges were allowed by the court. The

statute allows challenges as follows: 'In capital cases the prisoner shall have twenty peremptory challenges and the state five.'

Where two are jointly indicted and tried for a capital offense each prisoner is allowed twenty peremptory challenges, but the law does not allow more than five to the state as to both. *To allow the state to challenge five for each would in effect give the state ten for each prisoner, because each challenge affects each prisoner alike.* Counsel for the plaintiffs in error cite several authorities to sustain this position.

We have found no other cases directly in point. It is clear that the court erred in allowing more than five peremptory challenges to the state, and an exception having been taken to the action of the court there was *material error affecting the rights of the defendants."*

In *Wiggins* v. *The State*, 1 Lea (Tenn.), 738, the court said:

"In making up the jury for the trial of the defendants (in court below) after the state, through the attorney general, had challenged four jurors, another juror being presented was challenged by the state and accepted by the accused; but the court being of opinion that when two defendants were on trial under a joint indictment the state was entitled to double challenges, overruled the motion of the defendants that the juror should take his seat for the trial of the cause, and afterwards, the defendants having exhausted their challenges, the jury were elected.

By the act of 1875, ch. 75, 'in the trial of criminal prosecutions' of this character the state is entitled to four peremptory challenges. Under the act of 1829, ch. 55, which provided that 'in the trial of all indictments,' etc., 'the state and the defendant shall each be entitled to challenge peremptorily five jurors,' it was held that where two defendants were arraigned each had the right to the full number of challenges. (*Hill* v. *State*, 2 Yer., 246.) The rule thus established has been followed ever since. But the court refused to extend the rule to civil cases. (*Blackburn* v. *Hays*, 4 Col., 227.) It is argued that the state should have the

benefit of the construction. But the reason of the rule is, that the right is given to the defendants, and where there are several defendants, although they may be tried together, *yet the judgments may be different. Each defendant is on trial, and must stand or fall, ordinarily, as if tried alone.* It is only a natural and reasonable construction of the statute to hold that every defendant should have the benefit of its provisions. The state, however, *is not multiplied with the defendants,* and, having elected to indict and try the parties together, cannot claim beyond the fair meaning of the language used. Nor has the construction contended for ever prevailed in practice. The court erred, therefore, in its ruling."

In *Mahan* v. *The State,* 10 Ohio, 234, the court said:

"It is provided by the fifteenth section of the act, entitled, 'An Act relating to juries,' 29 Ohio Laws, 98, that every prosecuting attorney, and every defendant on the trial of an indictment, may challenge, peremptorily, two of the panel; and if any person, prosecuting in behalf of the state, shall challenge any petit juror, except as aforesaid, he shall immediately assign the cause of such challenge. It would seem to us this language can hardly admit of construction. The words themselves express the legislative intention as clearly as it could be well conveyed.

There was but *one* indictment, and, on the part of the state, *the right of peremptory challenge should have been confined to two,* while each of the defendants could, in like manner, legally object to the same number. Had the defendants been separately tried, the indictment would have been separate as to each; *Bixbe* v. *The State of Ohio,* 6 Ohio Rep., 86; and on every trial, the state's right to such challenge of two of the jurors would have been legal; but upon a joint trial it is otherwise.

In extending this right of peremptory challenge to *six,* as claimed by the state, it is our opinion, *the privileges which the law throws around the accused, to a certain extent, as a shield for his protection, in the selection of his triers, was clearly invaded,* and that the Court of Common Pleas, therefore, erred."

In *State* v. *Earle*, 24 La. Ann., 38, the court said:

"It appears from an inspection of the first bill of exceptions taken during the trial, that the state was allowed to challenge peremptorily *more than six jurors*, the court below deciding that each prisoner was entitled to twelve peremptory challenges and *'the state to six for each accused.'*

It is true that each defendant was entitled to twelve peremptory challenges, but it *by no means follows that the state is entitled to six for each defendant.* The state has no rights in the matter beyond those conferred by the statute, and the statute declares that 'in all criminal prosecutions wherein the defendant is allowed peremptory challenges, the state shall also be allowed to challenge without cause any number not exceeding six.' R. S., 1870, Sec. 998. This means, clearly, six in a single prosecution in the trial of a single indictment—without any reference to the number of defendants included in the prosecution or mentioned in the indictment. The language is plain, the case at bar is within its provisions, and we are, therefore, constrained to think the court erred in allowing the number of peremptory challenges by the state to exceed six."

In *Schoeffler* v. *The State*, 3 Wis., 823, the court said:

"Upon the trial of indictments for a capital offense, when there are more than one defendant, each defendant is entitled to challenge twenty-four jurors peremptorily. One or all may be found guilty, and *each one must be regarded as defending for himself.* Not so in regard to the prosecution. The state is prosecuting for one crime, and though several may be guilty of it, all may be included in the same indictment, and thus make one prosecution, or each may be indicted separately. *If, therefore, the prosecuting officer desires to secure to himself six peremptory challenges for each defendant, he should prosecute each separately.* But, while he cannot curtail the right of any defendant whom he may choose to join in the indictment, by adopting a joint prosecution against several, he thereby makes the *state a party, one and indivisible, upon the one hand, and each of the defendants a party on the other.* The right

to peremptory challenges is purely a creature of the statute, and it cannot be extended beyond its obvious purview. We are therefore of the opinion that the court below erred in allowing the prosecuting officer to challenge peremptorily the juror Fairfield, he having already been allowed six such challenges. If the statute should be so construed as to allow the prosecuting officer six challenges for each defendant, *he could multiply such challenges indefinitely by simply increasing the number of defendants.* Such a construction ought not to be allowed, *as it might defeat the very object and intent of the statute.* We do not know, of course, why the prosecution challenged the juror. It is sufficient to know that he was to all appearance competent; that he was acceptable to the defendants, and that the challenge of the prosecuting officer was unauthorized by law."

The possible exception above referred to is the case of *Spies et al.* v. *The People,* 122 Ill., 1, in which eight persons were jointly indicted and tried. In the opinion (*pp.* 264-5) occurs the following:

"The defendants claim that, although they were entitled to one hundred and sixty peremptory challenges yet the state was entitled to only twenty, and they charge it as error that the state was allowed to peremptorily challenge more than twenty talesmen. The statute says: 'The attorney prosecuting on behalf of the People shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to.' (Rev. Stat., Chap. 38, Sec. 432.) We cannot conceive how language can be plainer than that here used. It explains itself and requires no further remark."

The foregoing case is shown for entire frankness, but it appears to stand absolutely alone in its view of the point thus briefly decided; and it has manifestly no general authority.

The plain result is that the number of challenges to the same jury cannot be changed as to any party by joining

the cases under the statute for convenience or economy of trial.

By the error committed in granting the plaintiff below too many challenges it is to be presumed, in the absence of proof to the contrary, that petitioner was injured. An error will not be regarded as harmless unless it affirmatively appears so clear as to be beyond doubt that it did not and could not have been prejudicial.

Deery v. *Cray*, 5 Wallace, 795, 807.
Gilmer v. *Higley*, 110 U. S., 47, 50.

THIRD SPECIFICATION.—RELATING TO THE EXCLUSION OF CERTAIN CONSPIRACY EVIDENCE.

FOURTH SPECIFICATION.—RELATING TO AN INSTRUCTION REFUSED, AND TO A PORTION OF THE CHARGE, AS TO THE PLAINTIFF'S RELATION TO THE DEFENSE OF CONSPIRACY AND FRAUD.

FIFTH SPECIFICATION.—RELATING TO AN INSTRUCTION REFUSED, AND TO A PORTION OF THE CHARGE, AS TO THE BEARING OF THE DEFENSE OF CONSPIRACY AND FRAUD IF THE DEAD BODY SHOULD BE FOUND TO BE THE BODY OF HILLMON.

SIXTH SPECIFICATION.—RELATING TO CERTAIN INSTRUCTIONS REFUSED, TO THE EFFECT THAT A FRAUDULENT CONSPIRACY IN THE PROCUREMENT OF THE POLICY WOULD RENDER THE POLICY VOID.

The errors presented by the above four specifications all have their genesis in the conspiracy and fraud alleged against Hillmon and his associates by petitioner's answer, set forth at the beginning of this brief. The subject can best be considered under a single heading.

The policy of insurance took effect immediately upon its issuance at Hartford, Connecticut, for payment of the first premium was made in advance. It was therefore a Connecticut contract, not under seal, and liable to be defeated in an action of law for fraud in its procurement, precisely as a policy was defeated in *New York Life Insurance Company* v. *Fletcher*, 117 U. S., 519, referred to *infra*.

The majority opinion in the Circuit Court of Appeals (*Rec.*, 2019), contains the following (the italics being ours):

> "During the progress of the trial and in its final charge to the jury, the lower court ruled, in substance, that the defendant company had not averred in its answer that Sallie E. Hillmon, the sole beneficiary in the policy, was a party to the alleged conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin to defraud it and other life insurance companies; that as her connection with the conspiracy had not been averred it could not be claimed that she was a party thereto; that the substantive defense which was pleaded in the answer was that Hillmon was not dead, for which reason no liability had accrued on the policy when the suit was filed; that the principal question in the case was whether John W. Hillmon died, as claimed by the plaintiff, in consequence of a gunshot wound inflicted on March 17, 1879, and that the existence of the alleged conspiracy between Hillmon, Brown and Baldwin was only relevant to strengthen the probability that Hillmon was still living. In various ways *exceptions were reserved to these rulings*, which will collectively form the first subject for consideration.
>
> "It is manifest, we think, from an inspection of the answer, that the trial court was right in holding that the defendant had not pleaded that Mrs. Hillmon was a party to the alleged conspiracy between the three persons last above named. . . .
>
> "It is further manifest that the trial court was right in holding that the fact that John W. Hillmon was not dead when the action was brought, but was concealing

himself somewhere, constituted the substantial defense pleaded in that part of the answer which is quoted above; that the issue tendered by the plea was whether he was dead or alive, and that such issue presented the principal question of fact for the consideration of the jury. It will not be presumed that the second plea contained in the answer *was intended to state more than one defense*, for which reason the first paragraph thereof, which alleges in effect that Hillmon, Brown and Baldwin had entered into a conspiracy to defraud certain insurance companies, among others the defendant, cannot be regarded as stating a substantive defense to the plaintiff's cause of action, but that averment must be treated as being merely introductory to the fact afterwards alleged that Hillmon was not dead. As we construe the plea, this latter allegation constitutes the defense on which the pleader intended to rely. We do not perceive, therefore, that the lower court committed any error in the several rulings last aforesaid, or in making the statement that the existence of the conspiracy between the parties named in the plea was not a controlling issue, but at most was only relevant in so far as its existence, if shown, might tend to strengthen the probability that Hillmon was still living. . . .

"We very much doubt, although it is unnecessary to express a definite opinion on the point, whether the fact that the policy was solicited in pursuance of the alleged conspiracy and with intent at some time in the future to make a fraudulent claim thereunder, would constitute a defense to the action brought by Mrs. Hillmon, who was not alleged to have been a party to the conspiracy when the policy was solicited or to have been in anywise concerned therein. The contract of insurance was founded upon a valuable consideration. It was not an unlawful contract. Mrs. Hillmon had a well recognized insurable interest in the insured life, and it is not claimed that the policy was issued in consequence of any false or fraudulent representations. Under these circumstances it is not apparent that a mere intention on the part of John W. Hillmon to make a fraudulent claim thereunder, which was never in fact made, could impair the beneficiary's right of recovery."

The answer of the defendant was *designed* to present several defenses, with two of which we are now specially engaged: *one* a general traverse, which included a denial that Hillmon *was dead,* and a denial that the corpse presented was his; the *other* a charge of conspiracy to defraud the defendant by the procurement of the insurance upon Hillmon for the benefit of his wife, with the *undisclosed purpose* of collecting the insurance by a false pretense of the death of Hillmon and the presentation of a fictitious body as his.

(1) The first defense involved the identity of the body presented as Hillmon's; and the *fact of a conspiracy would have bearing as evidence on that,* for if the identity were otherwise uncertain, the existence of such conspiracy and purpose would increase the probability that the corpse was fictitious.

(2) The subject-matter of the second defense, namely, the charge of conspiracy to defraud the defendant, and the various proceedings in execution of that fraudulent purpose and conspiracy, were associated with a specific provision of the contract of insurance which is given below.* The assignments of error accordingly presented the subject-matter of this defense in their assertion of its legal effect in at least three aspects, differing from each other merely in their scope and in modifications of outline. They insist:

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* "1st. That the contract between this company and the insured is wholly expressed and contained in this policy, and the application therefore, which is a part of said contract, and a copy whereof is hereto annexed, and that the several answers contained in or endorsed upon the said application, are warranted by the insured and assured to be true in all respects, and *that if this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void.*" (*Rec.,* 6.)

(*a*) That the existence of the fraudulent purpose and conspiracy, and the procurement, receipt and acceptance of the contract as steps in execution of that purpose, in legal effect made the contract void *ab initio,* so that no recovery could be had thereon by any one claiming thereunder. (Assignment 89; *Rec.,* 1998.)

(*b*) That if, after the procurement of the contract of insurance under the conditions and with the purpose aforesaid, the parties *entered upon the further execution* of the fraudulent scheme, the contract was void for the fraud, and no right of action could be based nor any recovery had thereon, even *if* it should be true that while actually engaged in the prosecution of the fraudulent and unlawful purpose, or in preparation therefor, the insured did in fact come to his death. (Assignments 88, 92; *Rec.,* 1997, 1999.)

(*c*) That if before the institution of this suit the plaintiff below came to know that the policy of insurance had been so fraudulently procured and with such intent and purpose, and that it had been received and accepted in execution to that extent of such fraudulent design, and that the persons so conspiring together proceeded further in execution of said design, and that the corpse presented was falsely represented to be the body of Hillmon, then by the institution of this suit she thereby adopted, and made in legal effect her own, all the acts performed by the conspirators in furtherance of the unlawful conspiracy with like legal effect as to her as if she had been one of the parties originally conspiring. (Assignments 87, 91; *Rec.,* 1997, 1999.)

It is obvious, therefore, that in legitimate support of these defenses it was important to the defendant to establish the unlawful and fraudulent purpose and the conspiracy therefor averred in its answer.

That a *prima facie* case of fraud and conspiracy was established by the evidence offered was recognized by the Circuit Court in its charge to the jury. It submitted that evidence to the jury. It instructed them that they might consider the evidence bearing upon the fact of such conspiracy; but it limited the application by the jury of the *fact* of such a conspiracy, if it should find one from the evidence, to its bearing upon the identity of the corpse presented, as tending to increase the probability that the corpse so presented was fictitious. The charge to the jury contained the following:

> "If you believe from the evidence that John W. Hillmon, Brown and Baldwin did conspire as charged by the defendants and, pursuant to such combination, the policies of insurance were obtained, and that Hillmon did not die in March, 1879; that is to say, that it was not the body of Hillmon that was brought to Lawrence in the early days of April, 1879, then your verdicts should be for the defendants. Even if you should find that there was no lawful conspiracy or fraud or fraudulent intent as charged by the defendants, but should further find that the body brought to Lawrence as aforesaid was not the body of Hillmon, your verdicts in such event should be for the defendants. In other words, it is not necessary for defendants to prove a conspiracy or fraud or fraudulent intent in order to defeat a recovery. On the other hand, even if you should find that there was a conspiracy between the three men, as charged by the defendants, but should also find that Hillmon died in March, 1879, and that it was his body that was brought to Lawrence as I have stated, your verdicts in such event should be for the plaintiff and against the defendants. In other words, the existence or non-existence of the conspiracy is not the controlling question in the case. The existence of the conspiracy, if you should find one to have existed, may be given such weight as you deem proper in considering the identity of the corpse brought to Lawrence. If you believe from the evidence that the corpse

brought to Lawrence was that of John W. Hillmon, then it is unnecessary for you to find whether there was or was not a conspiracy. The essential point in these cases is the identity of the corpse." (*Rec.*, 1921.)

By effect of this language in its charge, and its refusal to give the instructions upon this subject specifically asked by the defendant, the Circuit Court denied and excluded from the case the second defense presented by the answer of the defendant. The fact of fraudulent purpose and conspiracy as a substantive defense to the contract of insurance, making it void, was thus excluded by the Circuit Court and by the Circuit Court of Appeals, and apparently upon these two grounds; *first*, that plaintiff, the beneficiary under the policy, was not affirmatively charged in pleading as one of the co-conspirators, and *second*, because the plea inadequately presented as a defense the combination to procure the policy for the undisclosed purpose of fraud, and was insufficient to advise the plaintiff that she would meet defense of that character.

The contention of the defendant, the petitioner, is that for the purpose of interposing that defense against the plaintiff it was not necessary to charge her with participation in the fraud or conspiracy at all; that as the beneficiary in the policy the contract was subject to that defense as against her in any event, and that it was clearly so in the present case for two special reasons, first, that the contract contained in terms this express provision, to-wit: "*If this policy has been obtained by or through any fraud, misrepresentation, evasion or concealment, then the same shall be absolutely null and void*" (*Rec.*, 6); and further, that the contract itself was in actual effect not one with the plaintiff but a contract made with Hillmon for her benefit. (*Aetna Life Ins. Co.* v. *France*, 94 U. S., 561, 564.) She derived her only claim through him as a voluntary beneficiary, no consideration

whatever emanating from her. The application was made and signed by Hillmon, and also in conformity to provisions on the face of the policy it was signed with the name of the assured, Sallie E. Hillmon, by Hillmon himself (*Rec.*, 153-4). The contract of the insurance company in this case was, therefore, with Hillmon distinctly, and not with the plaintiff. To the extent to which there may be claimed to be any contract between the insurance company and the gratuitous beneficiary, the plaintiff, it rests upon an assumed agency of Hillmon for her, which she must and does affirm in making any claim under the policy. In any event, therefore, the result is the same; as a contract with her she is bound by its express stipulations; as a contract with Hillmon, the insured, any interest she may have under it must be subject to any fraud that would affect the contract as against Hillmon, and in claiming under such policy she adopts such fraud and makes it her own. Under these circumstances the rule of law establishes that the contract in this case is one directly between the insurance company and Hillmon, and the voluntary beneficiary can claim under it only subject to any defense of fraud that would affect the insured himself. Thus, in *1 Biddle on Insurance*, Sec. 449, it is said:

> "The fraud of the insured would obviously affect a third party who was a payee under the policy."

In *Veazie* v. *Williams*, 8 How., 134, the purchaser of property at an auction sale filed a bill to set the sale aside on the ground that he had been induced to pay an exorbitant price by the fraudulent acts of the auctioneer, in which the defendants, the former owners, were charged to have participated. The answer of the defendants denied that they *or their agent* had participated in the fraud, and the evidence failed to show that *they* had, themselves, in fact done so.

In that connection the court on page 153 said:

> "Though no evidence is seen of fraud practiced by the respondents in person, nor by their express directions, yet a fraud was evidently perpetrated by the auctioneer, as agent for the respondents, or by him in connection with Stephen H. Williams, and the respondents have taken and still retain the benefit of it. This conclusion is indisputable, whatever obscurity or concealment may have been flung over the case by the auctioneer."

After stating that the owners were not liable for the fraud on the ground that they had personally participated in it, the court on page 157 said:

> "But they are held liable on a ground beyond and apart from all this, and as well settled in England as here, that if a principal ratify a sale by his agent, and take the benefit of it, and it afterwards turn out that fraud or mistake existed in the sale, the latter may be annulled, and the parties placed in *statu quo;* or they may, where the case and the wrong are divisible, be at times relieved to the extent of the injury.
>
> . . . . . .
>
> But the test here is, was the purchaser deceived, and has the vendor adopted the sale, made by deception, and received the benefits of it? For, if so, he takes the sale with all its burdens. *Wilson* v. *Fuller,* 3 Adolph. & Ell., N. S. 68.
>
> The sale, thus made here, was adopted and carried into effect by the respondents; and hence, on account of the fraud involved in it, they should either restore the consideration, and take back the mills, or indemnify the purchaser to the extent of his suffering."

In *New York Life Ins. Co.* v. *Fletcher,* 117 U. S., 519, an action brought by an executor of the insured to recover upon a policy was defended by the company upon the ground that false statements had been made in the application. It appeared that the insured, in answer to

questions propounded by agents of the company, had truthfully stated his condition, but that the agents had written false answers in the application without the knowledge of the insured.

Mr. Justice FIELD, in delivering the opinion of the court, said:

> "There is another view of this case equally fatal to a recovery. Assuming that the answers of the assured were falsified, as alleged, the fact would be at once disclosed by the copy of the application annexed to the policy, to which his attention was called. He would have discovered by inspection that a fraud had been perpetrated, not only upon himself but upon the company, and it would have been his duty to make the fact known to the company. *He would not hold the policy without approving the action of the agents, and thus becoming a participant in the fraud committed.* The retention of the policy was an approval of the application and of its statements. The consequences of that approval can not after his death be avoided.
>
> The court charged the jury that if the assured had discovered the fraud before the policy was delivered and the first premium paid it would have been his duty to decline to go any further with the transaction; but if he did not discover the fraud until after such delivery and payment he was not called upon to take any steps for the cancellation of the contract. In other words, *the jury were told that the assured might take to himself the benefit of the fraud, without responsibility for it, if he did not discover it until after it was consummated—a doctrine without authority and wholly indefensible. No one can claim the benefit of an executory contract fraudulently obtained, after the discovery of the fraud, without approving and sanctioning it.*"

In *Aetna Life Insurance Co.* v. *Davey*, 122 U. S., 739, the defense of fraudulent mis-statements in the application, set up by the defendant company in an action by the wife upon a policy of insurance in which she was named as

beneficiary, was entertained without question, although the wife was not charged nor shown to have been a party to the fraudulent mis-statements.

To the same effect are:

Maier v. *Fidelity Mutual Life Ins. Co.*, 78 Fed., 566; 24 C. C. A., 239 (6th Cir.).

Hubbard v. *Mutual Reserve Fund Life Ass'n*, 100 Fed., 719; 40 C. C. A., 605 (1st Cir.).

The principles thus established by express decision of this court and by the Circuit Courts of Appeal for the first and sixth circuits are the same that are recognized and illustrated by the following judgments of other tribunals:

In *Continental Insurance Co.* v. *Insurance Co. of State of Pennsylvania*, 51 Fed., 884; 2 C. C. A., 535 (2nd Cir.), the common agent of four marine insurance companies by fraudulent shifting of risks and effecting re-insurance, caused one company to bear an unfair proportion of losses, resulting in a corresponding gain to another. After discovering the fraud, the company defrauded sued the company for whose benefit the frauds had been committed, and a recovery was allowed, although the latter was in no way responsible for nor aware of the agent's frauds.

The Circuit Court of Appeals in affirming the judgment said:

> "The case is one for the application of the rule that *he who seeks to avail himself of the advantages of the act of another, after knowledge of its fraudulent character, must be held to adopt the fraud, although at the time of the act he was ignorant of it.* The doctrine is elementary, and prevails at law as well as in equity, that a person, though innocent himself, cannot retain an advantage obtained by the fraud of another, in the absence of some consideration moving from himself."

In *Carpenter* v. *American Ins. Co.*, 1 Story, 57; 5 Fed. Cases, 105, a policy was procured from the defendant by the owners of the insured property for the benefit, however, of their mortgagee. They subsequently sold the property and assigned the policy to the plaintiff. In a suit by the plaintiff it was urged that misrepresentations made by the original owners in order to obtain the policy could not be set up in a suit in which the mortgagee was the true beneficiary and innocent of the misrepresentations. The court, by Mr. Justice STORY, said:

> "It is suggested that the misrepresentation was in fact unintentional and without any fraudulent design, and that Epenetus Reed (the mortgagee), for whose benefit the insurance was made, was entirely ignorant of the misrepresentation; and that, under such circumstances, his rights under the policy ought not to be prejudiced thereby. But this suggestion cannot avail for the plaintiff or for Reed. *The misrepresentation made by an agent in procuring a policy, is equally fatal, whether made with the knowledge or consent of the principal, or not.* The ground in each case is the same. The underwriters are deceived. They execute the policy upon the faith of statements, material to the risk, which turn out to be untrue. The mistake is, therefore, fatal to the policy, as it goes to the very essence of the contract."

In *Burruss* v. *National Life Association*, 96 Va., 543; 32 S. E., 49, 50, a policy was taken out by a debtor for the benefit of his creditor. The insured made false representations unknown to the beneficiary. In a suit by the beneficiary upon the policy it was contended that the fraud of the insured could not affect the innocent beneficiary's rights. The court, by HARRISON, J., said:

> "It would hardly be contended that if the insured had taken out this policy for his own benefit his estate could recover it, in the face of the gross fraud shown to have been perpetrated by him in procuring it. There is noth-

ing in the circumstances of the case to place the beneficiary in any better position than the insured would have occupied had the policy been for his benefit. Where insurance is effected upon the life of a third person for the benefit of a creditor, and misrepresentations of materal matters inducing the contract are made by the party whose life is insured, it will vitiate the policy, although the beneficiary was ignorant of such false representations."

In *Baker* v. *Life Insurance Co.*, 43 N. Y., 283, 286 insurance was effected by a husband for the benefit of his wife, and failure to pay upon maturity any premium notes was to forfeit the policy by its terms. Without the knowledge of the beneficiary the husband failed in the payment of such a note, and in a suit upon the policy after his death recovery was denied. The court said:

"The insurance was effected by the husband for the benefit of his wife and as a provision for her in case of his death. *He was the party contracting with the defendants,* and the consideration for the agreement to insure proceeded from him, not from the wife."

Further, on page 287:

"In this case the husband agreed for the insurance and caused his wife to be named as the beneficiary in the policy. It was nevertheless *a contract with the husband*, and the terms and *conditions to which he assented* attached to and qualified the policy and determined the liability of the insurers."

And further, on pages 288-9:

"The case will not be changed, if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendants. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and, claiming the benefit of his acts, and of the policy procured by his agency, she necessarily ratifies and affirms the contract as it was made, with all its terms

and conditions. (*Elwell* v. *Chamberlain*, 31 N. Y., 611; *Bennett* v. *Judson*, 21 *id.*, 238.)"

In *Maynard* v. *Rhode*, 1 Car. & Payne, 360, the judgment of the court is correctly stated in the syllabus, as follows:

> "Where an insurance is effected on the life of a third person by a creditor, and misrepresentations are made by the party whose life is insured, of the state of his health, this will vitiate the policy, though the creditor for whose benefit the policy was effected was ignorant of the representations being false, and though the party did not die of the disease he was then afflicted with."

To the same effect are:

I Biddle on Insurance, Secs. 418-9.

Phillips on Insurance, Sec. 543.

I May on Insurance, Sec. 122.

Bliss on Insurance, Sec. 316.

Joyce on Insurance, Vol. 1, Sec. 646; Vol. 2, Sec. 2652.

Bennett v. *Judson*, 21 N. Y., 238.

Warner v. *Warner*, 46 N. Y., 228.

Smith v. *National Benefit Society*, 123 N. Y., 85.

Estes v. *Life Insurance Co.*, 13 Sup. Ct. Rep., N. Y., 349.

Draper v. *Fire Insurance Co.*, 2 Allen 569.

Forbes v. *Life Insurance Co.*, 151 Ind., 89; 51 N. E., 84.

Atlas Tack Co. v. *Exchange Bank*, 111 Ga., 703; 36 S. E., 939, 942.

The judgment in this case, affirmed by the Circuit Court of Appeals, that the defense of fraud and conspiracy alleged

in the pleading cannot be interposed against the plaintiff in the case unless she is affirmatively charged as a co-conspirator and a participant in the fraud, is, therefore, directly in conflict with rules of law established by this court, and by Circuit Courts of Appeal for other circuits, and which equally prevail in every forum. If the principles and rules announced by this court are supreme and are to prevail, the Circuit Court was wrong when it excluded that subject-matter of defense, and when it confined the application of the fact of fraud and conspiracy to its weight as evidence on the identify of the corpse brought from Medicine Lodge to Lawrence, and when it said to the jury:

> "If you believe from the evidence that the corpse brought to Lawrence was that of John W. Hillmon, *then it is unnecessary for you to find whether there was or was not a conspiracy.* The essential point in these cases is the identity of the corpse." (Rec., 1921.)

If the rulings of this court had been allowed to prevail, and in accordance therewith the fraud and conspiracy charged by the defendant had been held admissible as a defense against the plaintiff, then quite apart from the question of identity of the corpse brought to Lawrence it would have been necessary for the jury "*to find whether there was or was not a conspiracy.*" There would have remained a deeper and more important question than that of the identity of that corpse, namely, the question of the fraud that might make the contract void *ab initio* against the plaintiff, even *if* the body were that of Hillmon. It was insisted in the Circuit Court as well as in the Circuit Court of Appeals—and one hardly knows where to begin the argument of a proposition seemingly so self-evident as this—that if the contract of insurance was procured from the insurance company not in good faith but by conspiracy and collusion for the covert and undis-

closed purpose of defrauding the company by the process alleged, and the insured lost his life in the actual effort, with his confederates, to carry out and accomplish the fraud, *no representative of his* could turn about and support an action for indemnity upon that contract. Upon this point we may venture to supply an illustration. Suppose under the circumstances alleged Hillmon and Brown had been at night robbing a graveyard to procure a body to be substituted for, and presented to the insurance company as, that of the insured, and that while engaged in this exploit Hillmon had been shot and killed by the watchman or guard of the cemetery, could it possibly be imagined that the insurance company had ever in legal effect *contracted to pay* under such conditions, or that Hillmon ever *understood* that it had done so? If not, then even if the body produced was that of Hillmon it *was "necessary"* for the jury to find whether there was a conspiracy for the fraud or not; and the statement to the jury was not correct that if the body was Hillmon's they should find for the plaintiff whether there was such a conspiracy or not. So broad a proposition as that of the court,—that if the jury found a contract of insurance expressed in the policy and that the insured was dead, they need look no further; that no fraud or deceit, illegality or crime in inducing the contract, or in the issuance of it, or in the conduct of the parties insured or interested under it, could possibly make the contract void or bar their rights to enforce it,—finds no support in any principle ever yet announced by this court. It is astonishing that it should have received even the suggestion of countenance from the Circuit Court of Appeals. (*Rec.*, 2022.) The fraud was partially consummated, and a wrong and an injury were actually inflicted upon the insurance company, when the conspirators obtained the policy, which manifestly never would have been issued had

the fraudulent purpose to substitute a fictitious body been known by the insurance company.

In *Smith* v. *National Benefit Society*, 123 N. Y., 85, in an action upon a policy the defense was that the insured *in pursuance of a scheme to defraud* the defendant and other insurance companies, procured a large amount of insurance upon his life and then committed suicide. It was held that the contract of insurance was procured, and that the death of the insured occurred, in the execution of a scheme of deliberate fraud upon the insurance companies. The scheme was "to secure a large insurance upon his life appropriate to the payment of his *creditors* and the comfort and support of his *relatives*," and to reach the result by suicide. The scheme was carried out and the insured *died in the act of executing the original fraudulent purpose*. It was held that the contract was void for the fraud, although the plaintiff was a creditor and payee of the policy, and that the suicide was itself an act of fraud upon the defendant; judgment was rendered for the defendant and this judgment was affirmed in the Court of Appeals. In that case also the court had before it a contract of insurance; the insured was dead and there was no dispute as to his identity; but that court did not instruct the jury that it need inquire no further and that fraud upon the insurance company was an immaterial issue.

In *Patterson* v. *Nat'l Premium Mut. Life Ins. Co.*, 100 Wis., 118; 75 N. W., 980, a suit was instituted by the children of the insured upon a policy issued by the defendant upon the life of their father, made payable to his estate and by him assigned to them. One of the defenses interposed was that the insured had "*fraudulently procured the issuance of the policy with intent to commit suicide as a part of a scheme to defraud the defendant out of the sum of $3,000 for the benefit of his children*," and that in furtherance of the

scheme he had committed suicide. *The beneficiaries were not charged as a party to this fraud.* In passing upon this element of the case, the court said:

> "But it is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide, and defrauding the company for the benefit of his children. Doubtless this would be a good defense, if shown, unless it be cut off by the 'incontestable clause.' It should be a defense not based on the suicide alone, but on the whole fraud, of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury."

In *Parker* v. *Des Moines Life Ass'n*, 108 Ia., 117; 78 N. W., 826, an action was instituted by a wife upon a policy of insurance issued by the defendant upon the life of her husband, in which she was named as beneficiary. The sixth defense interposed by the defendant was that the insured had "*applied for and procured the policy in suit with the fraudulent intent to commit suicide.*" Upon this branch of the case the court said:

> "6. The sixth division of the answer set up fraud on the part of Parker in procuring the policy. It was alleged that he secured the same with the intent at the time to commit suicide. It needs no argument to show that *a secret intent of this kind would amount to a fraud;* and, as fraud vitiates all contracts, this defense, if established, *would defeat a recovery* on the policy. Being void in its inception, no rights would accrue under the contract to *any person. Patterson* v. *Insurance Co., supra.*"

We refer also to the following additional cases in the same connection:

Insurance Co. v. *Armstrong,* 117 U. S., 591.

Ritter v. *Insurance Co.*, 169 U. S., 139.
Church v. *Proctor*, 66 Fed., 240, 244-5; 30 C. C. A., 446.
Kingsbury v. *Fleming*, 66 N. C., 524.
Cowen v. *Milbourn*, L. R., 2 Exch., 230.

Nor does it seem possible that the plaintiff should not have been adequately advised by the plea of defendant that she was likely to be met by the contention that there could be no recovery upon this contract of insurance because of the fraud and conspiracy with which it was associated. She brought suit upon a contract of insurance made with Hillmon for her benefit, which expressly provided that if the policy had been obtained by or through any fraud, misrepresentation, evasion or concealment, then it should be absolutely null and void, and she was met by an answer which, among other things, charged that Hillmon, together with Brown and Levi Baldwin, and others unknown, *"procured"* the insurance, *"fraudulently conspiring to defraud the defendant."* The answer also averred "that thereafter in pursuance of the said conspiracy they falsely and fraudulently pretended that Hillmon was dead, and that a certain dead body which they had procured, and had, was the body of the said Hillmon. . . ." With such specific language in the answer it seems impossible to imagine that the plaintiff was not forewarned and advised that the defendant would prove, in support of its answer, the facts thus charged, and previously brought fully to her attention in the "Brown Affidavit," to-wit: the fraudulent scheme and purpose for which the insurance was procured; the unlawful combination and conspiracy of Hillmon and his associates to procure it for that fraudulent purpose; and that in pursuance of that conspiracy and purpose they procured the policies, and then

proceeded to carry the fraudulent purpose into effect by seeking for a body to be presented as that of Hillmon, the insured. Evidence was adduced by the defendant which the charge of the court itself shows to have been sufficient to establish *prima facie* these facts of fraudulent purpose and conspiracy. Of the subject of all this evidence she was adequately forewarned, so that no element of surprise to that point is conceivable, and these are the very facts and this the very evidence upon which the instruction (*Rec.*, 1911-12) was called for by the defendant and refused by the court. The defendant insisted that these facts being proven, there could be no recovery on the contract even if the answer charged also that, in the course of the consummation of the same scheme of fraud, there were additional facts which from the verdict in the case are to be considered as not proven. The failure (if there was one) to establish those additional facts can hardly be such a surprise to the plaintiff as to entitle her to the protection of the court against so much as was proved, and to a judgment upon the contract in the face of the abundantly established fraud and criminal conspiracy with which it was tainted.

In the quotation heretofore made from the majority opinion in the Circuit Court of Appeals, it is said that "it will not be presumed that the second plea contained in the answer *was intended to state more than one defense, for which reason* the first paragraph thereof . . . must be treated as introductory to the fact afterwards alleged that Hillmon was not dead."

The second plea, by which we understand is meant the "2nd" subdivision of the answer (set out in full at the beginning of this brief), contains three paragraphs, and if as a premise, it cannot be presumed that more than

one defense is stated therein, "for which reason" the first paragraph must be considered as introductory to the second, then these two must for the same reason be considered as merely introductory to the wholly independent and disconnected fact alleged by the third paragraph, namely, that the policy was void for non-payment of premiums. The fallacy of this line of reasoning is thus readily apparent. The third paragraph sustains no logical sequence whatever to the other two, so that it clearly appears that the above premise is unsound and that the "second plea" does contain at least two distinct defenses. The reason thus assigned in the opinion for treating the first paragraph of the second plea as "merely introductory" to the second paragraph having entirely fallen, the result falls with it. The second paragraph may be properly regarded either as setting up a separate and distinct defense from the first paragraph, or as specifying facts to explain the general allegation of the first paragraph. Its implications are as much a part of it as its expressions. (*U. S.* v. *Babbit*, 1 Black, 55, 61.)

If it was the right of the defendant to establish in legitimate support of its defenses the unlawful purpose and conspiracy against the plaintiff *at all*, which cannot be doubtful, and is for one purpose conceded, it was then its right in doing so to proceed under all the rules of evidence applicable to the introduction of proof upon that subject. Having established in the court below a *prima facie* case of conspiracy between John W. Hillmon, John H. Brown and Levi Baldwin, defendant offered to prove by the witnesses E. D. F. Phillips, J. H. Blythe, James S. Crew and Alexander Carr certain acts and declarations of Baldwin, one of the alleged co-conspirators, in contemplation of and preparation for the fraudulent purpose and the conspiracy for its consummation, and some of them in furtherance of its exe-

cution. Because the plaintiff was not charged as a co-conspirator, the Circuit Court excluded the evidence, and in that connection said:

> "The acts and the declarations of the conspirators are not admissible for the purpose of establishing the conspiracy; but the conspiracy having been established and a *prima facie* case made, then the declarations or the acts of one conspirator are admissible, *not against a party who is not a party to that conspiracy, but as against each other*, and that upon the theory that the acts and declarations of one of the conspirators are pursuant to the conspiracy, and they must be within those lines; they must be in aid of the conspiracy; then the acts and the declarations of one conspirator in aid of the carrying out of the conspiracy are evidence against the others, *and the application of that would be confined necessarily to a proceeding against one of the conspirators, or a proceeding in which one of the conspirators was a party.* Consequently I believe that the declarations of Levi Baldwin have no proper place in this case." (*Rec.*, 1611.)

Judge THAYER, in delivering the opinion of the Court of Appeals, said:

> "But for other reasons as well the testimony was not admissible against Mrs. Hillmon, who was the sole plaintiff. It was not alleged by the defendant company that she ever became a party to the alleged combination to defraud certain insurance companies, either by original participation in the scheme or by subsequently adopting it, and in the absence of any such averment we are of opinion that it would have been erroneous to have admitted as against *her* such casual declarations and inquiries of the man Baldwin as are above described. Under the issues which were presented by the pleadings we think that the trial court went quite far enough in permitting the existence of the alleged conspiracy between Hillmon, Brown and Baldwin to be shown for the purpose of strengthening the probability that Hillmon was not in fact dead, but was con-

> cealing himself. The existence of the alleged conspiracy was a single isolated fact which the jury might have regarded as having some probative force in solving the real issue in the case as to whether Hillmon was accidentally killed at the time and place alleged in the complaint." (*Rec.*, 2023.)

And upon the same subject Judge SANBORN, in his dissenting opinion, said:

> "The contention that this testimony constituted no evidence against the plaintiff because she was not alleged to be a party to the conspiracy does not seem to me to be sound. There was sufficient evidence of a conspiracy to obtain this policy to defraud the company to warrant the court in submitting this testimony to the jury. If the conspiracy was formed and the policy was obtained by John W. Hillmon, one of the conspirators, in pursuance of a plan that he formed to defraud the company, any assignee or beneficiary of the policy necessarily took it subject to its original defect, and any evidence competent to show that it was originally obtained by fraud must be competent against anyone who holds it, for the policy still has that defect in the hands of the assignee or beneficiary. *National Life Ins. Co.* v. *Minch*, 53 N. Y., 144; *Carpenter* v. *Ins. Co.*, 1 Story, 57; *Burruss* v. *National Life Ass'n.*, 32 S. E., 49; 1 Biddle on Ins., 448-9." (*Rec.*, 2029.)

It was conceded by the Circuit Court that the alleged conspiracy might be proved so as to be used as evidence against the plaintiff bearing upon the identity of the corpse presented. Evidence sufficient to make the *prima facie* case, which is a preliminary condition to the admission of the independent acts or declarations of co-conspirators against each other, was supplied to the satisfaction of the trial court. The right to supplement and reinforce the evidence already in followed of necessity. The proof, sufficient in the mind of the court to make the *prima facie* case, might not dispense in the minds of the jury with the importance

of the confirmatory evidence which the defendant had become entitled to introduce. It was the fact of the conspiracy that was admissible in evidence against her, and the admissibility of the fact of the conspiracy involved the subordinate conclusion that all lawful evidence establishing that fact was of necessity equally admissible. The evidence offered and rejected was evidence of the fact of the conspiracy. Acts and declarations, therefore, admissible to establish the conspiracy between the co-conspirators were admissible in establishing the *fact* which was admissible against the plaintiff. Whether these matters of evidence were admissible against the plaintiff or not was logically involved in the prior determination that the fact of conspiracy was admissible against her at all. A jury not convinced by the *prima facie* case recognized by the court might well have been convinced by the evidence that was excluded of the acts and declarations of one of the co-conspirators.

To show acts of Levi Baldwin to be taken in connection with other independent circumstances and with acts of other persons to prove that he, and Hillmon, and Brown were acting together in the prosecution of a common purpose, the defendant offered to prove the following facts:

That Levi Baldwin had a conversation with Dr. Phillips in October, 1878, in which Baldwin said he was thinking of taking out some insurance, and asked if certain insurance companies were safe; and how long it would take before a dead body would decompose after it was buried; and said, "wouldn't it be a good scheme to get a large amount of insurance on your life and go down south and get the body of some 'greaser' and palm it off as your body and get the money?"

That Levi Baldwin had a conversation with J. H. Blythe,

an insurance agent, in which Baldwin asked him about life insurance, saying that a relative or connection of his wanted to get some insurance, and wanted Blythe to recommend some good company to him. The court had already permitted plaintiff in error to show by the same witness a conversation between Baldwin, Hillmon and the witness, upon the same subject, a few days later.

That Levi Baldwin, in the latter part of February, 1879, had a conversation with James S. Crew, who, as receiver of the Simpson Bank held for collection some notes past due against Baldwin, two of which were secured by mortgage on real estate and one by chattel mortgage on live stock. During this conversation Baldwin said that a part of the money represented by this indebtedness had been furnished to insure Hillmon's life. Crew further testified that he had heard of Hillmon's death in the latter part of March, and that shortly thereafter Baldwin came in hurriedly and told him to let his matter rest, as he was then on his way west after Hillmon's body, and that he had arranged for a portion of the life insurance on Hillmon's life, and that as soon as he got it he would be able to straighten up all his affairs; that he was to have $10,000 of the insurance money.

That, shortly after the 10th of March Levi Baldwin had a conversation with Alexander Carr, during the course of which Baldwin said that "he and Hillmon had a scheme under brogue, and he said that if that worked out all right that he was all right." All this evidence was excluded.

The excluded testimony of all these witnesses shows *motive and inducement* in the state of Hillmon's and of Baldwin's affairs; *preparation* in pondering upon and devising a scheme of relief, and in providing money for the payment of premiums; and shows also what was occupying the mind of the dominant man and principal conspirator.

The rule applicable to evidence of this sort, as stated in 1 Greenleaf on Evidence, Sec. 184a, is universally recognized by all authority.

> "The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all; and is, therefore, original evidence as against each of them. It makes no difference at what time any one entered into the conspiracy. Everyone who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design."

Under this rule all evidence is relevant and admissible, which tends to show motive and preparation for what was done or furnishes indications of what was passing in the party's mind upon that subject.

Stephen's Digest of Insurance, p. 19.

Concurrently with this runs this principle in most cases, that statements or other utterances are admissible where the *material point* is, that under the circumstances *the statement was made*, and not that in itself it was true or false.

1 Greenleaf, Sec. 101.

Mut. Life v. *Hillmon*, 145 U. S., 296, 298.

In that case this court said:

> "Such declarations are regarded as *verbal acts*, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury. *Insurance Co.* v. *Mosley*, 8 Wall., 397, 404, 405. . . . 'So, it is uniformly held that the previous declarations of the testator, offered to prove the *mental facts* involved, are competent. . . . State-

ments and declarations, when the state of the mind is the fact to be shown, are therefore, received as mental acts or *conduct*. 99 Mass., 120.' . . . 'Wherever it is material to prove the state of a person's mind or *what was passing in it*, and what were *his intentions*, there you may prove what he said, because that is the only means by which you can find out what his intentions were. 1 P. D., 451.'"

So Lord Ellenborough said in *The King* v. *The Inhabitants of Hardwick*, 11 East., 578, 585:

"Evidence of an admission made by one of several defendants in trespass will not, it is true, establish the others to be co-trespassers; but if they be established to be co-trespassers by other competent evidence, the declaration of the one, as to the *motives* and *circumstances* of the trespass, will be evidence against all who are proved to have combined together for the common object."

The rules of evidence affecting the admissibility of acts and declarations of co-conspirators are in general the same in civil and criminal cases.

Nudd v. *Barrows*, 91 U. S., 426, 438.

In *Lincoln* v. *Claflin*, 7 Wall., 132, Mr. Justice FIELD defined the rule of evidence applicable to co-conspirators as follows:

"The declarations of each defendant relating to the transaction under consideration were evidence against the other though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs."

In *Wiborg* v. *U. S.*, 163 U. S., 632, 657-8, Mr. Chief Justice FULLER, in discussing the question of evidence applicable to a conspiracy, said:

"There was other evidence of declarations of members of the party as to their purposes, and the district judge in commenting thereon said that: 'If these men were in combination to do an unlawful act, what was

said by any of them at the time in carrying out their purpose was evidence against them all as to the nature of the expedition,' and to this an exception was taken. The general rule was stated in *American Fur Co.* v. *United States*, 2 Pet., 358, 365, by Mr. Justice Washington, speaking for the court, that 'where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others.' The declarations must be made in furtherance of the common object, or must constitute a part of the *res gestae* of acts done in such furtherance. Assuming a secret combination between the party and the captain or officers of the Horsa had been proven, then, on the question whether such combination was lawful or not, the motive and intention, *declarations* of those engaged in it *explanatory of acts done in furtherance of its object* came within the general rule and were competent."

In *State* v. *Johnson*, 40 Kan., 266; 19 Pac., 749, the court in defining the rules applicable to the proof of conspiracy, after stating that mere narrations of accomplished facts were not competent, said:

"Instances where a narrative of past events may be admissible can be imagined; but the narrative itself must tend in some way to promote the general purpose of the criminal enterprise. An illustration of such a declaration is given in *Cortez* v. *State*, *supra*, where it is said: 'A. will perform the part allotted to him when B. shall do a certain thing to be performed by him. B. acts, does that which is required of him, and writes to or verbally informs A. that the thing has been done. This is a narrative of a past event, but it is also in furtherance of a common design, and hence admissible. The general rule is that, to be admissible, the conspiracy must be pending, and the acts or declarations must be in furtherance of the conspiracy—the common design.'"

In *State* v. *Rogers*, 54 Kan., 683; 39 Pac., 219, 223, the

defendant Rogers was tried for the commission of the crimes of burglary and arson, and was convicted, from which conviction he appealed. The evidence showed that Rogers, owning books or abstracts of title, had hired one Shirley to steal or burn the public records of title. Shirley in turn hired men to burn the records, and evidence of this hiring by Shirley was introduced by the state and was admitted over the defendant's objection. Concerning this evidence the court said:

> "It has sometimes been said that proof establishing the conspiracy must precede proof of the acts and declarations of a co-conspirator. It is now well settled, however, that the order of proof rests largely within the sound discretion of the trial judge. It often happens that the conspiracy itself can only be proven by circumstances, and, if it is established by the whole evidence in the case, a conviction will not be set aside merely because of the order in which the testimony is presented. Whart. Cr. Ev., §698a; *State* v. *Winner*, 17 Kan., 298; *Place* v. *Minister*, 65 N. Y., 89; Rice Ev., §581. We think the evidence of the negotiations of Shirley with Carroll and others with reference to the perpetration of the crime, was competent to prove the guilt of Shirley, as were also his inquiries for fit persons for such an undertaking. If a conspiracy already existed between Shirley and Rogers by which Shirley undertook to find men who would actually perpetrate the crime for money, *all his acts in seeking instruments were done in pursuance of the conspiracy, and might properly be proven.*"

To the same general effect are:

Cuyler v. *McCartney*, 40 N. Y., 221, 229, 243-4.

Walsh v. *People*, 88 N. Y., 458, 466.

Smith v. *National Benefit Society*, 123 N. Y., 85.

State v. *Thompson*, 69 Conn., 720; 38 Atl., 868, 870.

State v. *Spalding*, 19 Conn., 237.
People v. *Bentley*, 75 Cal., 407; 17 Pac., 436.
State v. *Walker*, 98 Mo., 95; 9 S. W., 646.
Hart v. *Hicks*, 129 Mo., 99; 31 S. W., 351.
State v. *Winner*, 17 Kan., 298.
Spies v. *People*, 122 Ill., 1, 229.

It is sufficient to say that this conspiracy is still pending, and will so continue as long as these suits to enforce the fraudulent contract are being prosecuted by this plaintiff.

Jack v. *Mut. Reserve Fund Life Ass'n*, 51 C. C. A., 36, 45; 113 Fed., 49, 57-58.

Under legitimate application of the rule, the joint participation of all the persons charged may be shown by a number of independent circumstances, each apparently isolated, disconnected and without significance until, when grouped together, they disclose the common purpose which has brought them all into existence. An unlawful combination is generally proved by isolated and distinct circumstances, and, as said by the court, in *State* v. *Spalding, supra:* "In such case, it is seldom true that any one act, taken by itself, can be detected as tending to prove a combination; but, when it is seen in connection with other acts, its true nature may be discovered." Clearly the true nature of these acts can never be discovered if each of them may be individually excluded because its relevancy is not immediately apparent. The principle and importance of the rule is not its advantage to one side or the other in making acts and declarations of one evidence against others, but in that it lets a number of apparently disconnected and detached facts fall into their true relations to each other; enables them to throw light and explanation upon each other; and to show *whether* they *are* detached or are *parts of a combined effort for a common pur-*

pose. The acts of one person alone might not possibly produce the result actually seen, and the acts or declarations of one alone might be apparently without significance and unintelligible, but taken in connection with other acts or declarations of others they become clear, systematic and efficient in relation to the actual event. The evidence here under consideration was relevant and should have been admitted against the plaintiff.

SEVENTH SPECIFICATION.—RELATING TO THE ADMISSION OF EVIDENCE TO DEFEAT THE RELEASE.

After the alleged death of John W. Hillmon on March 17, 1879, and after Mrs. Hillmon, the beneficiary under the policy had seen the corpse produced as the body of the insured, and had been informed by John H. Brown that he had made the sworn statement commonly known as the "Brown affidavit," or "Brown confession," the beneficiary executed and caused to be delivered to your petitioner in Kansas the following release (*Rec.,* 585):

> "LEAVENWORTH, Kansas, Sept. 15, 1879.
>
> In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I hereby release, surrender and acknowledge satisfaction in full of all claims against the Connecticut Mutual Life Insurance Company by reason of policy No. 153,614, issued by said company, dated March 4th, 1881, and for the sum of five thousand dollars, on the life of my husband, John W. Hillmon, and hereby enter satisfaction in full, and order the dismissal of any and all suits or proceedings commenced or that hereafter may be commenced, by any person in my behalf, for the collection of the same.
>
> (Signed) SALLIE E. HILLMON."

Attest:
W. J. Buchan,
John H. Brown.

This release was deliberately executed, with others, by the plaintiff at Leavenworth, in September, 1879, and the plaintiff herself sought to procure the policy for surrender to the defendant. Delivery of the policy to her was refused by her counsel on account of his own claim of interest in it. She subsequently ratified and confirmed her action, and corrected an error in one of the other releases. The above release on its face recited a consideration, and by the law of Kansas in its legal effect imported a consideration. Section 7 of Chapter 21 of the statutes of Kansas of 1868, p. 183, then in force, provided as follows:

> "All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, *shall import a consideration.*"

This statutory provision, of course, entered into the release and belonged to the constitution of the instrument.

Pritchard v. *Norton,* 106 U. S., 124, 135.

Under this statute, as construed by the Supreme Court of Kansas, the legal effect of instruments thus executed, in respect of their import of a consideration, is the same as that of corresponding instruments under seal at common law.

Northern Kas. Town Co. v. *Oswald*, 18 Kas., 336, 339.

Sprague v. *Mo. Pac. Ry. Co.*, 34 Kas., 347, 353.

Of this proposition there can be no doubt nor any more that the Circuit Court had the subject definitely in mind, for in his charge to the jury it was said:

"While under the law the execution of the written

> instruments of release by the plaintiff *imports a consideration* therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration, and therefore they are inoperative as releases and do not constitute a valid defense, and the plaintiff did not by any of them release or discharge any cause of action or any other right that she may have had." (*Rec.*, 1921.)

The defendant below, claiming that the release was legally valid and effective, set it up in defense by pleading. The plaintiff, deeming the burden of overcoming it to be upon her, *offered it in evidence*, and in the same connection sought to impeach its legal effect. Repeated objections to testimony of this character offered by the plaintiff were overruled and the testimony was admitted subject to numerous exceptions. Having more than once excepted to the court's ruling, it was "not desirable nor seemly for counsel to continually repeat their objections to the same class of testimony." *Salt Lake City* v. *Smith*, 104 Fed., 457, 470 (C. C. A., 8th Cir.).

By this court the rule is established that "in an action upon a sealed instrument in a court of *law*, failure of consideration or fraud in the consideration for the purpose of avoiding the obligation is not admissible as between parties and privies to the deed." *Hartshorn* v. *Day*, 19 How., 211, 222. *George* v. *Tate*, 102 U. S., 564. In both of these cases the question came before this court upon *objection to the admission of evidence*. *George* v. *Tate*, was an action upon a bond in the Circuit Court of the United States for the District of Kansas. The answer admitted the execution of the instrument, but set up as a defense that the defendants had been induced to sign it by false and fraudulent representations. The lower court refused to admit evidence of these representations, and its action was approved by this court as follows (p. 570):

"Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected.

It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. *Hartshorn et al.* v. *Day,* 19 How., 211; *Osterhout* v. *Shoemaker and Others,* 3 Hill (N. Y.), 513; *Belden* v. *Davies,* 2 Hall (N. Y.), 433; *Franchot* v. *Leach,* 5 Cow. (N. Y.), 506. The remedy is by a direct proceeding to avoid the instrument. *Irving* v. *Humphrey,* 1 Hopk. (N. Y.), 284."

The rule is well illustrated by the case of *Vandervelden* v. *Chicago & Northwestern Ry. Co.,* 61 Fed., 54, which arose under a statute of Iowa similar to the above quoted Kansas statute, and we quote from the opinion of Judge SHIRAS in that case:

"The point presented for decision by the first ground of objection is whether, in an action at law, a written release of the character of that introduced in evidence can be impeached for fraud not inhering in the execution thereof, but which only goes to the extent of the consideration. . . . By sections 2112 and 2113 of the Code of Iowa, the use of private seals in written contracts, except in case of corporations, is abolished, and it is declared that all contracts in writing, signed by the party to be bound or his agent or attorney, shall import a consideration. Practically, the distinction existing at common law between instruments under seal and those not under seal is thus abrogated in Iowa. The execution of the release being admitted in the pleadings, no evidence is required on part of the defendant to sustain the defense based thereon. Being in writing, and its execution by the plaintiff being admitted, it imports a consideration, and therefore at law its validity is estab-

> lished. . . . Can the plaintiff in this law action attack it on equitable grounds? . . . The release is a validly executed instrument, and in an action at law must be given its full legal force and effect."

Among the objections interposed the evidence was always the one of *incompetency*. At no time was there any ambiguity or uncertainty of any kind as to the precise nature and kind of testimony against which this objection of incompetency was levelled. In more than one instance the inquiry of the court caused the plaintiff's counsel to state explicitly for what purpose the evidence was being offered (*Rec.*, 546, 576-80), and it was in connection with such explicit statements of the purpose of the plaintiff in offering the evidence and with specific objection of the defendant that the record shows the following:

> "The defendants object to the question as *incompetent*, irrelevant and immaterial, and *desire it understood that all testimony upon this subject is under their objection.* The court overruled the objection, to which action of the court the defendants at the time duly excepted and still except." (*Rec.*, 580.)

Although the record shows that there could have been no possible obscurity in the minds of either the court or of counsel as to the ground of objection and the particular character of testimony objected to as incompetent, it was urged in argument in the Court of Appeals that objection to evidence on the ground that it was incompetent, immaterial and irrelevant was not adequately definite to present the point that want of consideration and fraudulent inducement in procuring the execution of a sealed instrument, or of one in legal effect importing a consideration, are incompetent to be shown in a court of law.

In *Noonan* v. *Caledonia Mining Co.*, 121 U. S., 393, 400, Mr. Justice FIELD, discussing this general form of

objection to evidence as "immaterial, irrelevant and incompetent," stated the criticism which is suggested, and also its limitation. He said:

> "The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, *unless it be of such a character that it could not have been obviated at the trial.* The authorities on this point are all one way. Objections to the admission of evidence must be of such a specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time *if, under any circumstances, that can be done.*"

Accordingly in *Chapman* v. *Reynolds,* 23 C. C. A., 166; 77 Fed., 274, First Circuit, the court said:

> "Evidence objected to may sometimes be considered on appeal, although the objections were only generally expressed, if *in no event it could be made relevant,* and if, also, the objections to it are *not of a character which could have been obviated* if they had been stated."

It is obvious that under the decisions of this court above cited (*Hartshorn* v. *Day,* 19 How., 211; *George* v. *Tate,* 102 U. S., 564), the ground of the objection was "*of such a character that it could not have been obviated at the trial.*" That ground of objection was the subject-matter of the evidence—its inherent nature—and no "opportunity to obviate" the difficulty in this case could have availed the plaintiff under any circumstances.

Nor could the situation of the plaintiff in that respect be changed or helped by the provision contained in section 8, of the statute of Kansas already referred to. That section is as follows:

> "Section 8. The want or failure, in the whole or in part, of the consideration of a written contract, may

be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

The law is well settled by this court that state statutes like this of Kansas, which may authorize equitable defenses to be interposed in actions at law in the state courts upon contracts executed in that state, do not apply to the courts of the United States. A statute of Kansas cannot confer upon the courts of the United States power not otherwise possessed by them to entertain equitable defenses in in an action of law, for it cannot obliterate the recognized distinctions of the Federal judicial system between legal and equitable jurisdiction and procedure. The question involved is one of *power* in a court of *law*. What the Circuit Court did in declaring the release void was to exercise equitable jurisdiction. "Cancelling an executed contract is an exertion of the most extraordinary power of a court of equity." (*Atlantic Delaine Company* v. *James,* 94 U. S., 207, 214.) Herein lies an additional and a stronger reason why the form of the objection interposed to the admission of the evidence was not material. Indeed, it would not matter if no objection at all had been made in the Circuit Court. If there had been no objection or exception whatever, the Circuit Court had no more authority or jurisdiction to destroy the effect of this release at law, in the manner shown, than it would have had to act upon it directly and to order it also to be delivered up and canceled. Of such an error advantage may be taken at any stage and in any manner. Waiver or consent could not cure it, for it belongs to the class of errors which a court either of trial or of review will notice *sua sponte.* These principles have been repeatedly declared and illustrated in numerous decisions of this court, to some of which we here refer.

Jones v. *McMasters*, 20 How., 8, was a suit at law brought in the District Court of the United States in Texas, possessing Circuit Court powers, to recover possession of a tract of land lying in that state. One of the defenses sought to be interposed was irregularity in survey and location under which the plaintiff claimed. Upon this branch of the case Mr. Justice NELSON, delivering the opinion of this court, said (*p.* 22):

> "The counsel for the defendants claimed the right to inquire into the regularity of this survey and location, and also into the *bona fides* of the transaction.
>
> "It must be remembered that this is a suit at law to recover the possession of the land in dispute; and that, although it may be the course of practice in the courts of the State of Texas, in a suit of this description, to blend in the proceeding the principles of law and equity, in the Federal courts sitting in the state the two systems must be kept distinct and separate. This principle is fundamental in those courts, and *cannot be departed from.* The court, therefore, in a suit *at law, should exclude the hearing and determination of all questions that belong appropriately and exclusively to the jurisdiction of a court of equity.* In a case calling for the interposition of this court, and *turning upon equitable considerations, relief should be sought by bill in equity.* Many of the cases at law coming up from the District Court of this state are greatly complicated and embarrassed, from the want of the observance of this distinction in the proceedings before it. In respect to the survey and location in the case before us, we perceive no ground that could warrant the court in going behind them in a suit at law. They were made by the Government that granted the title, and there is no ground, or even pretence, for saying that they were made without authority; and hence, altogether void. If voidable, for irregularity or other cause, the question was not one for a court of law in an action to recover possession, but for a court of equity to reform any error or mistake."

Greer v. *Mazes*, 24 How., 268, was an action of ejectment brought in the Circuit Court of the United States in California. After the plaintiffs had proved a legal title the defendants offered evidence tending to establish an equitable title in themselves. The court excluded the evidence as incompetent and gave judgment for the plaintiffs. This court affirmed the judgment, and Mr. Justice GRIER, in delivering the opinion of the court, said (*p.* 275):

> "The court below refused to admit the testimony, not for its irrelevancy, but its *incompetency;* because the defendants, claiming under a merely equitable title, having neither survey nor patent, were not in a condition to dispute in a *court of law* the correctness of the survey made by the public officer or resist the plaintiff's proof of legal title."

Sheirburn v. *De Cordova*, 24 How., 423, presented another action brought in the District Court of the United States in Texas to recover a parcel of land in that state. Upon the trial the defendants established title to the land in controversy and judgment was rendered for them. The plaintiff established in himself only an equitable title to the property, but no objection was made in that court on that ground, and the state statute declared such an equitable title sufficient to authorize the maintenance of actions of ejectment. In this court objection was made that the plaintiff could not maintain his suit in a court of the United States upon an equitable title, and upon this ground alone, *although objection was not presented in the court below,* the judgment was affirmed. In the course of the opinion Mr. JUSTICE CAMPBELL said (*p.* 426):

> "The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the

> United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn* v. *Holme*, 20 How., 481, that a further discussion is unnecessary."

In *Hurt* v. *Hollingsworth*, 100 U. S., 100, suit was brought in a state court in Texas to quiet title to certain real property, and the defendant removed the suit to the Circuit Court of the United States. The defendant, in his answer, claimed to be the owner of the property, and that the plaintiff wrongfully withheld possession, and he prayed that title might be declared in him, and that he might have judgment for possession and for the value of the rents withheld. The case was considered by counsel and treated by the court as an action at law, and by stipulation of the parties a jury was waived, and the case was submitted to the court both on the facts and the law. A judgment for the title and possession of the property and for damages was rendered in favor of the defendant. This judgment was subsequently vacated and a rehearing granted, whereupon the plaintiff moved to transfer the cause from the law docket to the chancery docket on the ground that it was one seeking equitable relief. In over-ruling the motion the court observed that "it was a court both of law and equity and had cognizance of both kinds of cases; that though the cause was an equity cause the court had cognizance of it, and the question presented was, therefore, simply one of irregularity of pleadings and proceedings; *that the parties had waived all matters of mere form by going to final hearing on the merits and submitting the case to the court;* and that their substantial rights had not been violated by this mode of proceeding." The court thereupon heard the evidence presented and again rendered judgment for the defendant. But in

this court it was held that the motion should have been granted, and the judgment was reversed. In delivering the opinion Mr. Justice FIELD said (*p.* 102):

> "There would be great force in the observations of the court below, if the different causes of action presented by the parties could, by the usual forms of proceeding, either at law or in equity, be disposed of in one suit. It might then very well be said that as by stipulation the case had been submitted to the court for determination, it was too late to object to the form of the proceedings. If it was an equity case, then it was properly before the court; if it was a case at law, a jury having been waived, it was also properly there. In either view, the relief warranted by the facts would be administered. But here no such disposition could be made of the case presented by the petition and the one presented by the answer. The first is strictly a suit in equity seeking special relief, which only a court of chancery can grant. The second is an action at law for the recovery of real property, with the rents and profits. The two cases are entirely different in their nature, and can be determined, where the distinctions between legal and equitable proceedings are maintained, only in separate suits. In the one case, if the allegations of the plaintiff be sustained, the judgment must be declaratory and prohibitory, adjudging that the deed of the sheriff to the defendant constitutes a cloud upon his title, and enjoining the defendant from asserting any claim to the premises under it. In the other case, if the defendant establishes his averments, the judgment must be for the possession of the premises and the rent and profits.
>
> In the Federal courts such a blending of equitable and legal causes of action in one suit is not permissible under the Process Act of 1792, substantially re-enacted in the Revised Statutes, which declares that in suits in equity, in the Circuit and District Courts of the United States, the forms and modes of proceeding shall be according to the principles, rules and usages which belong to courts of equity. 1 Stat., 276, Sec. 2, Rev. Stat., Sec. 913. This requirement has always been

held obligatory upon parties *and the court* whenever the question has been raised. *Thompson* v. *Railroad Companies*, 6 Wall, 134. A party who claims a legal title must, therefore, proceed at law; and a party whose title or claim is an equitable one, must follow the forms and rules of equity proceedings as prescribed by this court under the authority of the Act of Aug. 23, 1842. 5 Stat., 518, Sec. 6."

Burnes v. *Scott*, 117 U. S., 582, was an action at law upon a promissory note, to which was interposed as one defense that the amount due on the note was dependent upon a distribution of partnership assets, which could not be ascertained without a settlement of the partnership affairs. The Circuit Court held this defense to be equitable in character and excluded the evidence offered to sustain it, on the ground that such evidence was *incompetent and irrelevant*. The exclusion of this evidence was assigned for error in this court. Upon this branch of the case the Court, Mr. Justice Woods, delivering the opinion, said (*p.* 587):

"Plainly the relief, if any, to which the facts set up in this plea entitle the defendant is an injunction to stay the suit at law upon the note until a settlement of the partnership and an ascertainment of the amount, if anything, coming to Winston out of the assets of the partnership. This is a remedy which a court of equity only can grant. But the defendant insists on a verdict and judgment in his favor, without settlement of the partnership on which, as he asserts, the validity of the note depends.

Under the jurisprudence of the courts of the United States a court of law can no more take cognizance of an equitable defense than a court of equity can entertain a suit upon a purely legal title."

And further, on page 588:

"If the defense set up in the plea under consideration could be made effectual in an action at law, it would render obsolete in the equity courts of the United States that great head of equity jurisdiction under which in-

junctions are granted to stay proceedings at law. 'The occasion,' says Mr. Justice Story, 'on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances.' 'Thus, an injunction is sometimes granted to stay trial, sometimes after verdict to stay judgment, sometimes after judgment to stay execution, and sometimes after execution to stay the money in the hands of the sheriff,' etc. Story Eq. Jur., Sec. 885, 886, and see Sec. 881, 882; Eden on Injunctions, Ch. 2, p. 3; *Waterlow* v. *Bacon*, L. R., 2 Eq., 514; *Hibbard* v. *Eastman*, 47 N. H., 507; *Hopkins* v. *Fletcher*, 47 Missouri, 331; *Tommey* v. *Ellis*, 41 Geo., 260.

It is clear, therefore, that the matters set up in the third plea were proper for the consideration of a court of equity, *and that they could not be set up as a defense in a court of law.* All the evidence offered to prove them was, therefore, properly excluded."

In *Northern Pacific Railroad* v. *Paine*, 119 U. S., 561, an action was instituted in a state court of Minnesota to recover damages for the taking and converting of certain logs alleged to be the property of the plaintiff. One of the defenses interposed was that the defendant had been fraudulently induced to sell the land from which the logs had been taken; that as soon as the fraud had been discovered the sale had been repudiated by the defendant; and that proceedings were then pending to have the sale set aside. The plaintiff *filed a replication denying the allegations of fraud.* Although this defense was equitable in character, it could be set up in an action at law under the state court practice. The case was removed to the Federal court, a trial was had upon the issues raised by the various pleas, and a judgment was recovered by the plaintiff. In the course of the opinion Mr. Justice FIELD said (*p.* 563):

"The case was then removed, on application of the defendant, from the state court to the Circuit Court of the United States. In that court the equitable defense

could not be made available. In the courts of the United States, to legal actions legal defenses only can be interposed. If the defendant have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity. If his equitable grounds are deemed sufficient, he may thus stay the further prosecution of the action at law, or be furnished with matter which may be set up as a legal defense to it. Upon the removal, therefore, of the action to the Circuit Court, the equitable defense could not be considered. It would have been entirely proper for the defendant to have amended his answer by striking out that portion embracing this defense. But he did not take that course, and the plaintiff relied upon its allegations as evidence. If the pleadings are construed as in the state court, there was an admission by them of an important fact in the case, namely, of title by a deed from the former owner of the lands. In the state courts, where an answer sets up several distinct defenses a denial in one is held to be qualified by an admission in another. . . .

"In the case at bar no proof was offered by the plaintiff of his title to the land, from which the logs in controversy were cut, or of his ownership in any other way, he relying upon the admission to that effect contained in the paragraph of the answer setting up the equitable defense. This defense was not, as already stated, available in the action at law after the removal of the case to the Circuit Court of the United States, and the answer might have been there amended by striking it out; but so long as it remained a part of the pleadings, the fact admitted by it in the state court must be considered as still admitted in the Federal court. No hardship can follow from this rule, for the defendant, by amending his answer after the removal of the cause, can always avoid this result; in many cases it will obviate the inconvenience of making proof of a fact within the knowledge of the parties."

Willard v. *Wood*, 135 U. S., 309, was an action at law instituted in the Supreme Court of the District of Columbia by the administrator of the assignee of a mortgage against

the executrix of a purchaser of the equity of redemption, to recover so much of the mortgage debt as remained unsatisfied after a foreclosure sale. The case was submitted upon an agreed statement of facts, and judgment was rendered for the defendant. This court in affirming the judgment held that the action was equitable in nature and could not be sustained at law. In delivering the opinion Mr. Justice GRAY said (*p.* 314):

> "In the Supreme Court of the District of Columbia, as in the Circuit Court of the United States, the jurisdiction in equity is distinct from the jurisdiction at law, and equitable relief cannot be granted in an action at law. Rev. Stat. D. C., Sec. 760, 800; *Fenn* v. *Holme*, 21 How., 481.
>
> "A statement of facts agreed by the parties, or, technically speaking, a case stated, in an action at law, doubtless waives all questions of pleading, or of form of action, which might have been cured by amendment; *but it cannot enable a court of law to assume the jurisdiction of a court of equity.*"

Scott v. *Armstrong*, 146 U. S., 499, was an action brought in the Circuit Court of the United States in Ohio by the receiver of a national bank to recover against the makers upon a promissory note. The defendants pleaded as a defense an equitable setoff. Demurrers by the plaintiff to these pleas were sustained and judgment was rendered for the plaintiff. Pending a writ of error to the Supreme Court, a bill in equity was filed in the Circuit Court by the defendants against the receiver, praying for an injunction against the judgment and for an enforcement of the setoff. A demurrer of the receiver was sustained to this bill, and an appeal was taken to the Circuit Court of Appeals for the Sixth Circuit. The Circuit Court of Appeals certified to this court for instructions certain questions, one of which was as follows:

> "Has a Circuit Court of the United States, sitting in Ohio as a court of law, *jurisdiction* to entertain a defense of setoff as against an action brought by a receiver appointed by the Comptroller of the Currency to wind up the affairs of a national bank doing business in Ohio because of its insolvency, upon a note held by said bank, which note matured and became payable after the appointment of such receiver?"

This question the Supreme Court answered in the negative, although the Ohio Code of Civil Procedure abolished the distinction between actions at law and suits in equity, and permitted all defenses, both legal and equitable, to be set up in law actions. The court held that the code could not affect the jurisdiction of the Circuit Court of the United States upon its law side. In delivering the opinion of the court Mr. Chief Justice FULLER said (*p.* 512):

> "We are of the opinion that the Circuit Court had *no power* to grant the set-off in question in the suit at law. Judgment, however, was given in that case on the merits upon sustaining the demurrer to the defense of equitable set-off, and as we think that the set-off should have been allowed, we do not feel called upon, having the judgment before us and under our control for affirmance, reversal or modification, to sustain it upon a *jurisdictional* ground not passed upon by the Circuit Court.
>
> "We shall, therefore, reverse it without discussing the question whether, if affirmed, it would or would not be a bar to relief in the suit in equity."

Other cases to which reference may be made in support of the above principles are:

Robinson v. *Campbell,* 3 Wheat., 212.
Watkins v. *Holman,* 16 Peters, 25, 59.
Fenn v. *Holme,* 21 Howard, 481, 484, 488.
Singleton v. *Touchard,* 1 Black, 342, 344.
Foster v. *Mora,* 98 U. S., 425, 428.
Johnson v. *Christian,* 128 U. S., 374, 381-2.
Cates v. *Allen,* 149 U. S., 451, 459.

Mississippi Mills v. *Cohn*, 150 U. S., 202, 204.
Lindsay v. *First National Bank of Shreveport*, 156 U. S., 485, 493.

It is submitted that after the plaintiff in the Circuit Court had admitted the execution of the instrument by her pleading, and had herself voluntarily introduced it in evidence, and had testified that she had executed and delivered it, she was absolutely concluded thereby in this action at law, and could set up no claim of right as against it. The court should not have admitted any evidence impeaching the release, but at the conclusion of the plaintiff's case should have sustained the demurrer of the defendant to the evidence (*Rec.*, 836, 854), and, as requested by the defendant, should in its charge have *instructed the jury to find a verdict for the defendant.* (*Rec.*, 1910.)

EIGHTH SPECIFICATION.—RELATING TO THE "BROWN AFFIDAVIT."

The affidavit or sworn statement of John H. Brown has in many respects been always an important factor in this case. Designated at different times by various names, as the "affidavit," the "sworn statement," the "confession" of John H. Brown, it is found in its connection with the present question at page 1284 of the record. This sworn statement, executed on the 4th of September, 1879, was but the repetition in writing of a statement made orally by Brown to his attorney some months before at Lexington, in Missouri. (*Rec.*, 1230-8.) It was an acknowledgment verified by his oath that he and Levi Baldwin together with Hillmon had conspired to defraud the insurance companies by procuring policies upon Hillmon's life, with the purpose

of collecting the insurance by falsely pretending the death of Hillmon and fraudulently presenting a fictitious body to the insurance companies, and that the body brought from Medicine Lodge to Lawrence and presented as the body of Hillmon was not the body of Hillmon, but a body falsely pretended to be his, in pursuance of that conspiracy. Subsequently, the same John H. Brown made a deposition, which the plaintiff read in evidence on the trial below, wherein he stated in substance that the above affidavit which had been made by him was untrue; and later in the trial, during the cross-examination of a witness called by defendant, the *plaintiff offered* in evidence this affidavit or sworn statement, *generally and without any limitations upon its scope,* and it was so admitted without objection from defendant. (*Rec.,* 1284.)

In due time the defendant requested the court to give to the jury the instruction referred to in the specification. The court refused to give the instruction, to which refusal the plaintiff duly excepted (*Rec.,* 1914), and assigned error thereon in the Circuit Court of Appeals. (Assignment, 105; *Rec.,* 2006.) Having refused the instruction, the court charged the jury as follows (*Rec.,* 1923):

> "The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you. The oral declarations of said Brown not under oath, and the statement signed and sworn to by him, are not affirmative evidence of the truth of any matter therein contained or mentioned, and they should not be considered by you excepting as affecting the credibility of the evidence of the said Brown given in his deposition, and in determining this matter of credibility you should consider the testimony of both sides, showing the circum-

stances under which Brown made said declarations and statement, as well as all other evidence bearing on that question."

A reference to the instruction requested, and to the charge, will show at a glance that both are upon the same identical subject, and are in direct opposition to each other, in that the *one* asks instruction to the jury that the affidavit *having been introduced in evidence by the plaintiff* should be considered evidence against her of the facts therein stated, and the *other*, namely, the charge, instructed the jury that the statement was *not affirmative evidence* of the truth of any matter therein contained. The defendant having carefully reserved exception to the ruling of the court in refusing the instruction asked for upon this subject, it was not then necessary by express decision of the Circuit Court of Appeals for the Eighth Circuit for the defendant to except again to that portion of the charge which embodied a contrary statement of the law. This rule had then been announced by the Circuit Court of Appeals for the Eighth Circuit in the case of *Long-Bell Lumber Company* v. *Stump*, 30 C. C. A., 260; 86 Fed., 574, 582. In that case the opinion of the court, delivered by Judge PHILLIPS, with whom concurred Judge SANBORN, declared as follows:

"In *Evans* v. *Clark* (Ind. T.), 40 S. W., 771, it is held that where the applicant requested the giving of a proper instruction, which was refused, it is not necessary, in order to insist upon error of such refusal, that the party should have excepted to an inconsistent instruction given by the court. The court said:

'Where a party takes proper exception to any matter in the record, it is not necessary to take other exception, if the exception thus taken covers the matter in issue.'

While this is the language of the Court of Appeals of the Indian Territory, it is nevertheless valuable for

the force of the reason assigned. See, also, *Guinard v. Knapp, Stout & Co.* (Wis.), 70 N. W., 671, where the court lays down the rule to be that the refusal to give a correct instruction is reversible error, unless it appears that the same was substantially given in the general charge. Having requested the court to give a proper declaration of law, and the court, by its refusal having declared that it held the law to be otherwise, to which exception was duly taken, why should counsel be required again to except to the converse or modified declaration given by the court? It would be but a repetition of the objection already expressed in the first exception. And, so far from the silence of counsel at the first re-assertion of the error by the court evidencing a waiver of the first error, it but evinces a respectful deportment by counsel towards the court, in refraining from repetitious objections at the ruling of the court, after having once taken exception involving in effect the same principle which would be represented in the second exception."

In the above case Judge THAYER dissented but without specific reference to the point in question. In the present case a precisely opposite position is taken by the majority of the court upon this subject. In its opinion in this case the court said:

"We are *relieved, however, of the necessity of deciding* whether there was anything misleading in the excerpt from the charge which has been quoted above, *by the fact that no exception was taken* thereto, and we may reasonably infer from the fact that no exception was taken, that the direction given by the court that Brown's sworn statement to the defendant's attorney was not *'affirmative evidence,'* etc., was not deemed to be of much importance or as liable to mislead, when the case was submitted to the jury."

It is plain that the language of the Circuit Court in its charge to the jury is in direct opposition to the rule of law asserted in the instruction refused by the Circuit Court, and that the Court of Appeals refused to consider the objection of

the defendant to the rule of law expressed in the charge because separate and independent exception had not been taken to the charge itself. We submit that any criticism of language which would make the instruction asked by the defendant and the charge presented by the court otherwise than the precise antitheses of each other is verbal and without substantial foundation. The interpretation of the language of that instruction presented by Judge SANBORN in his dissenting opinion, we submit to be correct and to state the manifest purport of the language employed.

In his dissenting opinion upon this point Judge SANBORN said:

> "A perusal of this brief statement of the record upon this subject will not, it seems to me, raise a doubt in the mind of any reader that the question presented by the request, that ruled by the charge and that decided by the refusal to grant the request was the single question whether or not the affidavit of Brown was any evidence of the facts it recited. This, it seems to me, was the only question intended to be raised by the request, was the question which the charge clearly shows that the court understood was presented and was the only question ruled either by the refusal of the request or by the terms of the charge upon this subject. If this view is correct, the exception to the refusal to grant the request fairly presents the ruling upon this issue.
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> . . . . . .
>
> The request and the charge seem to me to fairly present one and only one question which was clearly understood and directly ruled by the court both in its charge and in its refusal to grant the request, the question whether or not the affidavit was evidence of the facts it recited. In the light of the charge, which contradicted the terms of the request, the refusal of the request ruled this question as directly as the charge itself, and for that reason the exception to the refusal fairly challenged the error and entitled the defendant to a review of the ruling.

When we turn to a consideration of the correctness of the ruling itself no issue is presented for argument or consideration. Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give to the opposing party the opportunity and right of cross-examination and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of such evidence have this effect for he who introduces testimony is ordinarily in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence and the defendant consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited because the defendant relied, and had the right to rely upon it for that purpose and because the plaintiff having introduced it was not permitted to take the inconsistent position that it was not competent evidence of the facts it related. *Walton* v. *Chicago, St. P., M. & O. Ry. Co.*, 56 Fed., 1006, 1008; 6 C. C. A., 223, 225; 12 U. S. App., 511, 513; *National Loan & Investment Co.* v. *Rockland*, 94 Fed., 335, 337; 36 C. C. A., 370, 372. The affidavit was persuasive telling evidence upon the crucial questions in the case, upon the identity of the corpse and upon the conspiracy to defraud the defendant, and yet the company was deprived of its benefit by this ruling of the court. This error is so plain and glaring, and it necessarily deprived the defendant of such important testimony that in my opinion it ought not to be disregarded."

We do not understand the suggestion that exception to the language of the charge was omitted because the matter "was not deemed to be of much importance, or as liable to mislead." The importance of the issue to the plaintiff is vividly illustrated by the language in the dissenting opinion just quoted; and the point had, under the rules of the court then

in force, been effectively preserved by the careful request of an instruction and by exception to its refusal. It is obvious that whether one rule of procedure or the other should determine, the right of the petitioner has depended not upon any principle or rule settled in the Circuit Court of Appeals of the Eighth Circuit, but upon mere hap and chance in the composition of the court; so that the rule announced one day upon which litigants are presumed to rely is announced to be otherwise on another day, and they are caught in a situation where their gravest interests are involved and overturned and into which they are presumably led by following a path declared by the court to be legitimate and correct.

The fact that the Brown statement was unequivocally offered in evidence by the plaintiff was obscured if not effectively mis-stated by the court in its charge. The statement was put in evidence without qualification or limitation of its scope by the plaintiff under the circumstances shown by the record. When a party calls a witness he represents him as worthy of belief and assumes responsibility for the truth of his statements. The deposition of Brown had already been offered and read in evidence by the plaintiff, and when afterwards, at a later stage of the trial, the plaintiff put in evidence, and the court admitted without objection, the sworn statement of the same witness, the plaintiff then represented the witness to be credible as to that statement, assumed the responsibility for his veracity and became estopped to impeach his allegations.

1 Greenleaf Ev., Sec. 442.

It is insisted, therefore, that the court erred in its declaration to the jury that the statement signed and sworn to by Brown was not affirmative evidence of the truth of any matter therein contained, and in limiting the effect of that sworn

statement to its bearing upon the credibility of the evidence of Brown given in his deposition. It is the contention of petitioner that in its bearing upon the credibility of the witness Brown in his deposition, the affidavit is to be considered by the jury not merely as *qualifying* that credibility, and in determining which of the two, namely, the deposition or the affidavit, shall be given the greater weight, or how much of either it will believe, but that, having been thus introduced in evidence affirmatively by the plaintiff at a later stage of the trial, it *absolutely destroys* the credibility of the witness as to the deposition, and concludes the plaintiff as an admission against interest (1 Greenleaf Ev., Sec. 147) wherever the deposition is contradicted by the affidavit. The affidavit being introduced by the plaintiff at a later stage of the cause, and the deposition having been also introduced by the *plaintiff*, the situation is not the same as it would have been if, to qualify the credibility of the witness, various conflicting statements at other times had been put in evidence by the *defendant*. As against the plaintiff the credibility of the witness Brown in his deposition is not merely qualified or impaired but absolutely destroyed, and the deposition is superseded by effect of the admission of the plaintiff in the statement sworn to at Parkville. As affecting the credibility of Brown, therefore, in his deposition, the sworn statement is *conclusive* upon the plaintiff; and if that be so, it is then conclusive of the case and should conclude this litigation.

It is the contention of petitioner that the statement sworn to at Parkville is evidence against the plaintiff as to all things alleged in it to precisely the same extent as any part of John Brown's deposition read on the trial.

In another aspect this sworn statement or affidavit is evidence of high character and of great importance. The fact

that under the conditions of the time such an affidavit came into existence is an independent circumstance competent to be proved and considered in its connection with other circumstances which may be correlated with it. The affidavit is evidence to prove the *fact* that Brown *made* it, and that fact is as competent evidence as the fact of his flight, and is of the same character. It is original and primary evidence that he made it, and that he *made* the allegations which it contains. Whether the things alleged were true or not is another matter. Evidence of such allegations is often competent where the material point upon which the evidence is offered is that they were made, and not whether they were true or false. The affidavit and the allegations thus made may, nevertheless, derive credence from other circumstances with which they fall into connection, or they may reciprocally confirm or explain or give significance to other circumstances appearing independently, and in such connection the allegations of this affidavit may become entitled to great consideration and weight as evidence. This principle finds ample illustration and confirmation in this record. That the statements made at Lexington at the beginning of May or in April were the same in substance as those contained in the Parkville affidavit made in September is confirmed by the trouble Levi Baldwin had to procure his "proofs of death" in the interim. His own testimony confirms Brown's statement that he had to go several times to Missouri to obtain them from Brown, and that he got them by great importunities. He learned inevitably on those occasions that Brown had already admitted that the body was not Hillmon's. (*Rec.*, 696, 714, 717-19, 1234-5.) So from the subsequently developed testimony of Marshall and Helda and Mesh and Healey (*Rec.* 1403, 1417-18, 1430, 1561, 1575), and the letter of Walter's (*Rec.*, 1689), comes fur-

ther confirmation of the affidavit of Brown concerning the third person taken with them from Wichita, together with the other evidence in the case that the man dead at Medicine Lodge was a stranger and not Hillmon; and still further confirmation comes from the curious correspondence between that expectation mentioned in Brown's affidavit of finding on the plains a subject which would appear to be Hillmon frozen to death, and which could be identified only by the clothes and paper found on it (page 63 *ante*), and that suggestion of Baldwin's to Dr. Phillips (sought to be shown in evidence, but excluded by the court) that one might "go down south and get the body of some 'greaser'" and palm him off on the insurance company when no longer recognizable. (*Rec.*, 1606.) *Might Baldwin also have suggested that to Brown as well as to Dr. Phillips?*

By this correspondence between the sworn statement or affidavit of Brown and the excluded testimony of Phillips, the importance and value of both to the development of the truth is *illustrated;* and the truth of the statements of the affidavit in these respects, and that of the excluded testimony of Phillips and of the testimony of Marshall and Helda and Mesh and Healey, and of the indications in Walter's letter, and the evidence of the identity of the body at Crooked Creek as that of some stranger and not of Hillmon, are all reciprocally confirmed.

NINTH SPECIFICATION.—RELATING TO THE EXCLUSION OF PART OF MCKAMY'S TESTIMONY, AND OF THE TEXAS CRIMINAL STATUTE, AND TO THE INSTRUCTION REQUESTED IN REFERENCE TO THE BEARING OF THE CRIME COMMITTED BY HILLMON IN TEXAS.

The defendant on the trial below proved that Hillmon and Brown were living on buffalo ranges in the winter of 1877 and the winter and spring of 1878, and were engaged in hunting buffalo and selling their hides. They were brought in the course of these transactions into relations with the members of a trading firm known as McKamy & Anderson, located at Fort Griffin, Texas, having also a store known as the Pease river store at the head of the Pease river and at the foot of Stake Plains, and in the course of their dealings with McKamy & Anderson they finally bought of that firm a cattle train, consisting of thirty-three yoke of oxen and nine wagons. For this purchase they gave to the firm the notes of Hillmon and Brown, three in number; one for $900 and the other two for $1,361.95 each. To secure the payment of these notes they executed under the laws of Texas a chattel mortgage upon the cattle and wagons purchased, and upon some buffalo hides alleged to be then lying at some other point in Texas. (*Rec.*, 369-380, 1389-1400.) A statute of Texas then in force provided as follows:

> "If any person has given, or shall hereafter give, any mortgage, deed of trust or other lien, in writing, upon any personal or movable property or growing crop of farm produce, and shall remove the same or any part thereof out of the state, or shall sell or otherwise dispose of the same with intent to defraud the person having such lien, either originally or by transfer, he shall be punished by imprisonment in the petitentiary not less than two nor more than five years." (*Rec.*, 1400.)

Of this statute the court will take judicial notice. The notes were never paid. Having thus acquired the possession of this cattle train, Hillmon and Brown moved out with it on the plains of Texas and never afterward returned. (*Rec.*, 1389, 1400.) On the contrary, they proceeded directly to run this mortgaged property out of the State of Texas. (*Rec.*, 1097.) They took it into New Mexico, and then selling portions of it as they went along, they conducted the rest into Colorado, and finally sold the last of it at Trinidad and at Pueblo. (*Rec.*, 372-6.) The defendant also proved by the testimony of the city marshal of Lawrence that in the fall or winter of 1878 Hillmon was drawn to his attention by a communication from Fort Griffin, Texas, and that that communication contained an enclosure of some sort. (*Rec.*, 1007.) In addition to this, the defendant sought to prove and offered evidence to prove, that when McKamy & Anderson learned that this cattle train had been moved up toward the Pecos river and was about to be carried out of Texas, he set out in pursuit; that McKamy, following along the trail, found at Las Vegas and elsewhere portions of the property which had been sold, but that Hillmon and Brown had gone to Kansas; that thereupon McKamy, from Trinidad, Colorado, sent to Texas to have necessary papers forwarded to him so that he might procure the arrest in Kansas of Hillmon and Brown, but that before the papers reached him he read in the newspapers that Hillmon had been killed in Barber County, Kansas, and presuming that statement to be correct he returned to Texas. This evidence when offered was excluded by the court. Defendant also sought to prove the substance of the communication by which Hillmon was brought to the attention of the city marshal in the fall or winter of 1878, and what was the

enclosure received by the marshal from Fort Griffin, Texas. This also was excluded by the court. (*Rec.*, 1007.)

Petitioner claims that the facts which would have been shown by this excluded testimony should have been admitted in evidence. They were competent evidence to prove not merely the financial condition and circumstances of Hillmon, but also to show the character of Hillmon and Brown, both of whom are charged as conspirators by the pleadings, and that at this point of time they were criminals under the laws of Texas; and furthermore, it was competent evidence to prove an adequate motive on the part of Hillmon for going away at that time and disappearing from Kansas, and for concealing himself and keeping himself concealed, *apart from any other motive* whatever. A rule of law applicable in this connection was in terms recognized by the court, for after instructing the jury that Hillmon's continued absence might be taken into consideration by them as *evidence of his death*, the court said:

> "If it appears that a motive may exist for absence and a continuance thereof and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show *death.*"

(*Rec.*, 1920.)

But at the same time the court arbitrarily excluded from the knowledge of the jury the very evidence that would have furnished an adequate explanation of his absence. The defendant below had proved what Hillmon had done in the matter of this cattle train. It sought to read to the jury the statute under which what they had done was a violation of the criminal laws of Texas. This especially in connection with the inquiry about Hillmon which had come to the city

marshal at Hillmon's home, furnished adequate explanation for Hillmon's disappearance and concealment.

Sensenderfer v. *Pac. Mut. Lf. Ins. Co.*, 19 Fed., 68, 70.

N. W. Mut. Life Ins. Co. v. *Stevens*, 71 Fed., 258, 262.

Davie v. *Briggs*, 97 U. S., 628, 633.

Tisdale v. *Mut. Benefit Assur. Co.*, 26 Ia., 170.

TENTH SPECIFICATION.—RELATING TO THE EFFECT TO BE GIVEN LAPSE OF TIME AS EVIDENCE.

This action was begun on July 13, 1880. The petition alleged that Hillmon, the insured, was killed on the 17th day of March, 1879. To support the action, therefore, the plaintiff was bound to prove affirmatively the contract of insurance; the payment of all premiums that had accrued under its conditions; that Hillmon was dead when the action was brought; and that he died at the time alleged in the pleading. The primary point of objection in this specification of error is that the length of time which had elapsed at the last trial had no tendency to show that he died on the 17th of March, 1879, nor that he died before the second premium under the policy became payable; (for the payment of but one premium is proven, and there is no pretense of the payment of another); nor any more tendency to show that he was actually dead when the action was brought.

Hillmon paid an advance premium upon the policy before it was issued, and this payment kept the policy alive for a certain period when by its terms the insurance would expire for non-payment of further premium. (*Rec.*, 147, 153.) Plaintiff had no

right of action upon the policy unless Hillmon died *before* the expiration of *that* period. Proof of his prior death was an essential and vital element of her case. In her pleading she alleged that he died March 17, 1879, at Crooked Creek from a gunshot wound inflicted by John H. Brown, and at the trial it was not contended that, if dead at all, he died at any other time or in any other manner. It was conceded that a man was killed by a gunshot wound at the time and place alleged, but it was denied that Hillmon was that man, and upon this branch of the case the question to be tried by the jury was one of identity.

The only direct evidence of the occurrence on March 17, 1879, came from the mouth of Brown, who testified that he accidentally shot Hillmon; but Brown had previously made affidavit that it was not Hillmon at all who was killed, but that it was a man whom Hillmon had murdered with intent to have the body presented to the insurance companies as the body of Hillmon; and it was evident to all concerned in the trial that Brown was not entitled to the slightest credence. Eliminating his testimony, all the evidence produced by the plaintiff tending to show that Hillmon died at the time and place alleged in her pleading, bore upon the *identity of the corpse* found at Crooked Creek. In opposition to this the defendant not only introduced a mass of evidence which of itself was clearly sufficient to establish that the corpse was *not* that of Hillmon, but also gave evidence sufficient in itself to establish that the corpse was that of a man murdered by Hillmon in furtherance of the fraudulent conspiracy set up in the pleading. Upon plaintiff's evidence, standing alone, it appeared that Hillmon was killed as alleged; upon defendant's evidence, standing alone, it was indubitable that he was *not* killed as alleged, and that when last seen he was engaged in carrying out a criminal

fraud, for whose consummation murder and concealment were necessary. In this state of the proofs, the fact that Hillmon had not been seen nor heard from since March 17, 1879, could not serve as cumulative evidence in favor of either contention, for it was perfectly consistent with both. It became entirely immaterial upon the question of the identity of the corpse. It lent no more weight to plaintiff's assertion that Hillmon died at Crooked Creek than to defendant's theory that he was in that voluntary concealment which was necessary to the consummation of the fraud and conspiracy proved against him, and which was also necessary to avoid punishment for the murder done there by him.

In its charge upon this point the Circuit Court called the jury's attention to the legal presumption arising from seven years *unexplained* absence, though such a presumption was entirely foreign to the facts of the case, which exhibit no *unexplained* absence.

The attention of the court has already been drawn in the argument of the preceding specification of error to the fact that Hillmon had ample reason and abundant motive for disappearing when he left Lawrence in the winter of '78 and '79. The criminal law had prepared for him five years of a Texas penitentiary, and the shadows of its opening doors were darkening about his feet at that moment. Moreover, if the allegations in this case of conspiracy and fraud on his part are true, if the statements of John Brown at Lexington and Parkville were true, if in any event the man killed at Crooked Creek was not Hillmon—then his participation in murder as a principal or accessory, and the existence of these suits, furnished adequate explanation of his continued absence.

As was said in *Northwestern Mut. Life Ins. Co.* v. *Stevens*, 71 Fed., 258; 18 C. C. A., 107:

> "It goes without saying that if a guilty man, who has been indicted for a heinous crime, flees in the full vigor of health from impending disgrace and just punishment, and his friends and acquaintances hear from him no more, the inference of continued life after the expiration of seven years might well be drawn, and no presumption could arise from that state of facts that his life had ceased within that period."

The court told the jury in the same connection that Hillmon's absence might be considered with the other evidence relating to his death as tending to show that he died *at the time and place* alleged by the plaintiff, subject to be weakened by a motive, if any, for a voluntary concealment. The charge in effect asserted that the absence constituted evidence of the death as claimed, adding its weight to the sum total of plaintiff's evidence upon the point to be overcome by the defendant. The jury must have taken it to mean, especially in view of the misleading and unnecessary reference to legal presumptions, that the mere fact of absence was to be given a value and weight in favor of plaintiff's contention and against that of defendant which it obviously did not have, and this in the minds of the jury may have turned the scales of the evidence and given the preponderance to plaintiff. The charge embodied a statement of law directly contrary to that contained in the instruction requested by the defendant, which was refused and duly excepted to (*Rec.*, 1909), and under the decision of the Court of Appeals in the Eighth Circuit of *Long-Bell Lumber Co.* v. *Stump*, 86 Fed., 574, it became unnecessary to except to the charge as given.

At the time of the trial more than twenty-one years had passed since the death of the man who was shot at

Crooked Creek. The voluntary language of the court concerning a presumption of death arising from an unexplained absence of seven years tended to give that suggestion an unjustifiable introduction into the case, and an unjustifiable influence upon the mind of the jury. It was impossible for the jury to listen to this portion of the charge, woven in and connected with the instruction as to unexplained lapse of time becoming evidence of death, without conviction that the intimation of the court was intended to add the weight of a legal presumption to whatever impression might otherwise be gathered from the lapse of time up to the date of trial, but the suggestion of such presumption was distinctly foreign to the case and the situation. *No presumption from any lapse of time had arisen when this suit was brought, and the plaintiff must recover upon the conditions existing then or not at all.* Moreover, nothing is established with more certainty than that even after a lapse of time sufficient to permit under any circumstances a presumption of death to arise, there would still be no presumption that the death had occurred at any particular time or place. There was no presumption whatever of death before any of the unpaid premiums accrued, or before the commencement of the action; and the plaintiff could not recover, even upon an absolute proof of death after the action had been begun. In fact, it has been held that the established presumption of fact from the disappearance of an individual under ordinary circumstances, is that he continues to live for seven years after his disappearance. *N. W. Mut. Life Ins. Co.* v. *Stevens,* 71 Fed., 258; 18 C. C. A., 107. Lapse of time, therefore, since the death alleged in the petition "is an immaterial matter in this case" utterly, and the substance of the instruction asked should not have been refused. Particularly, after the de-

fendant had requested the court to give a proper declaration of law upon that subject, the court should not have given to the jury the instruction and misleading suggestion embodied in that portion of the charge set out in this specification of error. It would be impossible for ingenuity to devise anything more calculated to confuse the thought and mislead the minds of the jury than the apparent intimations involved in the suggestion of the court upon this subject.

The unexplained absence of a man from home and friends for more than seven years, during which no tidings of him have been received by those who, if he had been living, would naturally have heard from him, gives rise to the legal presumptions that the absentee *continued to live during* the first seven years of the absence, and that *after that time* he was dead. The presumption of death will sometimes arise upon a shorter absence, such as when at the time of disappearance the absentee was in desperate state of health, or was in imminent peril of his life; *but in no case is there any legal presumption as to the particular time of death.* Moreover the presumption of death is a mere limitation of the presumption of the continuance of life, and can only arise in a case where there is an entire absence and dearth of proof upon the subject. Where there are facts and circumstances shown, sufficient in themselves to account for the absence, there is no basis for any legal presumption, and none arises, and the party asserting the death must establish it by affirmative proof. And apart from legal presumptions, it would seem to be clear that where evidence is produced which standing alone exhibits a powerful motive for voluntary disappearance and concealment, no inference of fact as to death can be drawn from the absence. In such case there is no more basis for an inference of fact than for the presumption of law. *Then* the negative circumstance of

absence has no probative force whatever—no logical or evidential value—upon the question whether that absence should be ascribed to death on the one hand or to the motive for concealment on the other.

It is submitted that the following authorities support the proposition that the requested instruction should have been given and that the instruction as given was erroneous:

Davie v. *Briggs*, 97 U. S., 628.

Fidelity Mut. L. Ass'n v. *Mettler*, U. S., ; 22 S. C. R., 662.

N. W. Mutual Life Ins. Co. v. *Stevens*, 71 Fed. Rep., 258; 18 C. C. A., 107.

Montgomery v. *Bevans*, 1 Sawyer, 660; 17 Fed. Cas., 628 (by Mr. Justice FIELD).

Cone v. *Dunham*, 59 Conn., 145.

Ray v. *Mut. Benefit Co.*, 174 Pa. St., 1; 34 Atl. Rep., 283.

Schaub v. *Griffin*, 84 Md., 557; 36 Atl. Rep., 443.

Whitely v. *Equitable Life Society*, 72 Mo., 170; 39 N. W. Rep., 369.

Seeds v. *Grand Lodge*, 93 Ia., 175; 61 N. W. Rep., 411.

Watson v. *England*, 14 Sim., 28.

In re Phene's Trust, L. R., 5; Chan. App., 139.

1 Taylor on Evidence, Sec. 200.

1 Greenleaf on Evidence, Sec. 41.

Lawson on Presumptive Ev., pp. 251-298.

ELEVENTH SPECIFICATION.—RELATING TO THE REFUSED INSTRUCTIONS ABOUT HILLMON'S TEETH.

In the nature of things the permanency of the teeth furnishes oftentimes the most unmistakable indication and surest evidence of identity. In this case one thing is established and without controversy—that the teeth of the man whose body was brought from Medicine Lodge were extraordinarily large, perfect and brilliant, and constituted a most striking and noticeable feature. A model of them made by one Dr. Patterson, a dentist, was produced in evidence and by a special order has been sent up from the Circuit Court. (*Rec.*, 128, 236.) Sallie E. Hillmon, the plaintiff, stated that the teeth of her husband were good. (*Rec.*, 748.) The woman with whom Sallie E. Hillmon lived, Mary Judson (*Rec.*, 531), and her son, Arthur Judson (*Rec.*, 825), testified that they observed no defective or missing teeth; and one Dr. Simmons (*Rec.*, 215) says the same concerning them in 1873. No other witness testifies that his teeth were good. On the other hand a cloud of witnesses testified that they were imperfect and decayed. Some on various occasions when camping or herding cattle had inspected them and ministered to him when suffering from toothache. They seem to have been an inconspicuous feature with him. Among those who testified to their defective condition were a dentist who had treated him, some personal acquaintances and associates, two of his own brothers and his sister and her husband. A list of these witnesses with references to the pages of the record upon which their testimony is shown is given in connection with this specification of error. The weight of the evidence is conclusive; the fact proven was in its nature conclusive, as an element of

identification, or of differentiation between Hillmon and the body brought from Medicine Lodge; and the instruction asked in this specification should not have been withheld from the jury.

In Underhill on Criminal Evidence, Sec. 317, it is said:

> "The structure and condition of the teeth of a deceased person, by reason of the imperishable nature of the materials which compose them, furnish an excellent means of identification. Any witness who was acquainted with the appearance and conformation of the teeth of the person in question may describe their condition of soundness or decay, and point out whatever he may have observed which was abnormal or peculiar in them, as, for example, fillings, etc. This evidence may then be followed up by the testimony of experts, preferably dentists or dental surgeons, who have made an examination of the teeth after death. The jury may then determine as an inference from the points of similarity, if any, the identity of the remains with the person whose death is under consideration."

TWELFTH SPECIFICATION.—RELATING TO THE EXCLUSION OF EVIDENCE SHOWING RECOGNITION OF PHOTOGRAPHS OF THE CADAVER AS PHOTOGRAPHS OF YOUNG WALTERS.

Supervening upon the letters of Frederick Adolph Walters, written from Wichita on the eve of Hillmon and Brown's departure upon their last expedition, tending to show that Walters went with them, and upon the evidence of other witnesses to the same effect, is an important body of evidence tending to identify affirmatively the body brought from Medicine Lodge as that of Walters. Photographs of that body were taken at the instance of the defendant below, and this evidence lay chiefly in the identification of these photographs. The photographs themselves have by special order been sent up with the record and are before this court. Among those

who identified the body by these photographs were many of the friends and acquaintances of Walters at Fort Madison. Bucholz, the barber there, had known him from childhood, and was from five to seven years older. He says, "The expression shows for itself that it is Adolph Walters," and further, "I have shaved him for five years . . . and I know that photograph is nobody else but Adolph Walters." (*Rec.*, 1704.) In this connection we may recall the language of the court below in its charge that:

> "The causes and reasons why human beings recognize one another with whom they are acquainted do not generally depend upon analysis of separate features, but *rather upon general appearance, in which many elements combine*, and it is, therefore, immaterial if a witness, when called upon to describe in detail the features of a party whom he is identifying, differs in some of these details from others, *if he is able to say that as a whole he recognizes the person by his general appearance.* The act of recognizing between friends and even members of the same family may not depend upon the color of the hair, the condition of the teeth, the size or shape of the nose or any independent feature, but upon *the individual appearance* of the person as it *makes an impression upon* the mind or brain of the observer." (*Rec.*, 1924.)

Rourke had known him intimately and seen him almost daily from 1864 to 1870, and saw him with great frequency from that time on. He says he recognized it as the photograph of Walters when first he saw it, before he knew that Walters had died, and he recognized it "from the general appearance of the countenance in the picture." (*Rec.*, 1719-20.) D. W. Henry had known him from boyhood. Looking at one of the photographs and questioned whether he recognized the person, he said: "Yes, sir; I do, and that is poor Frederick Adolph Walters; *I can't be mistaken.*" (*Rec.*, 1725.) He further said: "I recognize it by the

general features of the man; there is something I cannot explain about it, but it is the general features of the man." In his testimony, and in that of William Schott and H. F. Stemple and others, will be found vivid descriptions of Walters in his life, which correspond with the appearance of the figure shown in the photographs.

In addition to the evidence of these acquaintances, all the members of Walters' family, his father, his brother and his swo sisters testified to their unanimous recognition of the photographs (*Rec.*, 1622, 1746, 1783, 1799), and in that connection happened the occurrence which the defendant sought to put in evidence, but which the court below excluded. The father, Daniel Walters, as the result of inquiry he had instituted for his son, who had unaccountably disappeared, received these photographs early in January, 1880. The statement of the daughters, Mrs. Rieffenach and Miss Fannie Walters, is that he brought them home and that their mother was in the room at that time (*Rec.*, 1773-8, 1798); that before the pictures had been shown to her the father accidently dropped one of them on the floor, and that while it was being picked up the mother saw it and exclaimed: "Oh, it is my son!" and immediately fell in a swoon.

Of course, it is understood that this matter is not offered as a voluntary statement by the person, though she was the mother. It is not offered as a "testimonial assertion" (1 Greenleaf's Evidence, Ed. 1899, Secs. 99a, 100, 101) of recognition. It is sought to prove the events that occurred as circumstances proving a state of mind and a mental act of the mother. The daughters, the son and the father *testify* in regular form to the fact of *their* recognition. The involuntary ejaculation and the swoon of the mother are *both* offered as the inevitable concomitants of the mental act of recogni-

tion, all the more conclusive as evidence of that because spontaneous and involuntary. The recognition by the mother, thus proved, is evidence as competent as that by the sisters and brother proved by their testimony. The proof was competent under the rules affirmed by this court on the former appeal in this case; and its exclusion was certainly a grave and material error.

What is proven is the *act of recognition,* and it is proven both by the spontaneous exclamation and by the swooning. As said by this court, these are made all the more conclusive as evidence of their inherent sincerity and the impossibility of collusion in respect of them. (1 Greenleaf's Evidence, 162f, 162g.)

THIRTEENTH SPECIFICATION.—RELATING TO THE EXCLUSION OF CERTAIN EVIDENCE OFFERED BEARING UPON THE CHARACTER AND CREDIBILITY OF THE WITNESS SIMMONS.

The testimony of the witness Simmons, was reserved and theatrically projected into the case almost at the very close of plaintiff's rebutting testimony, and when no time or opportunity could be had for investigation. The testimony is itself of extraordinary character. A cigar-maker of Leavenworth, who for perhaps twenty-five or thirty years had been running an establishment through which flowed a continuous stream of employes, a shifting and wandering class notoriously, assumed to remember and to identify a young man, who, he said, had worked in his shop for a few weeks twenty-one years before, by a photograph taken of that youth some four years before the time of his alleged employment. The athletics of the memory are extraordinary and capricious, but this feat

makes a large demand upon credulity. The character and habits which he ascribes to the Walters whom he employed find no counterpart in any account of the Frederick Walters whom, as we believe, the evidence in this case conclusively shows to have gone with Hillmon and Brown on their last expedition from Wichita, and whose body lay dead by the camp fire at Crooked Creek. Walters was of German race, and the name is common, and there may well have been many persons of similar name, but we strenuously insist that the parents and the sisters and the brother and the sweetheart of the Frederick Walters whose remains were brought to Lawrence were not, and could not have been, mistaken in their recognition and identification of him. There may not have been wilful wrong, but if not, there was assuredly mistake in the testimony of this man Simmons. The offer of one of the counsel for the defendants in the court below to question the character and credibility of this witness brought down upon him instantly, the thundering denunciation of the court (*Rec.*, 1878-9), and so the testimony upon this subject closed and the case was sent to the jury.

Under the pressure of time, and the great bulk of this record, petitioner omitted to formulate, as was intended, a definite assignment of error upon this subject. The attention of the Circuit Court of Appeals was nevertheless directed to this error, although no reference to it was made in the opinion of the court. Under rule 21 this court at its option may notice a plain error not assigned (*U. S.* v. *Penna*, 175 U. S., 500, 502), and we ask that the action of the court below, in this connection, may be considered by this court as upon an independent assignment and specification of error; but in any event that it may be considered in connection with the Fourteenth Specification of Error.

With all the respect due to the situation, we submit that the extravagant language and the unrestrained emphasis of the court were unjust to counsel, even if his claim of right had been without solid legal foundation, and were irremediably injurious to the cause of the defendant. The whole moral weight and influence of the court were thereby lent to give support in the minds of the jury to the character of the witness and the credibility of his statements. The entire proceeding was unjustified by any principle of jurisprudence or method of judicature. When cumulated upon the proceedings presented by the record and by our Fourteenth Specification of Error, it became absolutely impossible that the cause of the defendants could thereafter have an impartial consideration by that jury.

We submit, moreover, that the court below was wholly wrong in its emphatic statement: "There is no line of cases reported in the English language that will justify a question of that character, and the counsel ought to know it." Upon that proposition of the court below we refer to the following:

In *State* v. *Greenburg*, 59 Kan., 404; 53 Pac., 61, the Supreme Court of Kansas said:

> "For the purpose of judging the character and credit of a witness, he may be cross-examined as to specific facts tending to disclose or discredit him, although collateral to the main issue, and touching on the matters of record. Such questions are allowed when there is reason to believe that it will tend to the ends of justice and are asked for the purpose of honestly discrediting the witness."

In *Tla-Koo-Yel-Lee* v. *United States*, 167 U. S., 274, 277, the court below refused to permit counsel for the defendant to ask a witness certain questions relative to her past life, the general tenor of which would cast discredit upon her and

impair the credibility of her testimony. The Supreme Court held these questions were proper and said, by Mr. Justice Peckham:

> "We think answers to all these questions should have been permitted. The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end."

FOURTEENTH SPECIFICATION.—RELATING TO PREJUDICIAL REMARKS OF THE COURT.

In the course of the trial the court interrupted and suspended the proceedings for the purpose of the remarks shown in the specification of error, and in which the court indulged in the presence of the jury. The declamatory and dramatic character of the proceeding is sufficiently reflected in the record. (*Rec.*, 800-807.) In a forum ringing from morning till night with the clamor of counsel concerning the relative conditions of the plaintiff and defendant; with re-iterated platitude about the poor and helpless woman on the one side and on the other the enormous money-power of wealthy corporations; in an atmosphere reeking with appeals to such vulgar prejudice and antipathies, the implication in the minds of the jury, however impartial the court may have sought to make its language, must have been, not that the plaintiff in her poverty, but the defendants in their opulence were responsible for the offense which the court denounced. After this vivid proceeding before the jury, counsel insisted to the court that it was their firm conviction that *from that time on they could not have a fair trial* nor receive justice at the hands of that jury. (*Rec.*, 805-6.) It cannot be said that the re-

sult rebuked their apprehensions. We beg to refer to the record for the considerations urged upon the court below in support of the motion, which we thereby present in this court upon this specification of error.

FIFTEENTH SPECIFICATION.—RELATING TO REQUESTED DIRECTION TO FIND FOR DEFENDANT.

In support of this specification of error we beg simply to refer the court to the following conclusions which have already been discussed. In argument upon the seventh specification of error we have insisted that it was not competent for the court below in that action at law to hold that the release which was in evidence, and which was set up in the pleading of the defendant, was void for want of consideration. If that be correct, and if that holding was unauthorized, then the release as pleaded constituted a conclusive bar to the action of the plaintiff.

In the argument upon the eighth specification of error we have insisted that the sworn statement or affidavit of John H. Brown, being introduced in evidence by the plaintiff below, was conclusive evidence as to her of the fact therein disclosed, namely, that the body brought from Medicine Lodge of the man shot at Crooked Creek was not the body of Hillmon, and that this statement could not be controverted or impeached by her. If that be so, that consideration is conclusive of the case, and a verdict for the defendant should have been directed by the court.

Upon these grounds and each of them we submit that the judgment should be reversed, and the court below directed upon this record to enter judgment for the defendant.

SIXTEENTH SPECIFICATION.—JUDGMENT ERRONEOUS.

We respectfully submit this final specification of error upon consideration of the errors which have been detailed and upon the whole record which is before the court.

WILLIAM G. BEALE,
Of Counsel for Petitioner.

Office Supreme Court U.S.
FILED
MA
JAMES H.

Filed May 13, 1901.

IN THE

Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a corporation, *Petitioner.*

vs.

SALLIE E. HILLMON, *Respondent.*

662.

BRIEF AND ARGUMENT FOR RESPONDENT, IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI.

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HUTCHISON & BURBANK, PRINTERS, LEAVENWORTH.

IN THE

Supreme Court of the United States.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, a corporation, *Petitioner.*

vs.

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BRIEF AND ARGUMENT FOR RESPONDENT, IN OPPOSITION TO THE APPLICATION FOR WRIT OF CERTIORARI.

The petitioner has served upon us its petition for a writ of *certiorari* herein, but has not favored us with any copy of its brief or the argument which it is stated in said petition, has been filed in support thereof, and which argument presumably sets forth more fully the grounds of the application and cites authorities which it is claimed bear upon the questions discussed. As the petition and notice of the application was not served upon us until late on Saturday evening, May 4th, 1901, without its brief or argument therein mentioned, we labor under unusual difficul-

ties in preparing an appropriate answer or reply thereto.

We desire, however, to submit a short argument in opposition to the application for a writ of *certiorari*, and shall follow and answer, in their respective order, the various subdivisions as numbered and set out in the petition for the writ.

I.

STATEMENT.

(Petition, page 1, etc.)

The respondent brought three separate actions at law July 13th, 1880 (more than twenty years ago), against the Connecticut Mutual Life Insurance Company of New York, The New York Life Insurance Company, and the Mutual Life Insurance Company of New York, on policies of insurance issued by said companies, respectively, for her benefit on the life of her husband, John W. Hillmon, whom, she alleged, was dead. The said insurance companies each answered, alleging in substance that said John W. Hillmon was not dead, and that the dead body produced was not that of said Hillmon, but the body of some other person procured for the purpose of imposing upon the insurance companies and collecting the policies, although Hillmon was still living. It was incidentally alleged that all this had been planned in advance by Hillmon and persons other than the plaintiff, that is to say, that a false body had not only been produced as that of Hillmon, but that Hillmon himself, still being alive, had conspired with others to have this done. There was no charge in the answers that the plaintiff, the beneficiary, had any knowledge of, or was in any manner connected with the alleged fraud or conspiracy, and counsel for the

insurance companies, in his opening statement to the jury (Record, 138), in substance disclaimed that any such charge had been made. The answer also set up a release alleged to have been executed by Mrs. Hillmon and contained a general denial. The reply (Rec. 20 to 22) alleges that the release set up in the answer was procured by fraud and was without consideration. The issues being the same in all, the three cases were consolidated for trial. Six trials have been had, each occupying on an average more than twenty days each, the last trial consuming nearly five weeks. The principal point contested at all of these trials has been that of the identity of the dead body produced as that of Hillmon, the insured. That the insurance companies regarded that as the substantial question in dispute appears by the special instructions asked by it at the last trial; the insurance companies requested the Court in various forms to charge "that the REAL QUESTION in the case is whether or not John W. Hillmon died at the time and in the manner in the petition alleged." (Special instruction No. 1, Record page 1904, and special instruction No. 28, Record page 1909.) The trial judge, in substance, adopted these requests in that respect, and charged the jury as follows:

"In order that the plaintiff may recover in these cases, it is her duty to prove, by a preponderance of the evidence, that her husband died as claimed by her, in March, 1879, that is to say, whether it was his corpse that was brought to Lawrence in April of that year. If she should fail in so proving, your verdict should be for the defendants, but if she should succeed in so proving, your verdict should be in her favor." (Record, 1919.)—And thus the special matter of alleged fraud was substantially submitted to the jury.

Upon this question of identity, a vast mass of testimony was introduced. The jury in finding for the

plaintiff under the charge of the Court, necessarily found that the dead body produced was that of Hillmon. It is now claimed that, notwithstanding the answer, the opening statement of counsel, the special instructions asked and the charge given, and notwithstanding the dead body was that of Hillmon, the insured, yet that certain technical reasons exist why this judgment should be reversed and a seventh trial of the case precipitated.

In order to make plain what is to immediately follow, we draw the Court's attention to the fact that before the last trial The New York Life Insurance Company had settled with the plaintiff. The case was then consolidated as to the Connecticut Mutual Life Insurance Company and the Mutual Life Insurance Company of New York, for the last trial. Subsequent to the last trial and before either the hearing of the case in the Court of Appeals or the printing of the record therein, the Mutual Life Insurance Company of New York also settled with the respondent and its writ of error has been dismissed.

Upon these facts we desire to make the following preliminary objection to the consideration of the record which is presented here with the petition for a writ of *certiorari* so far as reference in said petition is made to the alleged bill of exceptions contained therein, set forth at pages, Record, 129 to 1927.

The respective pages of the record referred to by the petitioner in said petition to support its claims of error, are in a bill of exceptions set forth at pages Record 129 to 1927, which, as shown at page 1926, purports to have been taken by said petitioner, The Connecticut Mutual Life Insurance Company, in a case shown at page Record 129, to have been one in which Sallie E. Hillmon was plaintiff and The Mutual Life Insurance Company of New York was sole defendant;

and we submit that such bill of exceptions cannot be used or referred to in this proceeding. If that bill of exceptions purported to have been taken by any defendant in a case to which it was a party, then the question would be different, but even if it purported to have been taken by The Mutual Life Insurance Company, we submit it could not be used in this proceeding. And we claim that the Court of Appeals could not lawfully consider such bill of exceptions in considering the case in that Court.

II.

RIGHT OF CHALLENGE.

(Petition, page 4, etc.)

As shown above the two cases of Mrs. Hillmon, one against the Connecticut Mutual Life Insurance Company, the other against the Mutual Life Insurance Company of New York, were consolidated for trial; the trial judge ruled that each of the defendant insurance companies was entitled to the same number of peremptory challenges as though no consolidation had been made, namely, three each, and that the plaintiff, Mrs. Hillmon, was accordingly entitled to three challenges, because of being plaintiff in each case, that is six peremptory challenges in all.

The power of the Court to consolidate for trial *cases of a like nature* or *relative to the same question*, does not depend on whether the same person is party in the different actions.

That each party on each side of each case consolidated for trial is entitled to three peremptory challenges under Sec. 819, R. S. 1878, is, we submit, established by said case in 145 U. S. 285, 293-4—whether the *same* person is plaintiff or defendant in two or more of the cases or not is immaterial. The

plaintiff and defendant in each case is to be deemed a single party for the purpose of challenges under that section *merely* because of being such party. Sallie E. Hillmon was plaintiff in two cases consolidated. If John Doe had been plaintiff in the case against the Mutual Life Insurance Company, he would have been entitled to three such challenges as well as Sallie E. Hillmon as plaintiff in the other case; this because he would have been deemed a party for purposes of challenges under Section 819. And we submit that defendant in error was entitled to six peremptory challenges, same as two different plaintiffs would have been if some other person had been plaintiff in one of the cases; this because the plaintiff in each of the two consolidated cases was entitled to three challenges because of being plaintiff in either, making six. We submit the cases cited by plaintiff in error on this point are not at all applicable to this case. If we are not right in this contention, then it follows that under said Sections 819 and 921, the parties defendant are to be favored because of the consolidation.

Surely the cases when consolidated for trial were not merely *one* case for purposes of peremptory challenges *by the plaintiff therein only.*

They were separate for purposes of verdict, judgment, writs of error and exceptions, and also for purposes of peremptory challenges of jurymen by defendants in each case respectively.

Insurance Companies vs. Hillmon, 145 U. S. 285, 300.

Toledo, St. L. & K. C. Co. vs. Continental Trust Co., 95 Fed. 506.

From which it follows that respondent was entitled to three peremptory challenges, because of being plaintiff in each case respectively, six in all.

The ruling of the trial judge giving the plaintiff six peremptory challenges, so far as we can learn, is in accordance with the rulings of the Circuit Courts generally, since the decision in the case of Insurance Company vs. Hillmon, 145 U. S 285, but if the trial Court was in error in holding that the plaintiff was entitled to six peremptory challenges such error was harmless and no ground for reversal, because there is no complaint or ground for complaint that the jury was not a fair and impartial one.

The attention of the Court is called to the fact that the petitioner, the Connecticut Mutual Life Insurance Company, did not exercise its three peremptory challenges. (Record pages 136, 137.) It accepted the twelve men in the box when it still had the right to challenge peremptorily any juror that was unsatisfactory to it. (Record, page 137.)

After the jury were all in the box, the petitioner still had, but waived a peremptory challenge, and thereby accepted the twelve men then in the box; this was tantamount to a waiver of all objections to any thereof.

F. E. D. & W. V. Rld. Co. v. Ward, 29 Kans. 354.

There is a wide difference between overruling a challenge that a party is entitled to and sustaining a challenge that a party is not entitled to, and it is generally held that it is not substantial error to excuse a juror upon a challenge based upon insufficient grounds where an unexceptionable jury has been obtained, and especially where the complaining party has not exhausted his peremptory challenges.

Stout v. Hyatt, 13 Kans. 232, 241.
A. T. & S. F. Rld. Co. v. Franklin, 23 Kans. 74.

And the above rule has been substantially applied by this Court in the case of Hayes vs. Missouri, 120 U. S. 68, 71, where it is said:

"The accused cannot complain if he is still tried by an impartial jury; he can demand nothing more. (Northern Pacific Rld. Co. v. Herbert, 116 U. S. 642.) The right of challenge is the right to reject, not to select a juror. If, from those who remain an impartial jury is obtained the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one. He was allowed twenty peremptory challenges and it does not appear that he exhausted them."

And again in the case of Hopt v. Utah, 120 U. S. 430, it is said by this Court:

"When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if until the jury is completed, he has other peremptory challenges which he can use."

And in Spies vs. Illinois, 123 U. S. 131, 168, the preceding cases quoted from above were referred to and the doctrine announced therein, approved and applied.

III.

DEFENSE OF CONSPIRACY AND FRAUD.

(Petition, page 8, etc.)

In the matter of this third subdivision of said petition for *certiorari* we refer to the answer of the petitioner set forth on pages 17 to 19 of the Record.

The first ground of defense was a mere general denial of the allegations in the petition on the policy set forth at pages Record 3 to 5.

The second ground of defense at Record page 18, in legal effect merely raises the question as to whether or not a certain dead body taken from Barber County, Kansas, to Lawrence, Kansas, where it arrived on the morning of the 3d of April, 1879 (Record 756, 757), it being then seventeen days dead (Record 723, 735, 742, 743, 689, 690, 347) was or was not the body of the insured, John W. Hillmon.

We submit that the whole of the matter of pleadings, evidence and instructions relating to any claimed conspiracy was immaterial and not relevant to any material issue, and that the allegations in the answer of a conspiracy were immaterial matter. That we are correct in this, see the case of—

Union Mutual Life Ins. Co. vs. Thomas, 83 Fed. 803, 804, 805.

If the dead body brought to Lawrence in April, 1879, was the corpse of John W. Hillmon, then the insurance companies were not harmed by any conspiracy, even if there had been one. The company could not have maintained an action on account of any claimed conspiracy unless some act had been performed by some one of the alleged conspirators that in itself would give rise to a cause of action. If something had been done by a person that would serve as a basis of an action, that could be the result of a conspiracy between several persons that would extend to the injured person a right of action against all those conspirators; but with or without a conspiracy, some wrongful act is always necessary to serve as the basis of the action. Now in the case at bar, if there *was* a conspiracy, and the body *was* the

body of Hillmon, there is lacking entirely the wrongful act as against the company which could serve as the basis of an action against any person, and of course if it could not serve as a basis for an action it could not serve as a ground of defense. See—

Adler vs. Fenton, 24 Howard, 407, 410.
Findley vs. McAllister, 113 U. S. 114.
Savile vs. Roberts, 1 Ld. Raymond, 374.
Cotterell vs. Jones, 11 C. B. 713.
Shaple vs. Page, 12 Vt. 519, 533–4.
Easton vs. Patracy, 1 Dev. and Bat. 44.
Kimball vs. Herman, 34 Md. 407.
Loverty vs. Van Arsdale, 65 Penn. St. 507.
Parke vs. Huntington, 2 Gray, 124, 127–8.
Herron vs. Hughes, 25 Cal. 556.
McHenry vs. Sneer, 56 Iowa, 649.
Page vs. Parker, 40 N. H. 47, and 43 N. H. 363.
Maxwell L. G. Case, 121 U. S. 380, seven lines at bottom of page.
Robinson vs. Parks, 24 Atlantic, 411; s. c., 76 Md. 118.
Keller vs. Johnson, 11 Ind. 337.

But whether we are right in that respect or not is practically immaterial because the general allegations about fraud and conspiracy in that answer were limited to the specific fraud charged, that is, to the presentation of a dead body other than that of Hillmon, claiming it was his dead body—and amounted to nothing further than as they were so limited and referred to the specific fraud charged, which, in substance, was that the dead body claimed to be that of Hillmon was not his corpse.

Hazard vs. Griswold, 21 Fed. 178, 179, 180, and cases there cited.
U. S. vs. Atherton, 102 U. S. 372.
Quimby vs. Conlon, 104 U. S. 426.

Allegations of fraud and illegality without a statement of the facts constituting the same, are mere legal conclusions and of no force in a pleading. No issue is presented by such averments and no proof is admissible thereunder

The State of Kansas *ex rel* vs. Williams, 39 Kansas, 520, and cases there cited.

And see the cases of—

Paving Co. vs. Botsford, 56 Kansas, 541.
Gleason vs. Wilson, 48 Kansas, 500, 502.
K. P. & W. Rld. Co. vs. Quinn, 45 Kansas, 478.
Amber vs. Choteau, 107 U. S. 591 (near end of opinion), to the same effect.

And these Kansas cases show the rule to be that in Kansas Courts to the effect that there could not have been any evidence given under the said second ground of defense further than as to whether the dead body herein mentioned was that of Hillmon or not. (In effect the second ground of defense was a mere denial of the death of Hillmon.)

And that general allegations of fraud will be limited to the particulars stated, see Knox Co. vs. Harshman, 133 U. S. 155.

In view of the authorities above cited we submit it is clear that there is not in that answer any defense stated in relation to the matter of the clause in the policy shown at Record page 6, referred to on page 9 of said petition for *certiorari*, nor any pretense that Sallie E. Hillmon, the plaintiff in the suit in the trial Court, was party to or had knowledge of any pretended fraud or conspiracy.

The petitioner did not, in its answer, refer to or set up the clause in the policy mentioned on page 9 of said petition, as a defense to the action, or other-

wise allege any facts which, even if true, would have avoided the policy, as it is in the ten cases above cited shown it should have plead any such defense before it could have proved the same, and therefore we claim that the 3d and 4th subdivisions of the petition and any brief, argument or cases that may be made or cited in support of either thereof, are not pertinent to the case tried on the pleadings filed by the parties therein.

It was not in said answer alleged that defendant in error was a party to any conspiracy. (Record, 18.) And in the opening statement to the jury it was not, by plaintiff in error, claimed she was party thereto. (Record, 138.) At the trial plaintiff in error conceded it had not alleged she was, by asking leave to amend so as to allege she was, so as to introduce a new issue into a case long pending. (Record, 1619.)

The opening statement at Record 138, is, we submit, conclusive against plaintiff in error that it did not claim that defendant in error was party to any fraud or conspiracy.

Lindley vs. R. R Co., 47 Kansas, 432.
Oscanyan vs. Arms Co., 103 U. S. 261.

From this it follows that there was no allegation in the answer that would or could render the policy void or sustain any claim that the plaintiff in the trial Court was party to any fraud whatever.

If the insurance company had wished to have attempted to prove that the policy was obtained by such fraud as would render it void, it should have alleged facts in its answer which if true would have shown the policy void; failing to do so, we submit that it was not competent for it at the last trial to first attempt to make such question.

And further, the insurance company in the in-

struction No. 1, Record 1904, and No. 28, 1909, among other things requested the Court to instruct the jury to the effect that the real question in the case was whether or not John W. Hillmon died at Barber County, Kansas, on the 17th day of March, 1879, and was brought to Lawrence in April, 1879, that is, whether the dead body aforesaid was that of John W. Hillmon or not. And the Court being so requested in substance charged the jury among other things to that effect, as shown in the record at bottom of page 1917, top of page 1918, and on page 1919, and on page 1921. And after having requested the Court so to charge, the petitioner cannot now be heard to claim that the Court erred in that respect by so charging.

Walton vs. Chicago, St. P., M. & O. Ry. Co., 56 Fed. 1006, 1008, and cases therein cited.
Badget vs. Johnson-Fife Hat Co., 85 Fed. 408.

The evidence showed that the premium in said policy mentioned was paid. (Record, 145, 151, 152, 153, 752, 1505, 1506 and 1496.)

In the reply set forth at pages 20 to 22 of the record it was alleged that there was no consideration for the release plead in the third ground of defense, and that it was obtained by fraud, stating the facts.

And the evidence showing there was not any consideration for that release (Record, 773, 830, 831), and that there was not to be any (Record 580, 581), was so clear, full and uncontradicted that it was therefore the duty of the Court to instruct accordingly.

Marshall vs. Hubbard, 117 U. S. 416, 419.

And we refer to that matter of third ground of defense, release and reply, and evidence relating thereto and the matter of the premium being paid, and the admission shown on Record 201, that due

proofs of death had been made, to show that there was no controverted question left in the case at the trial except the single one as to whether the aforesaid dead body was that of John W. Hillmon or not. That was the single and only undisputed question left to be tried on the pleadings, and petitioner by requesting the Court to charge on that matter as shown in said instructions No. 1 and No. 28 (Record, 1904 and 1909), made it evident it so understood the case. And from all this we see it was proper for the Court to instruct the jury accordingly, and that the rule of law announced by the Court in that respect was correct.

And by instructing, as shown at said pages (Record, 1917, 1918, 1919), and 1921, to the effect that it was incumbent upon the plaintiff in the trial Court to show by a preponderance of the evidence that said dead body was that of John W. Hillmon, the Court not only followed the idea so claimed by petitioner as to what was material matter in issue, but correctly instructed on the issue presented by the pleadings left for determination by the jury.

And we submit there is not in the record anything, either pleading, evidence or instruction, on or because of which to raise or consider the question as to whether an insurance company can plead and prove fraud in obtaining a policy to defeat a recovery thereon, or what would constitute such fraud, and that, therefore, not only the last paragraph on page 12 of said petition, but also the other parts of said 3d subdivision of the petition, is not relevant to this case, and are without requisite foundation in either pleading or evidence.

And we submit that the same objections are good against the next or 4th subdivision of said petition set forth at pages 13 to 16 thereof.

To raise such questions as made by the 3d and 4th subdivisions of the petition or to render applicable any claim, argument, cases or brief in support thereof, we submit the petitioner should, when it filed its answer, have plead facts therein, showing it relied on the clause in the policy mentioned at page 9 of its petition, and such facts as would be necessary to make a defense thereunder—not having done so, it is now claiming and arguing with reference to questions not made by the pleadings—merely because it in effect alleged fraud only in relation to a certain dead body, whereby it merely claimed Hillmon was alive and not dead, and that the dead body of another was shown and claimed to be his, which was not an attack on the policy or its validity at all, but practically conceded the policy to be good and valid, and only raised a question as to whether Hillmon was dead or not; and even if such question affected the validity of the policy, the facts plead only went to the question of, and as to whether a certain dead body was that of Hillmon or not, which question was fully and duly submitted to the jury and the jury were instructed to find for the defendant insurance companies if said dead body was not that of Hillmon, so that all the facts stated in the answer to show fraud was fully and duly submitted to the jury. The general allegations of fraud and conspiracy made in the answer, as shown by cases above cited, did not entitle the petitioner to make proof of facts further than as to whether said dead body was that of Hillmon or not, as to which question the special facts stated were limited.

IV.

EXCLUSION OF CONSPIRACY EVIDENCE.

(Petition, page 13, etc.)

We submit that the testimony offered and excluded, which is referred to under this subdivision of the petition, was properly ruled out, because it consisted of hearsay and conclusions and did not come within the rule that declarations of alleged co-conspirators in furtherance of a conspiracy are admissible. We submit that a mere glance at the testimony ruled out is sufficient to show that it was inadmissible for any purpose, in fact, that it is not evidence at all, but mere rumor and hearsay. As has been shown, it was not alleged that the respondent was a conspirator, but petitioner attempted to introduce against her the declarations of third persons to prove that such third person and other persons were co-conspirators. The declarations of co-conspirators, to be admissible against others than the ones making them, must of course be made in furtherance of and not in frustration of the common object, and must be made during the existence of and in the prosecution of the common purpose.

The existence of the conspiracy cannot be shown by the admissions or declarations of one co-conspirator, except in so far as the admissions of each conspirator may be introduced to prove the conspiracy as to him when he is a party to the litigation. Even if *prima facie* evidence of a conspiracy had been first introduced, it is difficult to see how anything in the alleged conversations between Levi Baldwin, Crew, Dr. Phillips, Blythe and Carr, can be characterized as in furtherance of a conspiracy. If such declarations would not be competent evidence against one alleged to be a co-conspirator, for stronger reasons such declarations

would not be competent against a party not charged to be a member of such conspiracy. The rule against such declarations seems to be well stated in the case of State vs. Johnson, 40 Kans. 268, as follows:

"To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common criminal design. Mere admissions or narrations of what has taken place which have no tendency to promote a common criminal intent, are inadmissible against any one but him who made it, and when the conspiracy has ended or the crime involving the conspiracy has been consummated, the admissions of one in the absence of the other conspirators, that he and others participated in the crime, is a mere narrative of a past occurrence, and can effect only the one who makes it."

We submit that the Court did not, by giving any instruction which it gave, decide that there was sufficient evidence to prove a *prima facie* conspiracy against any one, but permitted the jury to consider any evidence on that subject so far as it would help to determine the question of identity, thus giving the petitioner the benefit of every fact that it could prove by competent evidence tending or bearing in the remotest degree upon the question of the probability of the body produced at Lawrence not being that of the insured.

And surely it was not competent to prove by conversation between Baldwin and Crew that Baldwin had previously paid part of the premiums; that would be narrative of past transactions.

40 Kansas, 268.

And also that it was not competent to prove by anything he said that he was or had been agent of respondent. Agency cannot be thus proven.

Donaldson vs. Everhart, 50 Kan. 718, 724.
Railway Co. vs. Kinman, 49 Kan. 631.

And, of course, it was not competent to prove by oral evidence that Baldwin had made such notes, mortgages or other papers as mentioned by Crew in his deposition.

Petitioner had full opportunity to cross-examine Baldwin as a witness, as shown by the record, 684 to 719; it was competent to have asked him by way of effort to impeach him as to anything he might have said to either Crew, Dr. Phillips, Blythe or Carr; and then, if he had denied, etc., plaintiff in error could have called Crew, Dr. Phillips, Blythe and Carr to prove he had said so and so, but petitioner did not choose so to do, or to allege that defendant was a co-conspirator when it filed its answer; (but if they had done so, such evidence would have gone to his credibility, and would not have been affirmative evidence against respondent of the truth of such statements.)

Further, in relation to the claim of petitioner, to the effect that the Court *held* there was a *prima facie* case of conspiracy shown—as against respondent—is rebutted by what the Court charged the jury in that part of its instructions contained in the paragraph, or subdivision thereof, partly on each of pages 1920–1921 of the record.

Petitioner and its associate insurance companies having alleged conspiracy of Hillmon, Brown and Baldwin, the trial Court (erroneously, however, we claim) permitted in evidence every act and saying of John W. Hillmon and of either John H. Brown or Levi Baldwin, done or said in the presence of John W. Hillmon, thus giving the insurance companies the widest latitude on the conspiracy question it could, giving full force to any such claim made, because Hillmon had procured the insurance; but there was no competent evidence that Baldwin paid for or procured any

of the insurance, or helped so to do. And, also, admitted such other offered evidence as it deemed competent; merely stopped at such evidence as it thought not competent under the above mentioned issues, or because of some rule of law requiring exclusion.

And further, there is not any evidence in the case that would be competent as against John W. Hillmon on any issue in any imaginable case that he was party to any such, as alleged, conspiracy. Surely, unless there was evidence competent as against Hillmon of transactions occurring before the killing on 17th March, 1879, sufficient to prove he was a conspirator as alleged, we submit the whole alleged conspiracy matter is immaterial.

V.

BROWN AFFIDAVIT.

(Petition, page 16, etc.)

John W. Hillmon, the insured, came to his death by the accidental discharge of a gun in the hands of John H. Brown. Immediately after the accident an inquest was held at which Brown testified as a witness, detailing the circumstances of the accidental killing of Hillmon; afterwards, Brown again testified at an inquest held at Lawrence, fully identifying Hillmon's body, and explaining the manner of his death. He then made and swore to the usual proofs of death that were submitted to the insurance companies by Mrs. Hillmon, the beneficiary in the policies, for the purpose of collecting them.

Almost immediately after the inquest at Lawrence the insurance companies employed a lawyer, one Buchan, who, by the most extraordinary means pursued Brown until he obtained from him an affidavit

or a statement declaring that the body was not that of Hillmon, but of one Burgess, whom he and Hillmon had lured away and killed. This affidavit is the one referred to in the fifth point of the petition for writ of *certiorari* as the "Brown Affidavit." Some of the methods by which Buchan obtained this statement, briefly stated, are as follows:

At the instance of the insurance companies Buchan went to Brown and informed him that he was his lawyer, employed for that purpose by his father; that the companies were talking about having him arrested for murder, and that he, as his lawyer, was going to keep him from having any trouble; he tried first to get Brown to make a statement at variance with his evidence, but Brown refused. Buchan then said that he couldn't help him unless Brown gave to him some sort of a paper that would show at least that Brown had confidence in him as his lawyer. He said to him in substance: "If you don't want to make any statement, let me dictate a little note, which you can write, which means nothing, but which will show to the companies that I, at least, have influence with you." And finally, at Buchan's dictation, Brown wrote a short note addressed to Mrs. Hillmon, asking where John Hillmon was. Of course this letter was never delivered to Mrs. Hillmon, but was kept in Buchan's possession until he finally turned it over to the insurance lawyers.

At this time Buchan was the agent of the insurance companies, but pretended to Brown that he was acting as his attorney. He urged Brown, who was then living in Missouri, not to come back, but to go farther away, and gave him $15.00 with a view of causing him to stay away. (Record, 474–550.) Some time after this, Buchan made another visit to Brown, but without results. A third visit was made to Brown,

Buchan being driven from Wyandotte, Kansas, to the place where Brown was living in Missouri by a deputy sheriff, whose star of authority was conspicuously displayed.

Upon arriving at Brown's house, Buchan again began upon him to make a statement contradicting his testimony, and told him that he was his lawyer and friend, and would advise him to do nothing to his detriment; that his father had employed him to help him, but that he would be unable to do it unless he did just what he was asked to do. He urged him to make a statement to the effect that the body was another's than Hillmon's, and thus satisfy the companies, and stated that if he didn't do so he couldn't keep the companies from acting any longer, and that the deputy sheriff who was with him would then and there arrest him and take him back to Kansas. Of course the Kansas sheriff had no authority with or without a warrant in Missouri, but this fact was unknown to Brown, and his ignorance in that particular was perfectly known to Buchan; and continuing, he threatened that the companies would prosecute him for murder, and in substance said "that while we know that you are innocent, yet against all their money you will be unable to prove yourself innocent, and even if you did. you will have to lay a long time in jail." Brown still refused, and finally Buchan got hold of his brother Reuben and enlisted him, and together they urged Brown to make the statement, Reuben saying to his brother, "You have known Buchan for a long time, and know him to be a friend of the family and a lawyer; and he certainly wouldn't ask you to do what wasn't right and best." And finally Brown succumbed and signed the paper prepared by Buchan, and which is known as the "Brown Affidavit." The conditions under which it was finally

made, however, were that Buchan should in nowise use it to Brown's detriment, and after using it should return it, so that it could be destroyed.

Having gotten this paper from his client, prepared by himself, making a statement absolutely false, but which, if true, proved his client to be guilty of a cold-blooded murder—a paper which, if true, both his promises to Brown and his duty to his client commanded him to keep secret—he hastened with it to the insurance lawyers and joined with one of them in preparing a certified copy thereof. He then had another interview with Brown, and in pursuance of the scheme previously arranged with the companies' attorneys and agents, he insisted on Brown going to Mrs. Hillmon, informing her of the fact that he had contradicted his testimony, and obtained for Buchan an interview with Mrs. Hillmon. In obedience to his lawyer's directions, Brown did go to Mrs. Hillmon, and said that he had made a statement contradicting his evidence, but would say no more to her than that the whole matter would be explained by Buchan if she would only see him at Leavenworth. Filled with a natural curiosity, Mrs. Hillmon went to Leavenworth, where she was met at the depot by Buchan and Brown, and was by them taken to the Planters House. Here a prolonged interview was had. Buchan explained to her that, as Brown's lawyer, he had compelled him to make this statement to avoid prosecution for murder. He explained to her the contents of the paper, and when she asked Brown how he dared make such a statement, Brown replied that he had to do it to protect himself, and that he would stick to it. Buchan then showed to her how, with the only witness who knew the actual facts against her, it was impossible for her to hope to win

her law suit against the insurance companies. (Record, 771.)

Mrs. Hillmon, at this time, while a married woman, was little more than a girl, only about twenty years of age, reared in the country, and without that knowledge of the world that comes to one with wider experience. More than that, on this occasion she was so sick that she was obliged to lie down during the day. Sick, inexperienced, believing that the abandonment of the truth by Brown meant the ruin of her cause, she finally yielded and signed the releases.

When actions were subsequently instituted upon the policies, these releases were pleaded as a defense to the actions, and it became necessary in order to defeat the releases to show the circumstances under which they were obtained, which could only be done by putting the jury in possession of the facts with reference to the use that was made of this false affidavit of Brown's. After the making of this affidavit, and the institution of the actions upon the policies by Mrs. Hillmon, she gave notice to the insurance companies and took the deposition of Brown. In this deposition he reiterated what he had testified to at the coroner's inquest, and described in detail the accidental killing of Hillmon. He was subjected to a most thorough and searching cross-examination by the attorneys for the insurance companies; he was confronted with the fact that he had made this affidavit, but utterly denied the truth of the same, and explained the manner in which it had been obtained from him. This deposition was introduced in evidence by the plaintiff, and the contents of the affidavit which was brought into and became a part of the deposition by the cross-examination, was in effect put before the jury. It is true the affidavit was read to the jury by the plaintiff,

but it was well understood to be the evidence of the defendant. The trial judge evidently so understood it, and in the excerpt from the general charge of the Court, which is set out on page 17 of the petition for *certiorari*, the Court so treated it, saying:

"The deposition of John H. Brown was read to you *on behalf of the plaintiff.*

"*On behalf of the defendants*, evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you."

Any statement of the Court in this instruction, that this affidavit was evidence *on behalf of the defendants*, was not excepted to in any way by the counsel for the insurance companies. Clearly, if the counsel for the insurance companies understood or believed this characterization of the affidavit of John Brown, as evidence on behalf of defendants, to be erroneous and to have resulted from inadvertence or misapprehension of the judge, they should then and there have excepted and called attention to the error that the trial judge might have corrected it.

In any event, whether the affidavit of John H. Brown is to be treated as the evidence of the plaintiff or as the evidence of the defendant, we contend that the instruction of the Court correctly states the law applicable to this case, and, especially in the absence of any exception by the insurance companies, they ought not to be heard to complain of the same.

In some form it was necessary that the contents of this affidavit should be made known to the jury to enable the plaintiff to show the manner and means by which the plaintiff was induced to execute the releases.

The claim that the plaintiff, in reading this affi-

davit, was understood by the insurance companies, the Court or the jury, to introduce the same as evidence of truth of the facts therein stated, is in conflict with the entire theory of the case. The exact reverse was true and was so understood by all concerned. It was contended at all times by the plaintiff that this affidavit was false; that the insurance companies had corrupted the plaintiff's witness; that by obtaining this false affidavit and other means, the plaintiff had been fraudulently induced to sign the releases without any consideration. As said by Judge Thayer in the opinion (petition for writ of *certiorari*, page 43) of the Court of Appeals:

"There was evidence in the case which tended to show that the *ex-parte* statement had been obtained from Brown on September 4, 1879, by much persuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action on the policies in suit without consideration; on the other hand, Brown's deposition had been taken at a later date in the usual way, and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement, and asserted that the statements therein contained, to the effect that Hillmon was not dead and that another man had been killed, were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide in view of the circumstances tending to show how the *ex-parte* statement had been obtained and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the plaintiff, not as creditable testimony, but merely for the purpose of discrediting it, whether they would treat it with '*like effect*,' or consider it as entitled to the same credence as Brown's deposition."

In the dissenting opinion of Judge Sanborn (petition for *certiorari*, page 49), it is said:

"Forms and rules are prescribed by statutes and decisions for the taking and production of testimony which give the opposing party the opportunity and right of cross-examination, and the security of an oath. But this opportunity, this right and this security may be waived by stipulation for, consent to, or silent acquiescence in the introduction of testimony, and when this is done the statement admitted becomes as competent evidence of the facts it details as though every formality had been complied with. Much more does the offer and introduction of this evidence have such effect, for he who introduces testimony is, ordinarily, in some sense sponsor for its character. The plaintiff introduced this affidavit in evidence, and the defendants consented to its admission. The plaintiff was thereby estopped from claiming that it was not evidence of the facts it recited, because the defendant relied, and had the right to rely, upon it for that purpose, and because the plaintiff having introduced it, was not permitted to take the inconsistent position that it was not competent evidence of the facts it related."

Now we respectfully submit from an examination of the circumstances under which this affidavit was read to the jury, whether it would not be a most violent and unreasonable construction of the conduct of the parties, their counsel and the trial judge, to say that the plaintiff intended to introduce this affidavit as evidence of the truth of its contents, or to say that the defendant had reason to suppose or believe that the plaintiff so intended it or had any right to "rely" or did "rely" upon any such supposition, and whether the trial Court in view of its instructions and all of its rulings, believed or supposed at the time said affidavit was read that the plaintiff intended to introduce it for any such purpose, or that the defendants under-

stood that the plaintiff so introduced it, or had any right to rely upon any such supposition.

The insurance companies at all times understood, and the trial judge at all times understood, that the plaintiff claimed that this affidavit was wholly and absolutely false and corrupt and was obtained by fraud for the purpose of using it to extort the releases from Mrs. Hillmon. To say now that the insurance companies relied upon the belief that the plaintiff introduced the affidavit for the purpose of proving the truth of its contents or to prove the contents thereof to be true, we submit is absurd, and would give the insurance companies the advantage of a mere technicality in that when this affidavit was read the plaintiff did not expressly state that it was introduced for a limited purpose, although the defendant and the Court both so understood it.

The deposition of Brown commences at page 342 of the record, and therein John H. Brown testified to the effect that he accidentally killed Hillmon in Barber County, in March, 1879, and further testifies to the effect that said affidavit was obtained from him by duress and because of undue influence of a person acting as his attorney, really the agent of the insurance companies, by which undue influence he was induced to sign a false statement and swear to it before a notary public, such agent and pretended attorney representing to him to the effect (as stated in that part of the instruction of the Court quoted at page 18 of the petition for *certiorari*) among other things, that the affidavit was unlawful, could not be used against him, in substance that it was not prejury to so swear to such facts, and using other influences and arguments to obtain the affidavit, as shown by that deposition.

Now as a matter of law, it is clear that Brown

could not be prosecuted for perjury for making that affidavit, it being utterly false, because it was not made in any legal proceeding or in any proceeding in which a false statement would subject a party to the pains and penalties of perjury—and the whole case was tried on the theory and claim on the part of the plaintiff in the trial Court, that that affidavit was false and untrue, and that because thereof influence had been obtained by Buchan over Brown, because of which he secured Brown's assistance in getting her to sign the releases plead, and that it was a part of the matters because of which she had been induced to sign the releases. Surely a party may prove all the frauds and fraudulent practices, means and statements used in and against a party and others by means of which a wrong is done, and that so doing would not admit the truth of the false statements used to obtain a release or other paper from them. If this is not so, how can any fraud, fraudulent allegation or false statement be proven or shown in any case? A forged deed is introduced in evidence to show that it was a forgery; false and fraudulent pretenses are proven to show what operated to induce a person to do an act of which complaint is made. Plaintiff by abundant evidence proved that the affidavit was false.

The affidavit states that the person killed by Hillmon and Brown was one Burgess, yet the evidence is clear that Burgess was not killed, but was afterwards seen alive. (Record, 903–6–8.) If the instruction asked, that the affidavit is to be given like effect as the deposition, was correct, then the jury were authorized to believe that Hillmon and Brown murdered Burgess, although the uncontradicted testimony is that Burgess was not murdered at all, and this by the testimony of one of the insurance companies' witnesses. (Record, 903–6–8.)

Buchan knew the affidavit to be false. (Record, 472–475.)

But if the *ex-parte* affidavit of John H. Brown, in the language of said 44th special instruction, is to be treated "as evidence of the facts therein stated under oath, against the plaintiff," still said 44th special instruction is vicious and misleading and invades the province of the jury, in this that said *ex-parte* affidavit of Brown's is wholly and irreconcilably in conflict with the deposition of said Brown upon the same subject, and the instruction which required the jury to treat said affidavit "with like effect as the deposition," eliminates and withdraws from the consideration of the jury all of the numerous tests, including cross-examination arising from the evidence, and proper to be applied by the jury in determining which of said two items of irreconcilable evidence it would believe.

We submit that it was the province of the jury alone, having both the affidavit and the deposition before them, to utterly discredit both and give neither any weight at all either for or against the plaintiff or defendants, or they were at liberty to believe that the *ex-parte* affidavit was obtained under duress and by means described in the deposition and in the other testimony, and that the influences and duress having been removed that Brown in giving his deposition had finally told the truth. The jury could not believe both the *ex-parte* affidavit and the deposition because they cannot be reconciled, and if the affidavit was to be treated as evidence as well as the deposition, it was the exclusive province of the jury to say what weight should be given to either or both of these items of evidence, and it was not proper for the Court to say that the affidavit should be treated "with like effect as the deposition."

It is complained under this head that Judge Thayer incidentally remarked, in the opinion in the Court of Appeals, that no exception had been taken to the charge of the Court upon this subject, and that, therefore, the Court of Appeals was relieved of the necessity of deciding whether there was anything misleading in the excerpt referred to. The case of Long Bell Lumber Company v. Stump, 86 Fed. 574, is referred to as holding that no exception to the charge is necessary where a special instruction asked embodying the same principle has been refused and excepted to. We respectfully submit, however, that the general charge of the Court upon this subject is very far from being a mere denial of the proposition contained in said 44th special instruction asked, and that under no circumstances could said 44th special instruction have been given without the clearest invasion of the province of the jury. In this connection we also submit that no proper exception was ever taken to the refusal to give said 44th special instruction. After the Court had charged the jury in this case, one of the counsel for the insurance companies made the following remarks: "We except to what you say on the subject of conspiracy." "We except to the refusal to give the instructions which we requested." (Record, 1926.)

This was all the exception that was taken either to the charge given or the special instructions requested and refused, as clearly appears upon page 1926 of the record. The general charge of the Court contained several distinct propositions upon the subject of conspiracy, some of which are not now complained of and certainly were unexceptional. The special instructions requested consisted of a series of forty-eight different propositions, some of which were inconsistent with others. It is true that when the

bill of exceptions was signed some months later, a separate exception was inserted after each one of the special instructions, but the record, at page 1926, clearly shows what was said by counsel at the close of the charge of the Court, and contains the following recital, namely: "This (referring to the above quoted words) was all that was said by counsel upon the subject of exceptions to the instructions requested and charges given."

Now we submit that no such general exception to the entire series of forty-eight special instructions and the entire charge of the Court upon the subject of conspiracy was of any validity, and that it was beyond the power of the judge who signed the bill of exceptions to enlarge the same four months after the trial was had.

Rogers vs. The Marshal, 1 Wall, 644.
Harvey vs. Tyler, 2 Wall, 328.
Block vs. Darling, 140 U. S. 238.
Bogk vs. Gassert, 149 U. S. 17.
Newport M. & M. V. Co. vs. Pace, 158 U. S. 36.
Railway Company vs. Callaghan, 161 U. S. 91.
Halloway vs. Dunham, 170 U. S. 615.

There was abundant evidence, independent of any of the testimony of Brown, that the dead body mentioned was that of Hillmon. The case did not at all necessarily turn on his testimony, and we submit that with reference to anything said or done by John H. Brown, that his affidavit so far as the case related to the identification of the dead body was only matter of impeachment as to whether he was a credible witness on the question of identity of the dead body, and was not evidence and could not be made evidence for any other purpose in relation to the matter as to who the dead man was, whether Hillmon or another, no matter which party read it.

FURTHER AS TO THE BROWN AFFIDAVIT AND ALSO AS TO THE RELEASE PLEADED.

If in any brief or argument that has been or may be filed herein for the petitioner for a writ of *certiorari* reference shall be made to any of the testimony of William J. Buchan, relating to either the affidavit of Brown or the release, then for this Court to understand how the questions and matters relating to that affidavit and the release respectively arose and appeared and were presented at the trial to the trial Court, it will be necessary for this Court to read, among other, the following parts of the record, to-wit: The deposition of John H. Brown, commencing at page 342 (except the parts not read, as shown at pages 339, 340, 341), particularly pages 436, 437, 457, 458, 459, 472 to 477, 482 to 484, 493 to 519.

And the testimony of Reuben Brown, commencing at page 544.

And testimony of Sallie E. Smith (formerly Sallie E. Hillmon, the plaintiff), at pages 766 to 779, 795, 796, 816 to 830, 1892, 1893, 1898 to 1900.

And testimony of James W. Green, at pages 575 to 597, 1901 to 1904.

And testimony of William J. Buchan, a witness called by the insurance companies, and on and really as part of his cross-examination that affidavit was read after he had testified on examination in chief for the insurance companies, as shown at pages 1227 to 1250. Also to read page 1269 where he shows he took pen, ink and paper with him to write the affidavit, after he had been employed and urged to procure the same for the insurance companies, as shown at pages 1246, 1247, 1250 to 1269.

At pages 1247, 1248, 1250, 1251, 1288, it is shown

Buchan was paid $500.00 and expenses by the insurance companies for what he did. (See also pages 1277 to 1288.)

The evidence of Buchan conflicts with that of Reuben and John H. Brown and Mrs. Smith. But from his and their testimony it is, we submit, clear beyond question that Buchan was in the employ of and acted in the matter for the insurance companies, including the petitioner from some time in April, 1879 (Record, 1250, 1251), until and after he obtained the releases, employed to ruin the character of John H. Brown for truth and veracity by procuring that affidavit, and also to obtain the releases; we submit that by any reading of said affidavit on such cross-examination, which of course was done as part of the cross-examination of William J. Buchan, not only for the purpose of showing all the facts and circumstances relating to that affidavit and as to how the releases were obtained, concerning both of which, so as to make such cross-examination proper, he had testified for and as a witness of the insurance companies on his examination in chief, but also to affect and destroy the credibility of William J. Buchan as a witness because of his obtaining such affidavit written by himself (Record, 1284), and making such use as he did thereof, on his own showing, and more so if he obtained it as shown by Reuben and John H. Brown, particularly so as to the matters in which he conflicted with any other witness in relation thereto. By procuring and making such use of that affidavit and the letter by him obtained from Brown, shown in evidence, he put John H. Brown in serious peril and great danger of prosecution for murder. For Buchan to have done that when acting as attorney for Brown, as shown by the cited evidence, Buchan, of course, did that which, as such attorney, he should not have

done no matter what the facts were in relation to the killing. But no matter what he should have done, his credibility was affected by his procuring and making such use as he did of that letter and affidavit.

And we submit that by such reading of the affidavit on such cross-examination, the respondent did not either become responsible therefor, or represent it stated any truth. And by so causing the affidavit to be so procured and used, surely the insurance companies, including the petitioner, became responsible therefor as their paper, statement or affidavit prepared by Buchan and signed by Brown as their agents and representatives to injure the respondent, and of course they are not entitled to have respondent held to have represented the affidavit was true because of so reading it under the circumstances shown by the record.

And further, the testimony of William J. Buchan being irreconcilably in conflict with that of Reuben and John H. Brown in relation to the manner in which that affidavit was obtained, and as to whose the statements therein made really were, that is, as to whether the affidavit was, as we claim, the invention of Buchan as the representative of the insurance companies and therefore the act and invention of the petitioner, or was the invention of John H. Brown, that was, of course, an important matter for consideration by the jury. And it was also material whether the statements as to what John H. Brown told Buchan, as testified to by Buchan in his examination in chief, was true, or whether the testimony of John H. Brown and Reuben Brown on the same subject were true—as to which told the truth in relation to those matters was exclusively the province of the jury to determine—the Court would have invaded that province if it had given the 44th instruction

asked, and therefore we submit it was properly refused as well as for other reasons.

VI.

IMPEACHMENT OF THE RELEASE.

(Petition, page 22, etc.)

The insurance companies respectively set up in their answers certain written releases alleged to have been executed by Mrs. Hillmon on Sept. 15th, 1879. In the replies in this case it was alleged that the release was obtained by fraud and without consideration. (Record 20-22.) The insurance company did not demur to or in any other manner question the right of the plaintiff to so attack the release in the action at law, and no objection on the trial was made to the introduction of evidence in support of the replication on the ground that the release could not thus be proved in any action at law, or that a suit in equity was necessary to set it aside. It is, however, after verdict on a proceeding in error, for the first time claimed by the petitioner that the release is to be treated as an instrument under seal, and that it was not competent for a court of law to deal with it, but that recourse should have been had to equity. In answer to this contention, we claim that if such a question could be raised at all, it must have been done by demurrer to the reply or by some seasonable appropriate objection, and cannot be done after verdict and after twenty years of litigation, and after a suit in equity to set aside and vacate the release would be barred by limitation. In the case of Union Pacific Ry. Co. vs. Harris, 63 Fed. 800, a similar question was raised, and the Court of Appeals, overruling on the point, said:

"The chief contention of the plaintiff in error is that the issues arising on the replication to the defendant's supplemental answer should not have been submitted to the jury. It is said the plaintiff cannot in this action avoid the release for fraud, or show that he was mentally incapable of entering into a valid contract at the time he executed it; that the release can only be avoided upon these grounds by a suit in equity. This question was not raised in the lower Court. The defendant did not demur to either of the causes of reply, or move to strike the same out of the reply, but acquiesced in the issues presented, and went to trial thereon, thus conceding that the court could try the issues presented. These issues were tried to the jury without objection, and it is now too late to object for the first time in the Appellate Court to that mode of trial. The objection that an action should have been brought at law instead of in equity, or *vice versa*, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. (Hollins vs. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Insley vs. U. S., 150 U. S. 512, 14 Sup. Ct. 158; Preteca vs Land Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler vs. Savage, 143 U. S. 79, 12 Sup. Ct. 340; Reynes vs. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486.) If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the Appellate Court. The general principle is now well established that an appellate court will not entertain an objection to the form of the action, when the objection was not interposed in apt time in the trial Court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one, and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial Court will be deemed waived. (Elliott, App. Proc. Secs. 658, 679, 690, and citations; Brown v. Lawler, 21 Minn 327; Brown v. Nagel, id. 415; Weaver v. Kintzley, 58 Iowa, 191, 12 N. W. 262; Town of Mentz v. Cook, 108 N. Y. 504,

15 N. E. 541; Buffalo Stone & Cement Co v. Delaware, L. & W. R. Co. (N. Y. App.), 29 N. E. 121; Sexton v. Pike, 13 Ark. 193; Creely v. Brick Co. 103 Mass. 514.) In what is here said, we are not to be understood as intimating that, if the defendant had interposed a timely objection to the jurisdiction of the lower Court to try the issues presented by the replication, the objection would have been of any avail."

The decisions of this Court, cited by the Court of Appeals in the above case, fully sustain the principle of the decision and are conclusive upon the point that such objection must be taken *in limine* or it will be waived.

But furthermore there was no exception taken in the trial Court that presents any such question for review; to some of the testimony offered by the plaintiff in support of the reply, the objection that the offered testimony was "incompetent, irrelevant and immaterial" was made. No other objection was offered. The testimony to the effect that the release was obtained without consideration was uncontradicted, and free from conflict, and upon the close of the case the Court eliminated the release as such, wholly from consideration by the jury, by instructing as follows:

"As to the releases executed by the plaintiff and set up in the answers of the defendants. While under the law the execution of the written instruments of releases by the plaintiff imports a consideration therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration and therefore they are inoperative as releases, and do not constitute a valid defense, and the plaintiff did not, by any of them, release or discharge any cause of action or any other right that she may have had, etc." (Record, 1921–1922.)

The insurance companies at the trial acquiesced in this action of the Court by taking no exception of any kind to this instruction. The only exception taken at any time by the insurance companies or either thereof to the general instructions of the Court, was in the following language:

"We except to what you say on the subject of conspiracy." (Record, page 1926.)

That such an exception was not sufficient to raise any question as to the exclusion by the Court of the release to the petitioner from consideration by the jury, as such release is, we submit, too plain to require further observation. The Court did not exclude the releases so far as they might operate against the plaintiff in determining other questions.

And further, for additional reasons, independent of the above, we claim it was competent to defeat the releases in the manner done, because at common law it would have been necessary for the insurance company to have pleaded and proved a consideration therefor.

1 Chitty on Pl. (16 Am. Ed.) 300, (382, bottom paging.)
4 Enc. Pl. & Pr. 928, 929.

This, because the release pleaded by the respective companies were not any of them under seal. (As to the one pleaded by the petitioner, see page 19 of the record and page 22 of the petition.)

Sections 6, 7 and 8 of the 21st Chapter of the General Statutes of Kansas, set forth at pages 23 and 24 of said petition, taken together and considered as applicable to this case, merely change the burden of allegation and proof with reference to the matter of consideration of the release.

The statute did not affect the common law in relation to matters of fraud. The statute has no bearing upon the question as to the manner of proving or pleading fraud in the obtaining of a written instrument.

That the want of consideration and fraud, alleged in said reply, could be plead against said release without any previous recision of the release, see—

Railway Co. vs. Goodholm, 61 Kansas, 758, 761 to 766, the pleadings in which case are described at id. 759.

Railroad Company vs. Doyle, 18 Kansas, 59, 62.

Union Pacific Ry. Co vs. Harris, 63 Fed. 800 to 804.

Silk vs. M. R. L. F. A., 28 Atlantic, 445.

Berry vs. A. C. Ins. Co., 39 N. E. 254; s. c., 132 N. Y. 49.

Platt vs. Continental Ins. Co., 19 Atlantic, 637, 638; s. c., 62 Vt. 166.

And see also the following additional cases which, with the six last above named cases, are also cited in support of our contention that plaintiff in error took the release, subject and liable to be defeated, because of the fraud and want of consideration therefor stated in the reply.

Atlantic Cotton Mills vs. Indian Orchard Mills, 17 N. E. 496, 501; s. c., 147 Mass. 268.

De Souchet vs. Dutcher, 15 N. E. 460; s. c., 113 Ind. 249.

Crain vs. Hunter, 28 N. Y. 389.

Lawrence vs. Hand, 23 Miss. 103, 105.

Bower vs. Johnson, 10 S. and M. 169, 173.

V. S. M. Co. vs. Rheinschild, 25 Kansas, 537.

Fitzsimmons vs. Joslyn, 52 Am. Decs. 46; s. c., 21 Vt. 129.

Union Trust Co. vs. Phillips, 63 N. W. 903.

Albitz vs. M. & P. Ry. Co., 42 N. W. 394.
Michigan M. L. Ins. Co. vs. Naugle, 29 N. E. 393.
Fairchild vs. McMahan, 34 N. E. 779; s. c., 139 N. Y. 290.

Those three sections of the Kansas Statutes, as construed in the above cited cases in the 18th and 61st Kansas, merely have effect to change the burden of proof and render it necessary for the party desiring to defeat such an instrument for want of consideration, to plead the same; that is, the want of consideration, and on the person pleading rests the burden of proof to show the want of consideration.

By its second cause of reply respondent pleaded such want of consideration. (Record, 20, 21, 22.)

There is certain particular evidence especially applicable to and fully showing that there was not any consideration for the release set forth at record, pages 773, 830 and 831, and more showing that there was not to be, set forth at page 581.

The testimony referred to at page 23 of said petition (Record, 576, etc.), had application to the matter of the Brown affidavit before mentioned, and also to the attempt to be made to procure the releases, and was applicable to both the want of consideration and fraud pleaded to defeat the release. In this connection we refer also to pages 582 to 586 of the record.

It will be seen from the evidence at pages 576–578, that it was necessary for Munn, the agent of the insurance companies, to give Buchan the paper set forth at Record 580, signed by Munn in behalf of the companies to get Buchan to proceed in the matter of attempting to obtain the releases pleaded.

We do not suppose it is necessary to refer to more of the evidence on the subject of fraud or want of consideration, because we do not understand

the petitioner to be making any claim that the evidence was not sufficient to show as matter of law such failure of consideration for the release as would as a matter of law defeat it, within the rule relating to instructions laid down in the case of Marshall vs. Hubbard, 117 U. S. 416, 419.

If those three cited sections of the Kansas Statutes had not been enacted, respondent could, without question, have defeated the releases for want of consideration, as well as because of the fraud alleged, and have pleaded and proved the same in the Federal Courts as at common law. And those three sections, taken together, did not deprive respondent of any such right to so defeat any such release.

And we submit that the construction of those three sections claimed by the petitioner is directly contrary thereto and to the object thereof, and that those sections of the statute do not have effect to make the release a sealed instrument; to hold they do would be squarely in the face of and in opposition to the sixth section.

It is always competent at common law in the Federal Courts to plead want of consideration to bills of exchange, promissory notes, and all other written instruments, not under seal, irrespective of any statutes similar to the sections cited.

About noon of the 9th inst., after our brief, as before prepared, was in the hands of the printer, we received copies of the brief for petitioner too late to duly consider or prepare answer thereto and get our brief prepared, taken to Washington and filed on the 13th inst., but we make such answer to parts of what is on pages 39 and 35 thereof as follows:

With relation to the claim at page 39 of petitioner's brief to the effect that a statute of Kansas cannot confer upon the Courts of the United States power to

entertain equitable defenses in an action at law, we submit such claim is not applicable to *this case* nor are the authorities cited in support thereof, because as above stated, at common law the defense of no consideration and fraud could have been plead against the release set up in the answer, it not being under seal.

And the sections of the Kansas statute cited at pages 23 and 24 of the petition, particularly Section 8, surely in effect continued that rule of common law in force as to all courts and cases.

As to the release relied on the common law in relation to the want of consideration for such an instrument was not by the three sections cited or by any other law of Kansas in any manner affected, repealed or annulled. If those sections of law had not been enacted respondent could have plead the want of consideration and fraud thereto in an action at law in the Federal Court, (not only so, but petitioner would have in its plea of release been required to show a consideration therefor). As such would have been the situation if those sections had not been enacted, surely the enacting thereof by which, among other things, the common law rule of right to defend against such releases is expressly continued as shown by Section 8, by giving right to plead such defense. Any claim that the Kansas Statute has attempted to confer equitable jurisdiction in a law case upon Courts of the United States is not applicable to this case. But even if we are wrong in that respect, then as shown in the case above cited in 63 Federal, 800–803, and the cases therein cited, the respondent waived any objection to the want of consideration or fraud being plead and proved as a defense to the release by not demurring to the reply when filed in January, 1883 (Record, 22), before any trial.

Of course, because of the Section 7 cited, it was incumbent on the respondent to attack the release, which she successfully did by uncontradicted evidence; not only was want of consideration shown by the evidence introduced by herself, but the testimony of the insurance company in relation to the procuration of that release showed it was without consideration.

In relation to the claim made on page 35 of the petitioner's brief, to the effect that the plaintiff, the respondent, on the 15th of September, 1879, the day on which the release plead by petitioner was made (Record 19), went with the release herself to the office of her counsel, we submit that there is not any evidence whatever to show or indicate in any manner that she either had or showed or mentioned the releases to or at the office of her counsel there mentioned in September, 1879. Any claim that she so had the releases or any thereof there, is without any foundation whatever in the evidence; and there is not any evidence that respondent either ratified or confirmed the release to the petitioner, and the circumstances shown by evidence in her behalf under which she executed the same shows she did not execute the same upon full or any deliberation on her part.

In reference to what is so said at page 35 of said brief about the releases, we refer to the following testimony, to wit:

The exhibit 16, the release to the Mutual Life Insurance Company, and exhibit 17, the release to plaintiff in error, both dated at Leavenworth, on the 15th of September, 1879, and copied at record 585, and the exhibit 19, an order for the policies of same date, copied at record 596, which are the exhibits 16, 17 and 19 referred to at record 773, 823, as having

been signed by defendant in error without reading or knowing the contents thereof. And when she was sick. (Record, 771-2-3, 821) Signed because Buchan told her to. (Record, 772, 823.) At the Planters Hotel where and when only Buchan and respondent and perhaps Brown were present. (Record, 822.) After which signing, respondent testified they went to the office referred to at said page 82. (Record, 822 774.) But Buchan testified that the releases were signed *after they went to that* office. (Record, 1241, 1242.) But both of them show by their testimony that the releases were not shown or mentioned at that office or to Wheat (Record, 774, 822, 823, 1241, 1242.) And the same last referred to pages show there was not any such opportunity for her to say anything to Wheat about the releases, as one having either signed the releases or demanding the policies would avail themselves of; and what Buchan afterwards induced her to do in staying away from Lawrence (Record, 774 to 778) and elsewhere, proves Buchan intended to keep her from informing any of her attorneys of her having signed any release or of any intention to deliver the policies. It will be noticed that although when she demanded the policies, Wheat asked what it meant, she did not explain. For all of anything said at the office of Clough & Wheat, she might have intended to employ Buchan to prosecute her claim on the policies. Nothing was said to Wheat to the contrary, or to indicate she had or intended to abandon her claims on the policies. All they let him know was that she wanted Wheat to let her have the policies she had before (in May, 1879) delivered to him. And there is not any evidence tending to show that anything was said at that office or to Wheat or any counsel of respondent at that time or until months

afterwards, about any release or order for the policies. From all which and the other evidence elsewhere herein cited, it is evident that the statements in said brief at said page 35 about *full deliberation*, respondent going with them (*meaning the releases*) *herself to the office of her counsel*, etc., is not only not sustained by evidence, but is contrary to the actual facts.

The record, referred to at page 35 of said brief, relates to the execution of a release, marked exhibit 24, to another company than the petitioner, and was executed ten days after the release in controversy in this case. It was a second release to the New York Life, and was executed while Mrs. Hillmon was still under the influence of Buchan, and was made at Wyandotte, and has no bearing upon this case, the New York Life Company having settled. And that also was shown to be without consideration (Record, 830, 831), yet that is not material in this case.

VII.

LAPSE OF TIME AS EVIDENCE.

(Petition, page 26, etc.)

At the time of the trial, more than twenty years had elapsed since the production at Lawrence of the dead body identified by his wife and many other witnesses as that of Hillmon. During all that time, notwithstanding the claim made by the insurance companies that he was still living, and the extraordinary efforts made by them to find him, the wide notoriety of his disappearance and of the litigation based upon his alleged death, Hillmon had never been seen or the slightest trace of him obtained. These facts

being before the jury the insurance companies requested the Court to instruct the jury that the length of time since Hillmon disappeared "is an immaterial matter in this case." (Record, page 1909.) The Court declined to give the requested instruction, but in substance charged that the jury were at liberty "to consider the fact, if it be one, that he has not been seen or heard from alive since the 17th or 18th of March, 1879, at which time it is claimed he was killed." (Record, 19 and 20.)

In the same connection the Court cautioned the jury that if the evidence disclosed that any motive existed for his absence, such motive should be given due consideration in determining what weight, if any, should be given to such continued absence. The insurance companies complain of this part of the Court's instruction, but no exception of any kind was taken by them thereto at the trial. The refused instruction No. 28, (Record. page 1909), after asserting that the lapse of time "is an immaterial matter," also asserts that "the real question in this case is whether or not John W. Hillmon died at the time and in the manner" alleged in the petition. The Court, as requested by the insurance companies in this 28th special instruction, distinctly charged the jury to the effect that the crucial question in the case was whether John W. Hillmon died in March, 1879, and whether it was his body that was brought to Lawrence in April of that year, and that unless the plaintiff established the identity of said body by a preponderance of the evidence, the jury should find for the insurance companies (Record, 1917, 1918, 1919 and 1921), so that the substance of the 28th instruction was given, except the Court declined to say that the lapse of time was an immaterial matter.

We submit that the lapse of time was not entirely an immaterial matter, but was proper to be considered by the jury upon the question as to whether the body produced at Lawrence was that of the insured. That the instruction as given by the Court was correct, is show by the cases of—

Davie vs. Briggs, 97 U. S. 628, 634, 636.
Whitely vs. E. L. A. Soc. of U. S., 39 N. W., 369, and cases therein cited.
1st Greenleaf on Evidence, Sec. 41, and notes.

CONCLUSION.

The attention of the Court is respectfully directed to the fact that the amount involved in this case originally was only $5,000; the litigation has been pending more than twenty years; it has been tried before six judges; two verdicts have been found in favor of the plaintiff and approved by the presiding trial judge; the last trial consumed nearly five weeks, and one or two preceding ones have consumed a longer time; three of the judges who tried this case, some of the counsel engaged, and many of the witnesses have died. The record in the Court of Appeals contains 2,007 pages; the case in that Court was fully and elaborately argued, the insurance companies being represented by six different able counsel, and voluminous briefs were filed.

And we submit there is not involved in this case any such question of gravity or importance as to make it appropriate for this Court, in the exercise of its discretionary power, to grant the writ of *certiorari* asked for by the petitioner for the purpose of bringing before this Court the 2,007 pages of printed

matter, including the 108 assignments of error for argument in this Court, which constitutes the record in the case, at a cost of from three to four thousand dollars to the parties. And we ask that the Court refuse the writ of *certiorari* asked for.

Respectfully submitted,

C. F. HUTCHINGS,
JOHN H. ATWOOD,
L. B. WHEAT,
Attorneys for Respondent.

May 10, 1901.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Petitioner.
vs.
SALLIE E. HILLMON,
Respondent.
No. 316.

OBJECTIONS TO MOTION OF PETITIONER.

And now comes Sallie E. Smith, formerly Sallie E. Hillmon, the respondent in this, the above entitled proceeding, and objects to the Court sustaining the motion of the above named petitioner herein, whereby it in substance asks this Court for an order that that printed volume containing 2007 pages of printed matter heretofore filed herein be taken and stand as a due return to the writ of *certiorari* heretofore issued herein for the following reasons among others which may suggest themselves to the Court, to-wit:

First. Because said printed volume does not purport to contain a full, correct or sufficient copy of the

record, proceedings, bills of exceptions and other necessary papers of or in the case of Sallie E. Hillmon vs. the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, in the Circuit Court of the United States for the District of Kansas, Case No. 3149 in that Court. The part of said printed volume which precedes the figure or side-paging 1, on page 3 of that volume, purports to be a copy of a citation to respondent, and of a writ of error requiring the clerk of the Circuit Court of the United States for the District of Kansas to have the record and proceedings in the above named Case No. 3149, filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit on or before the 11th of July, 1900, etc., in usual form for a writ of error and citation in such matter, followed by a statement on page 3 of said printed volume of the clerk of the Circuit Court for the District of Kansas, dated of the 20th of June, 1900, to the effect that he with said writ transmitted to said Court of Appeals a certified copy of the record and proceedings in that case with all things concerning the same, but by his certificate thereto set forth on said page 2007, he shows that he did not transmit with that writ of error any copy of a certain bill of exceptions, meaning, of course, of a bill of exceptions in that Case No. 3149.

By reference to pages 129 and 1927 of that printed volume, it will be seen that the 1798 pages thereof, commencing at the figures 221 on said page 129 and extending to the figures 206 on page 1927 of that printed volume, purports on its face to be a copy of a bill of exceptions taken in said Circuit Court for the District of Kansas in another case, to-wit: in Case No. 3147, wherein Sallie E. Hillmon was plaintiff and The Mutual Life Insurance Company of New York was the sole and only defendant, and that the

same was taken in such other case by The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, which last named company was not party in that Case No. 3147.

The affidavit of John D. Jordan, clerk of said Court of Appeals, filed herein, shows that the part of said printed volume commencing at said figures 221 on said page 129 and extending to said figures 206 on said page 1927, was not included or set forth in the transcript so transmitted by the clerk of said Circuit Court for the District of Kansas, and it, that affidavit, further shows that the transcript so transmitted consisted only of said citation and writ of error and of 304 typewritten pages numbered in said transcript consecutively from 1 to 304, and that a copy of all that transcript is set forth in those parts of said 2007 pages which precedes said figures 221 on said page 129, that is, the first 205 side pages of that printed volume, and of the parts of said printed volume which follow said figures 206 on said page 1927, and that said transcript so transmitted did not and does not contain any copy of any bill of exceptions other than a copy of a bill of exceptions set forth at pages 125 to 128 of said printed volume, which was a bill of exceptions taken by said Hillmon, and conflicts with any statement or claim in any other paper or bill of exceptions that said Hillmon approved thereof.

From all which and the other evidence bearing on such matter, it is certain that the part of said printed volume containing said 2007 pages, which is between said figures 221 on said page 129 and the figures 206 on said page 1927, is not any part of the record or of any proceedings or bill of exceptions made, taken, or prepared in any case in or to which said petitioner, The Connecticut Mutual Life Insurance Company

aforesaid, was a party or defendant in said Circuit Court for the District of Kansas.

And that the clerk of the Circuit Court for the District of Kansas did not ever certify that the same said 1798 pages or any part thereof were part or that much of any record, proceedings or bill of exceptions made, had or taken in any case to which said respondent and petitioner were both parties. And, therefore, said Hillmon claims that the same is not relevant to the case in this Court, and should not be certified, returned or made as or to be part of any record in this Court or of any record in any court in any case in or to which both said petitioner and respondent are or were parties, and therefore irrespective of any other reason and notwithstanding anything else shown in this case, said Hillmon asks that the aforesaid motion be overruled as to said 1798 pages, part of said printed volume, and that the clerk of said Circuit Court of Appeals be by this Court ordered and directed to not ever send any part of what is set forth on said 1798 pages, that is between said figures 221 on said page 129 and the figures 206 on said page 1927, as any part of any record or proceedings in any return he may make to said writ of *certiorari;* and to require him to limit his return thereto to a copy of such transcript as was in answer to the first aforesaid writ of error by the clerk of said Circuit Court for the District of Kansas returned to said Court of Appeals with that writ of error, that is, to said citation and writ of error and the first aforesaid 304 pages which constituted the transcript first aforesaid, and of such orders and proceedings as were had, made and done in said Court of Appeals in Case No. 1451 therein, and this without including or returning any pretended copy of any bill of exceptions taken or which purport to have been taken in the

aforesaid Case No. 3147, wherein said Hillmon was plaintiff, and the Mutual Life Insurance Company of New York aforesaid, was defendant.

And against any claim that may be made by petitioner that the aforesaid objected to part of said printed volume, that is, the 1798 pages thereof between the aforesaid figures 221 on page 129 and the figures 206 on said page 1927 because of any order of June 7, 1900, shown on printed pages 2012 and 2013 filed herein made in said Court of Appeals, became or should be considered or treated as a part of any record or proceedings between said petitioner and said respondent, it is submitted that Section 921, page 175 R. S. of 1878 does not authorize or empower any court to make any part of the record in one case a part of the record of or in any other case, and therefore we submit said order was and is void as against respondent.

And said respondent in and by her brief filed in said Circuit Court of Appeals in Case No. 1451, the case in which that Court rendered the judgment of affirmance which this Court is now asked to review, made objection to the aforesaid objected to parts of said printed volume being considered or treated as part of the record, this as shown on pages 34, 35, 36 and 38 of that brief and elsewhere therein, a copy of which brief is herewith filed in this Court, and therefrom as well as from pages 4 and 5 of the brief for respondent heretofore filed herein in opposition to the application for a writ of *certiorari*, it appears that said Hillmon has on all proper occasions objected to the aforesaid objected to part of said printed volume or the matter thereof being considered either in said Circuit Court of Appeals or in this Court or treated as a part of the record of the case in which she re-

covered the judgment complained of and that she has not ever waived that objection.

Said Hillmon did not cause said printed volume or any part thereof to be printed, nor was she ever called on to state or specify what should be printed in said Case No. 1451, nor is there anything in the most remote manner indicating that she was responsible for the same or any part thereof being printed.

Second. And for a further objection to the aforesaid objected to part of said printed volume, we request attention to the words, "Connecticut Mutual Life Insurance Company of Hartford, Connecticut," where the same appear on page 1926 of said printed volume, and refer to the affidavit of George F. Sharitt, clerk of said Circuit Court for the District of Kansas, filed herein, wherein he testifies among other things to the effect that the last named company, that is, said petitioner, did not take any such bill of exceptions in the aforesaid Case No. 3147 in that Court, as indicated by said objected to part of said printed volume, and that the only bill of exceptions that was filed in said Case No. 3147 (see the aforesaid page 129) in said Circuit Court for the District of Kansas in A. D. 1900 (other than certain exceptions taken on behalf of said respondent), was a bill of exceptions for and on behalf and of the Mutual Life Insurance Company of New York aforesaid, and that the name, "Mutual Life Insurance Company of New York," is therein in the place and instead of the name of said petitioner in the place corresponding to that where the name of said petitioner appears on page 1926, from which aforesaid affidavits and the other evidence in the case it is clear and certain that the aforesaid words, "Connecticut Mutual Life Insurance Company of Hartford, Connecticut," are not in

any actual or ever existing bill of exceptions taken or filed in the last named case in said Circuit Court for the District of Kansas in A. D. 1900, or of, concerning, or relating to any trial had in A. D. 1899, in such connection as indicated on said page 1926.

And in this connection we refer to the affidavit of respondent, Sallie E. Smith, formerly Sallie E. Hillmon, filed herein, and to the copy of an agreement therein mentioned, which shows that on the 6th day of August, A. D. 1900, the litigation between her and the Mutual Life Insurance Company of New York was by agreement settled, and that the last named company then paid her $22,000.00 in satisfaction of the judgment she had recovered against that company, and of all claims whatsoever arising out of the policy of insurance of that company on which she recovered that judgment; and that in consideration of certain premises, it, that company, then in and by said agreement agreed to and with said Hillmon that it should and would immediately dismiss its writ of error, that is, its proceedings in error against said Sallie E. Hillmon, then pending in said Court of Appeals, at its own cost, and that said company should and would pay all costs in that proceeding in error, including the cost of the transcript and copy of record filed therein. And, of course, neither that company nor the aforesaid petitioner can take any advantage of any failure on the part of that company to dismiss its proceeding in error and pay all such costs immediately after said agreement was made, which was long before said volume was printed.

And by reference to the affidavit of L. B. Wheat, filed herein, as well as to page 3 of the aforesaid motion of petitioner, it will appear that the aforesaid printed volume was printed by direction of said petitioner after the 27th of September, 1900, without said

respondent being in any manner responsible for the printing of that volume or of any part thereof.

It is shown by the case of Thorp v. Bonnifield, 177 U. S. 15, etc., that after said settlement agreement was made the Mutual Life Insurance Company of New York could not longer prosecute its writ of error, and that the Circuit Court of Appeals had not any longer jurisdiction of or in its proceeding in error against respondent, and of course said petitioner could not through or because of that agreement of settlement obtain any rights of any kind whatever.

If the petitioner had desired to have benefit of any supposed bill of exceptions by it taken in the aforesaid Circuit Court for the District of Kansas in the aforesaid Case No. 3149 in which it was defendant in that trial court, it should have had such bill of exceptions certified to the Court of Appeals in due and proper form and manner under and in pursuance of the first aforesaid writ of error.

The said affidavit of respondent shows that Mr. J. W. Green, one of the attorneys for petitioner in the case against it in said trial court, and who appears from said page 2007 to have signed the assignments of error relied on by petitioner as one of its attorneys, knew of the aforesaid settlement agreement on the 6th day of August, 1900, the day on which it was made. His knowledge thereof was of course notice thereof to petitioner, but whether notice to petitioner or not, is, we suppose, entirely immaterial, because if petitioner chose to have left out of the first aforesaid transcript any bill of exceptions or copy thereof, it knowingly assumed the consequences, which we submit are that it could only be heard lawfully in the Court of Appeals on such record and transcript as should be filed in its own case, that is, in Case 1451 in said Court of Appeals, and as petitioner's assignments

of error set forth in said printed volume are based on what it, the petitioner, claims to have been error occuring at the trial had in 1899, it follows that it has not any assignment of error which can be properly claimed to be shown by the transcript filed in the Court of Appeals in said Case No. 1451, its proceeding in error in that Court against respondent.

And we submit that this Supreme Court has not jurisdiction to hear the aforesaid assignments of error or any thereof on or because of any bill of exceptions taken in the trial court in said Case No. 3147, certainly not when not contained in the first aforesaid transcript.

From the evidence we submit it was entirely wrong for the clerk of the Court of Appeals or the petitioner to have caused to be printed any copy of any bill of exceptions filed in the aforesaid Case No. 3147 in said trial court between different parts of the first aforesaid transcript, even if we are wrong in claiming that the Court of Appeals could not by any order it might make, make any bill of exceptions taken and filed in said trial court, in said Case No. 3147 a part of the record of or in either Case No. 3149 in said trial court, or part of the record in said Case No. 1451 in said Court of Appeals, we still claim that petitioner cannot be heard on or as to the aforesaid 1798 pages of said printed volume, the parts thereof between the aforesaid figures 221 on page 129 and the figures 206 on said page 1927 thereof because of any order made in or by said Court of Appeals.

The order of June 7, 1900, of that Court of Appeals, set forth at the aforesaid pages 2012 and 2013, states in substance that the two referred to bills of exceptions were *identical*.

We submit that said Court of Appeals did not have jurisdiction to try or determine whether any such

supposed two bills of exceptions were *identical* or not. But if we are wrong in that, and if that Court of Appeals could or had jurisdiction to try or determine such question, then it follows that any such supposed bill of exceptions filed in said trial court in Case No. 3149 therein was taken and entitled in the case of Sallie E. Hillmon, plaintiff, vs. The Mutual Life Insurance Company of New York, defendant, Case No. 3147 in said trial court (see said page 129), and as from the aforesaid affidavit of Sharritt, clerk of said trial court, it appears that there was not in said Case No. 3147, the last named case, any bill of exceptions ever filed in A. D. 1900 purporting to have been taken by said petitioner, or with its name therein in the place where its name is on the aforesaid page 1926, and if such two supposed bills of exceptions were *identical*, and if said affidavit of said clerk of the trial court cannot be heard or considered as against said printed volume or any evidence that may be shown herein, even if it should be shown that the copy of any record in Case No. 1450, the case in which the Mutual Life Insurance Company of New York was plaintiff in error against respondent, showed the name of the petitioner where it ought not to have been, still we submit the petitioner cannot be heard on or as to the aforesaid objected to parts of said printed volume, said 1798 pages thereof.

From the evidence in the case, it appears *prima facie* at least that the petitioner did not ever take any bill of exceptions entitled in the case against itself in said trial Court, if said bill of exceptions are identical.

What case the bill of exceptions is in is shown by the entitling thereof at its commencement (see said page 129), and of course one person cannot take a bill of exceptions in a case in which it is not a party, and afterwards have the same by some other court

made part of the record in another case to which it is a party.

And from the evidence in the case, it appears that by mistake or otherwise the matter of bills of exceptions, filed on the 2d of April, 1900, has been made to appear in some of the papers different from the facts, for whom the bill of exceptions were taken, at least as to who prepared and took those referred to on said page 1926, after the figures 2404 on that page 1926.

If the clerk of the trial Court made the mistake as to the name of the company at the place indicated on said page 1926 in any transcript signed by him, then that was done before the Mutual Life Insurance Company of New York compromised the judgment against it, and at a time when it was important for it to have a copy of its own bill of exceptions in the transcript in the case in which it was plaintiff in error, that is, in said Case No. 1450 in said Court of Appeals. Whilst after the time when it compromised the judgment against it, and agreed to dismiss its writ of error, its proceedings in error in said Court of Appeals, and to pay costs, as shown by the compromise agreement referred to in said affidavit of respondent it was no longer materially interested on the point as to what name appeared in the place where the name of petitioner is, on said page 1926. It would be hard to print such a volume as that which contains the aforesaid 2007 pages, and probably could not have been done in the time in which the same was done without taking the records, from which any thereof was printed, apart.

Third. Said respondent consents that those parts of the aforesaid printed volume which contains 2007 pages of printed matter, which precedes the aforesaid figures 221 on the aforesaid page 129 of said printed

volume and following the copy of an index at the commencement of that volume, together with the part of said printed volume which follows the figures 206 on page 1927 thereof, be taken and stand as a copy of the record in the aforesaid Court of Appeals in the case therein in which said petitioner, The Connecticut Mutual Life Insurance Company aforesaid was plaintiff in error, and said respondent, by the name of Sallie E. Hillmon, was defendant in error, the same being Case No. 1451 in said Court of Appeals, of course a duly certified copy from said Circuit Court of such orders and judgments as it made in that case and of the opinion by it filed therein, should also be added as part of the record in that case in that Court.

But and said respondent says that among other things there is and was before A. D. 1900, in the aforesaid Circuit Court for the District of Kansas certain records and papers including such journal entries and other matters as are shown in and by a copy thereof duly certified by the clerk of that Court by his certificate dated the 27th day of October, A. D. 1900, marked "Exhibit No. 1," filed herewith in this Court which said respondent asks to have made part of the record herein for the purpose of showing that certain juries shown by the aforesaid transcript to have been impaneled in that trial court were duly discharged, and also to show some of the certain other matters left out of said transcript.

And respondent is willing to make any further proper consent that would save costs or trouble that she ought to make, but, as she claims that the aforesaid objected to parts of the first aforesaid printed volume, that is, the parts thereof between said figures 221 on said page 129 and the figures 206 on said page 1927, are not part of any record certified over or by the certificate of the clerk of the trial court on said page

2007, and because of the matter about the name of the company as to who took or for whom was made the exceptions mentioned on the lower half of the aforesaid page 1926, said respondent asks this Court to order that said objected to parts of said printed volume be stricken out and not considered either a part of the record in this Court or of the record in said Court of Appeals in said Case No. 1451 therein, wherein said petitioner was plaintiff in error and said respondent defendant in error, and that as from and because of the matters aforesaid, petitioner's assignments of error have nothing in the record, as we claim it to be, which would call for review by this Court, said petitioner asks that the order allowing the writ of *certiorari* to issue herein be set aside, and that said writ of *certiorari* be recalled by this Court, and all the applications of said petitioner herein be refused and dismissed.

And because of the hereinbefore mentioned objections to the part of said printed volume which is between said figures 221 on page 129 and the figures 206 on page 1927 thereof, it would have been proper for said Court of Appeals to have disregarded the same. And if it had done so, it would have necessarily followed that the judgment of the trial court by the petitioner complained of, should have been affirmed by the Court of Appeals, irrespective of any question passed on or mentioned in the opinion of that court; and as the judgment of affirmance was right, it is not important or material to consider the points passed on by that Court of Appeals.

Sullivan vs. Iron Silver Mining Co., 143 U. S. 431.

L. B. WHEAT,
Attorney for Respondent.

No. 316 93

Affidavits of Wheat Con[illegible]

Office Supreme Court U. S.
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NOV 18 1901
JAMES H. McKENNEY,
Clerk.

Filed Nov. 18, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 316.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

SALLIE E. HILLMON.

AFFIDAVITS IN SUPPORT OF OBJECTIONS TO MOTION OF PETITIONER IN REGARD TO RECORD.

L. B. WHEAT,
Counsel for Respondent.

(18,147.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. [illegible]

Supreme Court of the United States

OCTOBER TERM, A. D. 1901.

No. 316.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

SALLIE E. HILLMON, RESPONDENT.

UNITED STATES OF AMERICA, *Eastern Judicial District of Missouri,* } ss:

The undersigned, John D. Jordan, being first duly sworn, does on oath depose and say that he was on and before the seventh day of June, A. D. 1900, and has ever since then been and still is clerk of the United States circuit court of appeals for the eighth circuit, and that on the second day of July, A. D. 1900, there was filed in the said court of appeals, in my office as such clerk thereof, at the city of St. Louis, Missouri, a transcript of certain records, papers, and proceedings of and in the case of Sallie E. Hillmon *vs.* The Connecticut Mutual Life Insurance Company of Hartford, Connecticut, case No. 3149, in the circuit court of the United States for the district of Kansas, consisting altogether of pages "A" and "B," being an original citation to

Sallie E. Hillmon and an original writ of error, issued at the instance of the Connecticut Mutual Life Insurance Company, with the endorsements thereon respectively, and of (304) three hundred and four other typewritten pages, as numbered in said transcript, consecutively from one (1) to three hundred and four (304), a copy of all which said transcript is set forth in those parts of the two thousand and seven (2,007) pages printed by me as clerk of said court of appeals (in one volume in September and October, A. D. 1900, in case No. 1451, The Connecticut Mutual Life Insurance Company, plaintiff in error, *vs.* Sallie E. Hillmon, in said court of appeals), which precede the figures two hundred and twenty-one (221), found on page one hundred and twenty-nine (129) of said printed volume—that is, the first two hundred and five (205) side pages of that printed volume—and the pages of said printed volume which follow the figures two hundred and six (206) on page nineteen hundred and twenty-seven (1927) of that printed volume, and that said transcript, filed and docketed in said court of appeals as number fourteen hundred and fifty-one (1451), did not and does not contain any copy of any bill of exceptions other than a copy of a bill of exceptions set forth at pages one hundred twenty-five (125) to page one hundred twenty-eight (128) of said printed volume.

JOHN D. JORDAN.

Subscribed and sworn to before me by the above-named John D. Jordan this twelfth day of November, A. D. 1901.

[SEAL.] WM. MORGAN,

Clerk of the United States District Court in and for the Eastern Division of the Eastern Judicial District of Missouri.

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of John D. Jordan. Filed Nov. 18, 1901.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*, *vs.* SALLIE E. HILLMON, *Respondent.* } No. 316.

THE UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

I, the undersigned, George F. Sharitt, being first duly sworn, do on oath depose and say that I was on the 2d day of April, A. D. 1900, and had been for several years before that time, and have ever since been and still am clerk of the circuit court of the United States for the district of Kansas.

And that there was filed in my office as such clerk, at Topeka, Kansas, under and of date of the 2d day of April, A. D. 1900, a bill of exceptions in the case of Sallie E. Hillmon *vs.* The Mutual Life Insurance Company of New York (case No. 3147 on the docket of that court), containing and consisting of 2,157 pages, as consecutively numbered, and that the same remains and still is on file in my office as such clerk, and that the last page thereof—that is, page 2157 thereof as so numbered—is the page on which is the

certificate and signature of the judge thereto, and said page 2157 is in the words and figures following, to wit:

And now, inasmuch as the exceptions herein set forth and preserved are not of record in said cause and are not available to the defendant for review by the circuit court of appeals of the eighth judicial circuit, or the Supreme Court of the United States, except by means hereof the defendant, The Mutual Life Insurance Company of New York, has, by leave of court first duly had and obtained, and within the time limited therefor, prepared, and does now present to the court for allowance, settlement, and signing, this its bill of exceptions of said trial, and the court having examined the same and being satisfied that it is a true and complete bill of exceptions of said trial; that it contains all the evidence offered by the parties and admitted by the court, and all written evidence offered by the defendant and excluded by the court, except certain original exhibits admitted in evidence, which by order of the court will be transmitted to the said circuit court of appeals; that it was prepared within the time limited therefor, and that it has received the approval of the adverse party, does now

Settle, allow, and sign the same as a true and complete bill of exceptions of said trial, and does order that it be sealed and filed with the papers and record in said cause, to the end that it may be made a part of the same; which is accordingly done this 2nd day of April, 1900.

WILLIAM C. HOOK, *Judge.* [SEAL.]

And affiant further on oath deposes and says that the name "William C. Hook," above the word "judge," on said page 2157, was written by William C. Hook, the judge of

the district court of the United States for the district of Kansas, and is—that is, said name, "William C. Hook," is in his handwriting as written on said page, and that I am and have been for several years well acquainted with his handwriting, and have seen him write his signature many times, and that is his genuine signature as written on page 2157 of said original bill of exceptions.

And that said bill of exceptions is and was entitled in the above-named case of Sallie E. Hillmon, plaintiff, against The Mutual Life Insurance Company of New York, defendant, No. 3147, in said circuit court, and that said bill of exceptions is the only bill of exceptions that was filed in said case in A. D. 1900, or at any time since I have been clerk of said court, other than certain exceptions taken on behalf of said Hillmon, as of the same date, relating to objections and exceptions to the above said bill of exceptions.

And that there has not ever been filed in my office as such clerk, since I have been clerk of said circuit court, any bill of exceptions on behalf of the Connecticut Mutual Life Insurance Company in said case No. 3147, wherein said Sallie E. Hillmon is plaintiff and The Mutual Life Insurance Company of New York is defendant.

GEORGE F. SHARITT,
Clerk United States Circuit Court.

Subscribed in my presence and sworn to before me this 13th day of November, A. D. 1901.

[SEAL.] FRANK L. BROWN,
Clerk United States District Court,
By HELEN BUCKENAXTER, *Deputy.*

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of George F. Sharitt. Filed Nov. 18, 1901.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*,
vs.
SALLIE E. HILLMON, *Respondent*. } No. 316.

THE UNITED STATES OF AMERICA,
State and District of Kansas, Leavenworth County, } *ss:*

I, the undersigned, Sallie E. Smith, being first duly sworn, do on oath depose and say that I am the same person who, as Sallie E. Hillmon, was plaintiff in case No. 3149 in the circuit court of the United States for the district of Kansas, and that some years after the commencement of that action I married one James C. Smith, and I am now the wife of said Smith, and that on the 6th day of August, A. D. 1900, a certain agreement was made between myself and others, parties of the first part therein, and The Mutual Life Insurance Company of New York, the party of the second part therein, a copy of which agreement as written and signed, with a certificate of acknowledgment thereof thereon, is herewith filed, hereto attached, and made a part hereof, and referred to for a description of the same.

And affiant further says that J. W. Green, Esq., one of the attorneys for the above-named petitioner in this court, was present when that agreement was made.

And affiant further deposes and says that she did not ever cause to be printed or consent to the printing of any part of the printed volume containing 2,007 pages, as numbered, of printed matter referred to in the proceedings in the above-entitled case, and that she did not herself know that the same or any part thereof was to be printed until after the same had been printed.

SALLIE E. SMITH.

Subscribed in my presence and sworn to by the above-named Sallie E. Smith before me, the undersigned, a notary public in and for the county of Leavenworth, in the State of Kansas, this 15th day of November, A. D. 1901.

My commission expires on the 31st day of August, A. D. 1904.

[SEAL.] DAVID W. FLYNN,
Notary Public.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

SALLIE E. HILLMON, *Plaintiff,*
vs.
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Defendant.*

Indenture made this sixth day of August, 1900, between Sallie E. Hillmon of city of Leavenworth, county of Leaven-

worth, State of Kansas, and L. B. Wheat and John H. Atwood of the said city of Leavenworth, county of Leavenworth, Kansas, and Samuel A. Riggs of Lawrence, county of Douglas, State of Kansas, and C. F. Hutchings of Kansas City of the county of Wyandotte, State of Kansas, parties of the first part, and The Mutual Life Insurance Company of New York, a corporation of the city, county and State of New York, party of the second part:

Whereas in a certain action pending in the circuit court of the United States for the district of Kansas, between Sallie E. Hillmon as plaintiff, and The Mutual Life Insurance Company of New York as defendant, which action was brought to recover moneys claimed to be due under a certain policy of life insurance issued by said insurance company December 10, 1878, for the sum of ten thousand dollars ($10,000.00) on the life of John W. Hillmon, husband of said Sallie E. Hillmon.

A judgment in said action was duly rendered and entered in the circuit court of the United States for the district of Kansas, at the June term, 1899, against said insurance company, in favor of said Sallie E. Hillmon, for the sum of twenty-two thousand and sixty-eight dollars ($22,068.00) and costs.

And whereas, the parties to said action have mutually consented to a settlement thereof, and the party of the second part has paid to the said Sallie E. Hillmon, one of the parties of the first part, the sum of twenty-two thousand dollars ($22,000.00) in full satisfaction of said judgment and all claims whatsoever, arising out of said policy of insurance.

Now therefore, the said Sallie E. Hillmon, does hereby in consideration of the said payment of said sum of twenty-two thousand dollars ($22,000.00) receipt whereof is hereby acknowledged, release and forever discharge the said Mutual Life Insurance Company of New York, its successors and assigns, of and from all actions, causes of actions, suits, controversies, claims and demands whatsoever she has or claims against said company on under or by reason of said policy. And said L. B. Wheat, John H. Atwood, Samuel A. Riggs, and C. F. Hutchings, for value received, do wholly release and discharge any and all liens that they or either of them may have, against said Mutual Life Insurance Company, for compensation as counsel, attorney or otherwise, for the said Sallie E. Hillmon, upon the said judgment.

And in consideration of the premises, the said company hereby agrees to and with said Sallie E. Hillmon that it shall and will immediately dismiss its writ of error, that is its proceedings in error against said Sallie E. Hillmon, now pending in the United States circuit court of appeals in the eighth circuit, at its own cost and that said company shall and will pay all costs in that proceeding in error, including the cost of the transcript and copy of record filed therein, and in further consideration of the premises, said company hereby releases, acquits and discharges said Sallie E. Hillmon of and from all and any claims, demands and causes of action and rights of law or claims against her.

This agreement and said settlement shall not in any manner affect the Connecticut Mutual Life Insurance Company of Hartford Connecticut.

In witness whereof, said parties of the first part, hereunto

set their hands and seals, the date and year first above written.

SALLIE E. HILLMON.
JOHN H. ATWOOD.
L. B. WHEAT.
SAM'L A. RIGGS.
C. F. HUTCHINGS.
THE MUTUAL LIFE INSURANCE COMPANY
OF NEW YORK,
By F. L. ALLEN, *Agent.*

Attested: FREDMAN L. ALLEN.

STATE OF KANSAS, }
Leavenworth County, } *ss:*

Be it remembered that on this sixth day of August, 1900, personally came before me Sallie E. Hillmon, L. B. Wheat, John H. Atwood, Samuel A. Riggs, and C. F. Hutchings and F. L. Allen, agent, to me personally known to be the same persons who executed the above and foregoing instrument in writing, and duly acknowledged the execution thereof.

BENJAMIN F. ENDRES,
[SEAL.] *Notary Public.*

My commission expires Oct. 24th, 1903.

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of Sallie E. Smith & exhibit. Filed Nov. 18, 1901.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1901.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*,
vs.
SALLIE E. HILLMON, *Respondent.*
No. 316.

THE UNITED STATES OF AMERICA,
State and District of Kansas, Leavenworth County, ss:

I, the undersigned, L. B. Wheat, being first duly sworn, do on oath depose and say that I am and have been for many years one of the attorneys of and for the respondent in the above-entitled proceeding in the matter of the litigation between her and the above-named petitioner, and, because of being such attorney, I did, on the 26th day of September, A. D. 1900, write and mail in a postage-prepaid envelope to John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, a letter of that date, of which a copy, marked "Exhibit B," is hereto attached and herewith filed, and that afterwards and about the 28th day of September, A. D. 1900, I received from said Jordan, clerk as aforesaid, a certain letter dated of the 27th of September, 1900, in answer to my aforesaid letter, a copy of which letter from said Jordan, marked "Exhibit A," is hereto attached and herewith filed.

L. B. WHEAT.

Subscribed and sworn to by the above-named L. B. Wheat in my presence and before me, the undersigned, a notary

public in and for the county of Leavenworth, in the State of Kansas, this 15th day of November, A. D. 1901.

My commission expires August 31st, 1904.

[SEAL.] DAVID W. FLYNN,
Notary Public.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

John D. Jordan, clerk; Geo. F. Haid, ass't clerk.

ST. LOUIS, MO., *September 27th*, 1900.

L. B. WHEAT, Esq.,
Leavenworth, Kansas.

DEAR SIR: Yours of the 26th inst. received. The plaintiff in error in the case of Connecticut Mutual Life Insurance Company *vs.* Hillmon, No. 1451, has made the deposit and has directed the record to be printed.

Yours truly, JOHN D. JORDAN, *Clerk.*

"Exhibit A."

LEAVENWORTH, KS., *Sept.* 26, 1900.

JOHN D. JORDAN, Esq.,
Clerk U. S. C't Ct. of Appeals, St. Louis, Mo.

D'R SIR: Yours of 22nd inst. rec'd. Because of what you therein say and of your omitting to say that plaintiff in error has requested or made deposit to pay for printing of the record in case No. 1451, The Connecticut Mutual Life Insurance Company *vs.* Sallie E. Hillmon, in said court of appeals, I am afraid you may have construed

my letter of 21st inst. as including a request that you cause that record to be printed. I have not intended to and do not request you to cause said record or any part thereof to be printed. Please do not cause any printing to be done because of anything I have said or written you.

I had hoped that if plaintiff in error caused any printing to be done it would, under rule 23, select comparatively small parts of the record to print.

And I still fail to understand how or why a copy of a bill of exceptions taken by another company and copied in another record can be treated or printed as a part of the record first above mentioned; and I claim it is not part thereof.

Yours, &c., L. B. WHEAT.

"Exhibit B."

[Endorsed:] File No., 18,147. Supreme Court U. S., October term, 1901. Term No., 316. The Conn. Mutual Life Ins. Co., petitioner, *vs.* Sallie E. Hillmon. Affidavit of L. B. Wheat & exhibits thereto. Filed Nov. 18, 1901.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 316.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, PETITIONER,

vs.

SALLIE E. HILLMON, RESPONDENT.

Rejoinder of Respondent to the Reply of Petitioner in the Matter of the Motion Pending, Relating to What Shall Stand as or in Place of a Certified Transcript Herein, &c.

As we understand the situation herein, under claim of a question as to cost the petitioner seeks to have determined a controverted question relating to what can be considered the record in the court of appeals in the case therein, No. 1451, wherein the petitioner was plaintiff in error and respondent was defendant in error.

Respondent is as anxious as any one can be to save costs, expense and trouble, and would do anything reasonable so to do that would not prejudice her case.

We are not seeking to have anything that was of record in the court of appeals in said case No. 1451 left out, but we submit that the objected-to part of the printed volume of 2,007 pages mentioned in respondent's objections heretofore filed herein (consisting of 1,798 printed pages), commencing at the figures 221 on page 129 and extending to the figures 206 on page 1927 thereof, cannot properly be treated, considered, or held to be a part of the record in said case No. 1451, either in the court of appeals or in this court.

Surely the printing thereof in that printed volume did not make it a part of the record of that or of any court, in any case.

The affidavits filed and printed herein of Sharitt, clerk of the trial court, and Jordan, clerk of the court of appeals, considered together, leave the said objected-to part of said printed volume, on all the showing as yet made in this court, a mere *waif*, with no file-mark thereon showing it was ever filed in the court of appeals, and without any certificate whatever of the clerk of the court of appeals applicable thereto; and said affidavit of Sharitt, clerk of the trial court, shows that there was not ever filed in the trial court in case No. 3147, the case therein in which Sallie E. Hillmon was plaintiff and The Mutual Life Insurance Company of New York was defendant, any such bill of exceptions as indicated by said objected-to part of said printed volume; this because of the matter about the name of the petitioner shown on page 1926 of said printed volume, referred to in our aforesaid objections and as to which the said affidavit of Sharitt is applicable.

We have not supposed it of any practical use to raise any question as to whether there were two bills of exceptions,

actually *identically* alike, filed in the two cases, No. 3147 and No. 3149, in the trial court—that is, in the United States circuit court for the district of Kansas—or not; this because we suppose the order of June 7, 1900, of the court of appeals, set forth at printed pages 2012 and 2013, is EITHER *res adjudicata* on such question or utterly void.

We claim it is void, as not being matter which the court of appeals had jurisdiction to hear, try, or determine in such case, on motion or otherwise.

If it should ever become proper to offer evidence on the subject as to whether there were two such bills of exceptions, actually *identically* alike, filed in said cases, No. 3147 and No. 3149, then in behalf of respondent it will be claimed, and she will need proper time and opportunity to prove, that, irrespective of any question about what case either thereof was entitled in, or as to what name appears therein at a place corresponding to where the name of the petitioner appears on said page 1926 of said printed volume, other discrepancies existed at the time and soon after—for a while at least—the time when the respective bills of exceptions were signed by the judge of the trial court and filed in that court. What the extent or materiality of such discrepancies were I do not know, as I never heard thereof until within the last few days, and I was not present when the same were signed or filed and have not since ever compared the same, but on information I believe such discrepancies so existed in relation to matters of correction in one of the bills of exceptions made before signing or filing thereof, but omitted either accidentally or purposely—accidentally, I suppose, in the other; but we are not now asking time to make such proof, because we suppose

said order of June 7, 1900, is either *res adjudicata* against us or void and of no effect whatever; but whether *res adjudicata* or void, it of course does not pretend to establish any claim against the force or effect of the aforesaid affidavits, or of the facts thereby respectively shown; that order of court, of course, only related to what the court of appeals supposed existed in the trial court, and was made before any certificate dated of the 20th of June, 1900, shown on page 2007, was filed in the court of appeals.

And in view of the matter relating to the name of the petitioner appearing where it does on said page 1926 of said printed volume, and of the facts shown by said affidavit of Shuritt, clerk of the trial court, the statement herein about such discrepancies once existing are left to apply to a time when and soon after those bills were filed. Whether they still exist or not I do not know or make any claim. There has not been any order of the trial court shown (or made) concerning such matter of discrepancies.

The petitioner is here now insisting on having the case in this court heard and determined as though said objected-to part of said printed volume was a part of the record in case No. 1451 in the court of appeals, notwithstanding it is, as aforesaid, left a waif, as aforesaid, by the evidence and certificates herein, all of them being duly considered.

And, further, we submit it is evident that said objected-to part of said printed volume was not a bill of exceptions taken, prepared, or filed in case No. 3149 in the trial court, and that there was not taken, prepared, or filed in case No. 3147 in the trial court any bill of exceptions corresponding to said objected-to part of said printed volume, with the name of petitioner therein at the place corresponding to

where that name—that is, the name of petitioner—is found on page 1926 of said printed volume; and we submit it was long since up to petitioner to explain and show why and how its name came to appear on said page 1926, and why it does not concede its name ought not to appear in such connection as it is there found, and also why it does not concede that any supposed copy of any supposed bill of exceptions ought not to have shown its name in any such corresponding place in relation to any bill of exceptions filed in said case No. 3147 in the trial court. We suppose it proper to ask whether it supposes it is in better position because of its name being, as a result of either intentional wrongful act on the part of some person or of accidental mistake in copying from some original bill of exceptions, there on said page 1926 in the connection it is, puts it into better position than it would be in if the name of the Mutual Life Insurance Company of New York there appeared instead of its own name. However all that may be, we submit that it ought not to have any further hearing on its assignments of error on the basis or supposition its name appears in any original bill of exceptions taken, prepared, or filed in the trial court in case No. 3147 in a place corresponding to where it is on said page 1926. (And if the two bills of exceptions mentioned in said order of June 7, 1900, are exactly alike in all respects, then said petitioner is without any proper bill of exceptions, even in case No. 3149, this because of the matter relating to its name on said page 1926; said order, if correct, proves too much for petitioner's good.)

Why petitioner should seek to have this court finally hear this case on a supposed record, indicating it took, pre-

pared, and filed, as indicated by its name being where it is on said page 1926 of said printed volume, such a bill of exceptions in said case No. 3147 in the trial court as would appear if the objected-to part of said printed volume is accepted as part of the record herein in face of the affidavits of said clerks is, I submit, a matter of wonder at least.

It will also be noticed that there is nothing in any supposed record indicating that petitioner was given leave or had any time extended to or for it, petitioner, to take a bill of exceptions in case No. 3147, other than the statement on said page 1926, in connection with the name of petitioner, and the affidavit of Sharitt, clerk, shows the name of petitioner is not at any place corresponding to where it is on said page 1926 in any actual bill of exceptions filed in case No. 3147 in the trial court.

Referring to what is on page 3 of the aforesaid Reply about what the clerk of the court of appeals may have said in a letter about records not having been out of his possession *since the same were printed*, it is submitted all that is immaterial. The contention relates to what took place *before that* printing was actually done, completed, and to what should or should not have been printed. The printing of that volume of 2,007 pages surely made nothing *record matter* which was not before then and otherwise matter of record in case No. 1451 of said court of appeals.

If petitioner's contention is correctly understood by me, it is to the effect that because the clerk of the court of appeals printed said 2,007 pages in one volume, with 1,798 pages thereof—the objected-to part thereof—between what was pages 205 and 206 of the transcript from the trial court, that therefore, merely *because* of such printing, said ob-

jected-to part became part of the record in said case No. 1451 in the court of appeals, and respondent submits such contention ought not to be sustained; and, further, that although the court of appeals may have passed on the assignments of error the same as though such objected-to part of said printed volume was properly before it for consideration, still, as all the court of appeals did in relation to any matter of contention herein was on application of petitioner, it (petitioner) cannot be heard to complain of the court of appeals looking at said objected-to part of said printed volume; and as the judgment of affirmance rendered by the court of appeals was such judgment as would properly and necessarily have been rendered if the objected-to part of said 2,007 pages had not been printed or before the court of appeals in any form or shape, either as waif matter or otherwise at all, the matter of said court of appeals having passed on questions not shown otherwise than by said objected-to part of said volume is not now material, as shown by the before-cited case of—

Sullivan *vs.* Iron Silver Mining Co., 143 U. S., 431.

Attention is requested to the fact that the writ of certiorari heretofore allowed herein appears to have been granted without any such certificate as appears to be required by subdivision 3 of rule 37 of this court, and without any such affidavit as the one last mentioned on page 6 of the printed matter following the pending motion herein having been printed for use on the hearing of the application for said certiorari; even if it had been printed, we see it conflicts with the before-mentioned affidavits of the clerks of the trial court and of the court of appeals.

And respondent asks that on consideration of all the matter bearing on the questions involved, the objected-to part of said printed volume be disregarded and stricken out and the writ of certiorari recalled, and the case here dismissed at petitioner's cost, because if that part of the printed volume is rejected, or even if the name of the Mutual Life Insurance Company of New York is in effect placed or considered to be where the name of petitioner is on said page 1926, there is, we submit, no pretense for cause of reversal of any judgment on any exception preserved by petitioner.

Attention is requested to the fact that the printed matter on pages 2009 to 2031, fastened at the end of the aforesaid printed volume of 2,007 pages, etc., as numbered, is a matter entirely separate from said printed volume, and that the original of those printed pages 2009 to 2031 is to be found in a separate document, not attached by the clerk of the court of appeals to said printed volume; and, further, the certificate of the clerk of the court of appeals, found on pages 2030 and 2031, does not purport to certify as to any of the matter shown on said 2,007 pages of said printed volume, and that the certificate of Sharitt, clerk of the trial court, shown on aforesaid page 2007, is shown by the affidavit of Jordan, clerk of the court of appeals, to be not applicable to said objected-to part of said printed volume, and the affidavit of Sharitt shows that there was not any such bill of exceptions filed in the trial court in case No. 3147, as it would be if the name of the petitioner was therein at a place corresponding to where the name of petitioner is on said page 1926.

We submit, petitioner seeks to have it appear to this court that it took, prepared, and filed, under leave given it, such

a bill of exceptions in case No. 3147 as said objected-to part of said printed volume would indicate if it was a correct copy of anything. We submit, the evidence clearly shows it never took, prepared, or caused to be filed, or had leave to file, or had time extended for it to prepare, such a bill of exceptions in case No. 3147.

To show it (petitioner) had time in which to prepare such bill of exceptions would need an order of court in case No. 3147, because the 2d of April, 1900, the day on which it purports to have been filed in the trial court, was long after the June term, 1899, the term at which the trial was had, and the next following term, to wit, the November term, 1899, of the trial court had been, as required by law, commenced and intervened between the trial and the 2d of April, 1900.

If this court shall determine and hold that the objected-to part of the aforesaid printed volume is part of the record in the court of appeals in case No. 1451 therein, then we do not see any use of requiring the clerk of that court so to certify; but, we submit, it ought to hold he could not properly so certify because of the facts stated in his affidavit, and we also submit that this court ought now to rule that the said objected-to part of said printed volume cannot be considered in this case on any assignment of error, and therefore to now dismiss this case; but if the court requires or permits return to be made to the writ of certiorari, we ask that it order that what is in the transcript returned with the aforesaid writ of error in case No. 1451 be returned separately, and as so returned to that court with said writ of error without any interpolation therein of anything in or shown by any other paper, record, or transcript,

even if it permit other matter to be also returned by itself separated from what it was not attached to when received in that court of appeals.

And we suppose that appropriate orders can be made in this court that would answer in the place of any proper return to said writ of certiorari, and thus avoid great expense and cost to the parties, if but for such orders this court shall be of opinion that return should be made to that writ.

L. B. WHEAT,
Attorney for Respondent.

NOVEMBER 22, 1901.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1902.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Petitioner and Plaintiff in Error.

vs.

SALLIE E. HILLMON,
Respondent and Defendant in Error.

No. 94.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The record in this case shows that in 1880 defendant in error commenced her action in the Circuit Court of the United States for the District of Kansas, against plaintiff in error, Case No. 3149 on the docket of that Court, and for her cause of action in her petition alleged that on the 4th of March, 1879, plaintiff in error by its policy insured the life of John W. Hillmon, then her husband, to the amount of $5,000 in her favor, and that he died on the 17th day of March, 1879; and made such further allegations in that petition as are usual in actions on life policies (record 3-5).

The substance of the last amended answer of plaintiff in error to that petition is:

1st. A general denial of all the allegations therein.

2nd. That said John W. Hillmon was still alive and not dead, and that said John W. Hillmon, Levi Baldwin and John H. Brown, conspiring with intent to cheat and defraud plaintiff in error, and for the purpose of securing payment of certain policies, including the policy sued on, did in the lifetime of said Hillmon, falsely and fraudulently pretend and represent unto plaintiff in error that a certain dead body was the dead body of said Hillmon, and that said Hillmon had been and still was keeping himself concealed under assumed names.

3rd. That defendant in error had by a certain parol, that is, unsealed written instrument, released it from liability on the policy sued on (record 17–19).

The substance of the reply of defendant in error to that answer is:

1st. A general denial of all the allegations therein.

2nd. That said so-called release was without consideration and therefore inoperative and void.

3rd. That on or about the 17th of March, 1879, said John W. Hillmon died from a gunshot wound produced by the accidental discharge of a gun in the hands of John H. Brown, and that on the 15th of September, 1879, plaintiff in error by its agents and others by its procurement induced defendant in error, when sick, to sign and deliver said so-called release, without consideration, and by making certain false representations to obtain the same, and by fraudulently procuring John H. Brown to make the written statement set forth at record 1284–6, and mentioned in refused instruction No. 44, referred to in assignment of error No. 105 (record 2006)—all as more specifically alleged as shown at record 20–22, which reply is referred to for a description thereof.

After a verdict and judgment in favor of defendant in error had been reversed by this Court, as shown in the cases of Ins. Cos. vs. Hillmon, 145 U. S. 285, and also after some mis-

trials, the case was on the 13th of June, 1899, at the June term, by consent of the parties, set to be called for trial on the 16th of October, 1899 (record 67), and on that 16th of October, 1899, the case came on for trial on the issues made by said petition, answer and reply, and the trial thereof, with another case, to-wit: that of said defendant in error against the Mutual Life Insurance Company of New York, Case No. 3147, with which it had been consolidated for trial (record 65–6, 69), was proceeded with, and resulted in a verdict and judgment in her favor for the sum of $11,034.00 and costs, on the 18th of November, 1899, at said June term (record 117–18, 1928–9), and afterwards on the 20th of November, 1899, that Court extended the time of plaintiff in error for making, signing, settling and allowing a bill of exceptions in *that first mentioned action*, that is, in the case of defendant in error against plaintiff in error, Case No. 3149, to and including the 2nd of April, 1900 (record 120–1).

If we correctly understand the meaning and effect of the order of this Court of December 2d, 1901, the question as to what shall be considered and treated herein as the record to be considered and acted on by this Court is left open for consideration of all such proper objections as we may urge thereto; and hereinafter in the argument part of this brief, we urge certain objections, some of which are supported by affidavits filed herein on the 18th day of November, 1901, as reasons why the 1,798 pages, part of the printed volume filed herein, consisting of 2,033 printed pages, called the record in this case, which is between side paging or figures 221, on page 129, and the side paging or figures 206, on page 1927 thereof, should not be referred to, treated or considered as any part of the record herein, and without waiving our objections in that respect, we proceed with our statement of the case, and for such purpose as well as for the purpose of argument of the matter of the several assignments of error in the record, we refer to said volume as though said objected to part was a part of the record, without waiving our objections thereto.

On the 3d of April, A. D. 1901, the Circuit Court of Appeals affirmed the aforesaid judgment ot said trial Court as

shown at record 2030, and as that Court of Appeals acted in the premises without more of the record or proceedings in said case No. 3149, in which plaintiff in error was party in said trial Court, being before it, than was therein, at the instance and request and on motion of plaintiff in error, it follows as is hereinafter argued that plaintiff in error cannot now be heard to complain that the Court of Appeals proceeded and did what it did in the matter without having before it more than it did have of the record and proceedings of the trial Court in said case No. 3149, in which the judgment complained of was rendered.

And for reasons hereinafter urged in the argument part of this brief, we contend this Court has not jurisdiction to review the record or consider whether either Court erred in rendering such judgment as they respectively did.

The record—if the whole printed volume over our objection shall be treated as such—shows that as to some matters there was conflicting evidence, but as to the questions raised by the issues, there was when the introduction of evidence closed only one question left in controversy, and that was the question as to whether the dead body herein mentioned was the corpse of John W. Hillmon or not, which narrowing down of the issues came about in this way: Citizenship of the parties as alleged was duly and fully proven as shown at record 145–6, 744 to 750, 836, 839 to 847, and plaintiff in error, and the defendant in the other case being tried with it, admitted that defendant in error had made due proofs of death, as shown at record 201, and because of the nature of the defense, even if such admission had not been made, it would not have been necessary to prove giving of notice or proof of death. By uncontradicted evidence it was proven that the premium on the policy sued on had been duly paid for a period beyond the time of the death of Hillmon, as shown at record 145, 151–2–3, 752, 1496, 1524, and by uncontradicted evidence it was proven clearly and beyond question that there was not to be any consideration given for that release (r. 580–1, 592, 1241, 1243), and that it was made without consideration (r. 773, 830, 831, 1241, 1243), and fur-

ther the evidence showing the circumstances under which it was made and obtained, particularly the testimony of

Reuben Brown, record 544 to 575.

James W. Green, record 575 to 597 and 1900 to 1904.

(Munn paper, 580, 581.)

John H. Brown's deposition, record 341 to 465, so much thereof as was read.

Sallie E. Smith, formerly Sallie E. Hillmon, defendant in error, record 766 to 779, and 812 to 825, 830, 831, and 1897 to 1900.

William J. Buchan (r. 1241, 1243) proved an entire want of consideration for that release.

And thus the only issue made by the pleadings left in actual controversy when the evidence closed was as to whether said dead body was that of John W. Hillmon or not, and that plaintiff in error so considered the evidence and situation to be after all the evidence had been given, is shown by the fact that it requested the Court to instruct the jury as shown by instruction No. 1 (r. 1904, 1996), among other things that "in this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon," and also requested the Court to instruct the jury as shown at record 1909, 2003, as follows:

"No. 28. The lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case, for the reason that the real question in this case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown, at Barber County, on the 17th day of March, 1879."

But it not being proper for the Court to give to the jury all of said instruction No. 1, as is hereinafter shown by our argument in relation to the matter of the 85th assignment of error, nor to give all of said instruction No. 28, as shown by our argument hereinafter made in relation to assignment of error No. 99, the Court did not give all of either of those instructions, but did in substance adopt a part of each of those instructions, that is, the parts thereof respectively which were

to the effect that the *real* question in the case to be determined was whether said dead body was the corpse of Hillmon or not, by instructing the jury as shown at record 1917, 1919 and 1921, and of course after asking the Court to so instruct the jury, plaintiff in error cannot be heard to complain of the Court having so instructed the jury; and by requesting the Court to so instruct the jury, we see that plaintiff in error itself asked the Court to instruct the jury to the effect that if from the preponderance of the evidence the jury believed said dead body was that of Hillmon, they should find for defendant in error, and by so doing plaintiff in error eliminated many questions it now makes from the case, including all the questions it now makes in relation to any supposed conspiracy. And we see that by so doing plaintiff in error conceded that our claim in relation to the meaning and proper interpretation of its second defense is correct, that is, that by that second ground of defense it merely pleaded that Hillmon was alive, and not dead—a sort of affirmative denial of the allegation in the petition that Hillmon died on March 17, 1879.

THE EVIDENCE.

The only material question for consideration in connection with the evidence being whether a certain man accidentally killed by the discharge of a gun in the hands of John H. Brown, near Crooked Creek, on the evening of the 17th of March, 1879, was or was not John W. Hillmon, we now proceed to refer to the evidence bearing on that point.

Said Brown testified he so accidentally killed John W. Hillmon. (R. 344, 345, 404, 405, 411, 412, 413, 415.) His dead body was seen where killed by divers persons soon after he was killed, collected together because of Brown giving notice of the killing (r. 319 to 332, 346, 602 to 605 to 607), one of whom had seen the parties there the evening before. (R. 346, 408.)

An inquest was held there on the next day after the killing. (R. 323, 328, 346.)

EVIDENCE IDENTIFYING THE CORPSE AS THAT OF JOHN W. HILLMON.

The dead body was then taken in a wagon to Medicine Lodge, where, on the day following, another inquest was held. (R. 324, 346.)

And several persons who had seen Brown and Hillmon together in Medicine Lodge, recognized the body as that of Hillmon, among whom were Harvey M. Davis, John W. Upperman, Clark Gilmore, Derrick Updegraff, Eli Smith, E. M. Byerly, W. W. Standiford and F. P. McAllister, at pages hereinafter referred to.

Hillmon was then buried in the Medicine Lodge burying ground. (R. 334, 346.)

Defendant in error having heard of the death, sent relatives of hers, Levi Baldwin and Alva Baldwin, to bring the body to Lawrence, Kansas (r. 753, 792, 720, 721, 687, 705), who recognized the body as that of John W. Hillmon (r. 723, 689).

Representatives of the insurance companies, including Theodore Wiseman, Robert Walker and C. E. Tillinghast, agents of the insurance companies (r. 866–7, 884–5–6–7), also went to Medicine Lodge, and were present with John H. Brown, Levi Baldwin, Alva Baldwin, and others, when the body was exhumed at the Medicine Lodge burying ground. (R. 346, 347, 883–4–5–6–7.)

Alva Baldwin and John H. Brown transported the body in a wagon, about eighty or more miles, from Medicine Lodge to Hutchinson, a point on the A., T. & S. F. Ry., from whence it went by railroad to Lawrence, Kansas, where it arrived on the morning of the 3d of April, 1879 (r. 756, 757), it being then seventeen days dead (r. 723, 735, 742, 743, 689, 690, 347), and it was buried two days later, and on the 6th of April again exhumed, and the photos taken (r. 1542) of the twenty-day corpse, after the hair had been mussed, disarranged and become mixed with dust, the eyes sunken, lips shriveled, and decomposition had proceeded so rapidly, as shown by the photos of the corpse and testimony at record 241, 225, as to be nearly, if not quite, unrecognizable by any person who had not recently seen the corpse.

The corpse, on its arrival at Lawrence, passed into the possession of Bailey & Smith, undertakers at Lawrence. (R. 690, 525.)

Mrs. Hillmon expected it to be brought to the place where she resided by Bailey & Smith, but they took it to their undertaking establishment. (R. 756, 757, 758, 765, 525.)

VACCINE SORES.

When the body was exhumed, the first thing done by the representatives of the insurance companies was to cut open the sleeve on the arm of the corpse for the purpose of ascertaining whether it bore the vaccination mark which the agent of the company knew should appear upon the arm of John W. Hillmon; and the sleeve was cut open upon the arm known by the insurance companies to have been inoculated, and at the point on the arm where it was known to them the vaccine virus had been inserted; and when the sleeve was so cut the scab was found at precisely the point where the cutting was directed to be done, and where Dr. Stuart, the medical officer of the company, had inserted the vaccine matter. (R. 723–921.)

In the forenoon of the day of its arrival at Lawrence, defendant in error, with companions—her mother and others—went to that place (Bailey & Smith's) to see the body, but were refused and prevented from seeing it then on excuse to the effect that it was not then in condition to see. (R. 758, 796, 534, 535, 1542, 1540.)

This was the very time (r. 1540)—on April 3, 1879—when J. H. Stuart, M. D., and V. G. Miller, M. D., examining physicians of the insurance companies, and other M. D.'s were cutting out certain vaccine sores from the arm of the corpse at same place (r. 921), where said Stuart, medical examiner for plaintiff in error, had, on 20th February, 1879, vaccinated John W. Hillmon (r. 921). See evidence bearing on vaccine sores on arm of corpse, record 723, 688, 641, 507; also testimony of Dr. J. H. Stuart, record 919, 920, 922, 968 (in forenoon of first day Stuart, 968), 969, 970, 982, and that of Dr. A. Fuller, 672.

There was contention at the trial as to whether those

sores were the result of the vaccination of Dr. Stuart or of a more recent vaccination; but the fact that said learned M. D.'s, Stuart and Miller, applied a hot iron to the piece of flesh so removed for the purposes by them stated at record 969, 970, 971, considered in connection with the testimony of several other disinterested physicians, shown at record 1812 to 1847, clearly shows that as to the age of those vaccine sores on the corpse, no one could tell with any reasonable degree of certainty. The evidence altogether leaves it doubtful as to whether a first scab had been removed by accident or not, or whether a natural scab had dropped off. And more than that, the action of Stuart and Miller in burning the piece of flesh, raises a question of their good faith and intelligence.

It would seem that the doctors for the Insurance Companies were in doubt as to whether the marks upon the arm could not have been produced upon the body after it was dead by means of applying a hot iron, and were in doubt as to whether the marks were indeed vaccination marks or not; all of which is grossly inconsistent with the testimony of these same physicians, who testify dogmatically upon the trial that the marks were vaccination sores, and that they could determine the age of the same with certainty.

And the purpose, in part, of removing the vaccine sores being to apply a hot iron thereto to see the effect thereof, etc., goes far to show that the testimony of Drs. Stuart and Miller with reference thereto, could not reasonably be expected to weigh much so far as the same conflicted with the testimony of the other physicians and medical experts, referred to at said record 1812 to 1847, with reference to the age of vaccine sores, etc., by which it is shown that it could not, with any reasonable certainty, be told by the description given by Miller and Stuart of the vaccine sores or scabs, how long before death the vaccination had been done.

See as to such use of the hot iron, record 969, 970, 971, 988.

In this connection we refer to the excuse of Stuart for removing the vaccine scab, that he did so to preserve it (r. 922, 923); and the fact that he, early in 1882, threw it away,

before the first trial of the case (r. 923, 984, 987, 988), as bearing upon his good faith and apparent desire to get rid of evidence.

HAIR.

Some of the hair was taken from the corpse by Dr. J. H. Stuart to preserve a specimen, so as to be able to show, as he claimed, its character and color (r. 929, 987), *but none of it was produced at the trial.*

That the autopsy—removing of the vaccine sores and exhuming and examination of the corpse were all *without notice to or knowledge of defendant in error.* See record 969, 982. 738 766.

IDENTIFICATION OF CORPSE AS HILLMON'S.

Many persons who saw that dead body at Lawrence, had known John W. Hillmon in his lifetime, and recognized and identified it to be him, his corpse, as shown at the following pages of the record:

A. E. Wellman, 219.

Joseph Rahskopf (Rahskopf in cemetery), 226.

Ed. Canovan, 251.

Phillip Olmsted, 255.

John Osborne, 259.

H. Covey, 265, 266, 295. (Mole, 266, 281.)

John Eldredge, 302, 303–5, 312, 313.

J. W. Fugate, 521.

Arthur Judson, 525, 530.

Sallie E. Smith (defendant in error), 756, 758.

Levi Baldwin, 686 to 690. (See as to Alva Baldwin, r. 723), and John H. Brown, his deposition, record, 345, 346.

These last three and the following persons, also at Medicine Lodge, recognized the corpse as that of John W. Hillmon, namely:

Harvey M. Davis, 611, 612, 613.

John W. Upperman, 625, 627, 628, 631, 632, 633, 636.

Clark Gilmore, 640, 641 (vaccine scab, 641), 642.

Derrick Updegraff (hotel keeper at Medicine Lodge where Hillmon and Brown took meals in January, 1879) 663 to 665.

E. M. Byerly, 656, 657, 660.
Eli Smith, 661, 662, 663.
W. W. Standiford, 675, 676, 677, 678.
F. P. McAllister, 683.

That John W. Hillmon and John H. Brown were traveling to find a stock ranch suitable with range and water, without getting too close to the farmers around on the creeks, is shown by evidence, record 349, Q. and A. 80. (See also record 334 Q. and A. 33). Hillmon went to Lawrence twice during this time they were traveling, 344.

When they left Wichita, Kansas, on their last trip those two went alone in a wagon.

John H. Brown, record 393 and 344 (Q. 39) 443.
Julius Draves, record 1412, 1413, QQ. 62, 64, 68, 69 and 70.
Michael Mesh, record 1562.
Ben Helda, record 1574.

The three last named were witnesses called by the Insurance Companies.

They were seen together at Medicine Lodge on that last trip, without any third person with them.

Derrick Updegraff, 665.
Eli Smith, 662.
Byerly, 656.

At this place Hillmon evidently got the letter from his wife mentioned at record 759, and spoken of by Brown at record 397, and by Eli Smith, the postmaster at Medicine Lodge, record 662.

And the two men were seen to be alone as they went out of Medicine Lodge in their wagon by one E. M. Byerly. (Record 655 to 661.)

And farther along on the road going towards where Hillmon was killed, the two men were seen still to be alone by Nathan S. Priest. (R. 673.)

After the body arrived at Lawrence, another inquest was held, really at the instance of representatives of the insurance companies, at which Messrs. George J. Barker and James W. Green, attorneys for the insurance companies in the trial

Court, acted in behalf of the State, Mr. Green being county attorney of the county where this Lawrence inquest was held. (R. 894–5.)

There is much conflict in the evidence in said bill of exception as to whether that dead body was or was not that of John W. Hillmon. Plaintiff in error anong other things at the trial, as shown by evidence it introduced, claimed it was that of one Frederick Adolph Walters, of Fort Madison, Iowa, and it also further claimed that Brown and John W. Hillmon had enticed Walters to go along with them from Wichita by way of Medicine Lodge to Crooked Creek, in Barbour County, Kansas, and there shot him, notwithstanding the fact that only the two men, Brown and Hillmon, were ever seen on the route as above shown. Different men occasionally being with them, as would of course be the case on such a trip, as shown by the deposition of John H. Brown.

We here refer to the pictures of the corpse and the pictures of Hillmon and Walters, taken in life respectively, part of the exhibits at instance of plaintiff in error sent to this Court (as shown at r. 128, 129), and on comparison of all thereof, we claim that beyond any reasonable doubt, the corpse so photographed is by such comparison shown to be that of John W. Hillmon.

NOSE OF BOTH HILLMON AND WALTERS.

John W. Hillmon had a Roman nose. (R. 1094, 1080, 636, 621, 662, 1116, 1125.

That the nose of John W. Hillmon was injured, see testimony of Dr. N. Simmonds, record 214 to 218; Henry Hillmon, his brother, record 1094, and Mrs. Nichols, his sister, record 1116, 1125. See also testimony of Rahskopf, record 227, 233.

And that such injury was the natural cause of the breaking down, shown on side of the nose in the front view photograph of the corpse, as testified by Dr. A. Fuller, record 672.

And that picture shows the nose of the dead man to have been crooked, turned a little to one side, as Dr. A. Fuller testified, record 672.

That the nose of John W. Hillmon because of such injury *was* a little *crooked* or *turned* a *little* to *one side.* (See testimony of his brother Henry Hillmon, record 1094, and also his sister, Mrs. Nichols, record 1116, 1125. See also tintype picture, Exhibit No. 22 D, record 128).

That the nose of Frederick A. Walters had not been injured and was STRAIGHT, *not crooked sideways*, see testimony at following pages of record, of his father Daniel Walters, 1628, Q. 138; his sister Fannie Walters, 1805; Alvina D. Kasten, 1700, Q. 122; Charles W. Schott, 1677, Q. 184; Gustave Buckholz, 1708, Q. 37.

That Walter's nose was blunt, his sister, Mrs. Rieffenach, testified, record 1783.

EYEBROWS.

Dr. Stuart, at record 927, 965–966, testified to the effect that the eyebrows of the corpse came close together. The pictures of Hillmon show his did. The picture of the corpse corresponds with Stuart's testimony and the photos of Hillmon in that respect, whilst the pictures of Walters show a large, clear, open space between his eyebrows.

DOG BITE.

Physicians and surgeons, medical examiners of the insurance company and others, made an examination of the dead body carefully, with a magnifying glass, from head to foot, with a view of finding identifying marks while it was so at Baily & Smith's, and to some extent further when it was last exhumed, and testify that they failed to and could not find any marks thereon, and further said that their examination was such that the scars could not have been on body and they not have seen it. (R., A. Fuller, 671, 672.) Dr. J. H. Stuart and others carefully examined the body from sole of foot to top of head. He made full notes (r. 939, 940); they did not find anything to correspond with the dog bite or corns or bunions on Walters, nor a crooked finger, although they examined so carefully as to find a little mole, not larger than a mustard seed (r. 938 to 941, 944, 945); if Stuart had found any such marks he would have noted same. (R. 944.)

But it is shown by the evidence of witnesses for the insurance company that Frederick A. Walters had the scar of a dog bite on one of his legs (calves). See the following pages: His father, Daniel Walters, 1624, Q. 70 to 80; his brother, Charles A. Walters, record 1770, 1743, 1755 (see also 1757); as to his sister, Fannie Walters, see 1802 to 1805, and 1810, 1811 and 1812; his sister, Mrs. Reiffenach, 1776, 1782.

WALTER'S CROOKED LITTLE FINGER—NONE ON CORPSE.

That one of the little fingers of said F. A. Walters was crooked, record 1716.

That the said dead body did not have any such crooked little finger, record, 945; nor did Hillmon, record 720.

WALTER'S BUNION.

That there was a bunion on one foot at joint of big toe of said Walters, which made one foot noticeably larger than the other, his brother, Charles A. Walters, record 1744, 1755, 1757; Lesch, record 1684.

That there was not any such bunion on the corpse, Dr. J. H. Stuart, 929, and other witnesses.

WALTER'S CORNS.

Corns on Walters' feet, record 1744 and 1652; none shown on corpse, record 938, 939, 940.

HILLMON RING MARK.

Ring mark on corpse on little finger, Rahskopf, record 227, 231, 232, 233; Patterson, 242 and 243, 247, 248, 249, 250.

That the corpse of John W. Hillmon would naturally have showed such ring mark, see record 779, 791, as he sometimes wore one, which was lost at trial of 1895, record 779.

HANDS—DRIVING MARKS ON.

Hands of corpse showed evidence of handling driving reins, 230; Hillmon's might show such rein marks, as he was sometimes driving a team, while Walters' would not, as he was a cigarmaker.

TEETH.

The teeth of the corpse appeared good except one worn or broken. (See testimony of the dentist who examined for insurance companies [r. 237], which is probably the same tooth spoken of by Henry Hillmon, his brother, at record 1094.)

Hillmon had good teeth (r. 748, 525, 531, 532, 539, 720, 507. See also evidence hereinafter alluded to in relation to assignment of error No. 85.)

Vaccine sore on arm of corpse, 723, 688, 641, 507.

HILLMON'S DARK BROWN HAIR.

That Hillmon had dark brown hair, see his description in applications and M. D. examiner's certificates, record 192 and 195.

Other witnesses, record 532, 537, 748, 612, 652, 667, 720.

HILLMON'S HEIGHT, LENGTH OF CORPSE, ETC.

Policies of insurance, as the Court will take notice (10 Kansas, 525), are issued on applications therefor, and certificates of medical examiners (agents of the insuring company) of the description, including height, marks or former injuries to, as matters of description of the person whose life is insured.

Dr. J. H. Stuart was examiner for the New York Life Insurance Company and for plaintiff in error. (R. 910, 913, 914, 915.)

Dr. Stuart, the medical examiner of the plaintiff in error, examined John W. Hillmon upon an application for life insurance December 24, 1878, and in doing so, measured him, and inserted in certificate attached to applications for insurance the statement that his height was 5 feet 11 inches. On February 25, 1879, he again examined him—this time when applying for the very policy which is the basis of this action, and again inserted into this application the statement that John W. Hillmon was 5 feet 11 inches in height. This height corresponds to the length of the corpse. (R. 178, 179, 184, 185, 926, 940.)

And in that application, as shown at record 180, it was stated to the effect that there was $20,000.00 insurance on the life of Hillmon, and the plaintiff in error chose to increase it to $25,000.00 (see r. 1523) when it was getting premium, but on pay day claims Hillmon had too much insurance.

Hillmon's own statement, in an application for insurance, of his height, at record 187, No. 5, shows him to be five feet eleven inches.

Application appearing, record 192 and 193, signed by Dr. V. G. Miller, of the Mutual Life Insurance Company, on 5th of December, 1878, shows same height.

In the effort to show the corpse was not the dead body of Hillmon, the insurance companies and their medical examiners went back on their statements made by themselves in those certificates.

For testimony in relation to said five feet eleven inches in the applications and M. D. certificates, see record 155 to 167, and 201 to 213; Dr. J. H. Stuart, record 909 to 918, 934 to 938.

Record 935–6 shows that Stuart stood by Hillmon on the level floor, 941–2–3, 948 and 949, and the scale for measuring was near by on wall, and height was important matter of description, as Stuart understood it (941 to 961), and this was true each time Hillmon was in Stuart's office.

Different examinations, measurements, etc., of John W. Hillmon by Dr. J. H. Stuart, on 31st October, 4th and 24th December, 1878, and 24th, 25th February, 1879. (R. 943, 945 to 949 to 961, 989.)

Dr. J. H. Stuart says Selig was present first time he measured Hillmon, and that that was in the early part 1879 (r. 989), and that if he measured him afterwards it was on 25th February, 1879. (R. 989.)

And Stuart swore he did not see Hillmon or measure him after 25th February, 1879 (r. 918, 990); and never measured him but once in presence of Selig, and that that was before February 25, 1879. (R. 990.)

And further in reference to Hillmon's height being five feet eleven inches, and Dr. J. H. Stuart having himself so

written it in the certificate, at record 184, 185, in addition to above reference to testimony at pages given, we also refer to record 1496, 1500, 1501, 1506 to 1518, 1522, 1524 to 1526. In this connection see the question objected to by plaintiff in error at record 1526, and see also record 1880 and 1881; which height corresponded with the length of the corpse. (R. 926.)

And there was oral evidence of several witnesses to the same effect (r. 748, 690, 222, 215, 225, 234, 235, 251, 258, 259, 266, 306, 315, 316, 318, 521, 522, 526, 528, 529, 690, 720, 764), that he actually measured 5 feet 11½ inches. (R. 748 and 526, 528 to 530, 507.) See also record 138 (opening statement).

And we here refer to what we hereinafter say in relation to assignments of error Nos. 79 and 86 respectively, relating to the matter of the height of Hillmon, as though here set forth.

SCARS.

Attention was drawn to injuries, and answered in application and M. D. certificate papers to the effect that Hillmon had no scars. (See r. 199, No. 13; 181, No. 9; r. 188, No. 9; r. 193, No. 8; 169, No. 8; 176–7, No. 9; top of r. 944; r. 196, No. 13.) None of the insurance company agents who insured him pretended to have seen any scar on Hillmon's hand.

If any such scar, as claimed by plaintiff in error, was on Hillmon's hand when being examined by plaintiff in error by its agent, J. H. Stuart, M. D., it would naturally have been seen by him. See his evidence at record 935, 943 to 948; and Selig, record 1521.

And there was none on the hand of the corpse, as shown particularly at record 929.

And none on the hand of Hillmon. (R. 537, 720, 831, 1123, 1124.)

PHOTOS OF CORPSE—HILLMON AND WALTERS COMPARED.

Defendant in error buried the corpse at the Lawrence cemetery. It was afterwards, without her knowledge or consent, at the instance of representatives of the insurance companies, exhumed (r. 766), and (r. 241, 929) photographs were,

at instance of the insurance companies, taken of the corpse in the coffin—one a front view and the other a side view—but this was not done until after the hair had been rumpled and become dusty, and some had been pulled out, as shown at record 241–2, 225–6; copies of which two pictures are among the exhibits mentioned at record 128 and 129, forwarded for examination to this Court.

Several witnesses identified pictures (Exhibit No. 10) as that of John W. Hillmon. (R. 225, 226, 251, 255, 259, 266, 303, 304, 313, 690, 760, 761, 763).

When the body was so exhumed at the cemetery at Lawrence, and the photographs of it taken, it had of course greatly decomposed, as shown at record 241, 242, 928, 989.

Still the whole matter of pretended identification as to Walters rests on the photos taken twenty or more days after death and exposure, as shown by the evidence. (See r. 241, 742).

WALTERS SEEN ALIVE AFTER APRIL, 1879.

And in this connection we refer to testimony which is to the effect that it could not have been the corpse of Walters, because of his being alive. See deposition of Charles W. Schott taken by insurance company, in May, 1881, who in answer to question of insurance company, said he saw Walters at Kansas City, Mo., in the spring of 1879 (r. 1666, 1670 to 1673), and the testimony of Arthur Simmons (r. 1856, 1858, 1860), to the effect that Walters worked for him in May, 1879, two months after the death of Hillmon on Crooked Creek.

And Walters whilst on his tramp was in Leavenworth, Kansas, where he so worked for Arthur Simmons. See testimony of his sister Fannie Walters. (R. 1795 and 1808).

And further in this connection we refer to what we hereinafter say in relation to assignments of error Nos. 74 to 77 and 84, relating to the matter of the Walters theory, which, with an examination of the evidence, will show was by plaintiff in error, by its assistants and agents, introduced in the case as a supplemental substitute to supply the crushed Burgess

theory, but which Walters theory on examination of the materials of which plaintiff in error thus attempted to construct it, will show was not only an attempt to pass off an untruth as a truth, but also shows an effort so to do by witnesses who admitted to the effect that in their opinion falsehood was good enough to try to defeat defendant in error with.

Defendant in error, whose maiden name was Sallie E. Quinn, was a farmer's daughter, and lived as such girls usually do, and of course occasionally visited her cousin, and would naturally sometimes stay for a short time at his house; she was never a dependent of Levi Baldwin in any manner, nor is there anything to excuse claiming she was.

John W. Hillmon was an average young man, excepting more energetic than most young men. He was only at Baldwin's house when his business made it proper for him to be there. It is true he had served in the army. The occupation of Hillmon was honest, upright, and showed efforts to get on in the world by honest efforts and business. There is nothing to the contrary shown in the case—nothing to excuse any aspersion of him whatever; he worked on farms, and at herding cattle, and in the matter of gathering buffalo robes, and in mining, and in trading in live stock like other men; he is shown to have had considerable property before his death. Brown paid him some money (r. 475, 477), which he had received from Hillmon from a packing house where Brown sold hogs he had fed for Hillmon. (R. 476.) Hillmon held notes on Baldwin to considerable amount (r. 1889), on account of which Baldwin paid some money to defendant in error after death of Hillmon. (R. 1895, 1896.) It is not reasonable to suppose that all of Hillmon's money can be accounted for, he having died as he did.

Hillmon and defendant in error contemplated marriage from some time in 1873 until they were married on the 3[illegible] of October, 1878 (r. 746, 748, 782), soon after which Theodore Wiseman, who afterward figured largely in the respective Nichols-Burgess-Walters theories (r. 903, 906, 908, 877–8, 880–1, 887–8), and was the general manager of the efforts to defeat defendant in error until H. B. Munn come on the

scene of action, both as hereinafter shown, solicited John W. Hillmon to take insurance on his life (r. 305, 306), which was the beginning of the insurance negotiations.

Plaintiff in error knew Hillmon was a stock dealer, as shown in the applications for insurance (r. 167, 171, 174, 180, 186); see record 1498, where it is shown that Selig, the agent of plaintiff in error (r. 1496, 1505), because of the accident policy transactions mentioned there and elsewhere in his (Selig's) testimony, knew and had notice, and through him, its agent, plaintiff in error had notice that it got the chance of so insuring Hillmon, because the accident company was not willing for Hillmon to carry fire-arms and do fast riding after stock. (R. 1496–7–8 and 1518.) His doing so appears to not have been objected to by plaintiff in error. From the fact that negotiations about insurance commenced 31st of October, 1878, extended until February 25, 1879 (r. 170, 173, 177, 179, 181, 183, 185, 187, 191, 194, 198, 305–6), and by the testimony of Selig, Stuart and Miller, representatives of the insurance companies, it will be seen that the insurance contracts were not made in a hurry, or without due consideration on the part of the insurance companies, whose agents surely knew who and what Hillmon was, and insured him in the light of that knowledge.

We submit there is nothing in the record justifying any claim that the Insurance Companies were overreached in any manner by any person acting under any false pretences. The business was transacted in the usual and ordinary way, and his taking insurance was entirely natural, when we consider that Hillmon was going into a dangerous country, dangerous because of the then recent Indian raids in that part of Kansas, shown by the public history of this country, of which of course this court takes notice, memory in relation to which may be refreshed by referring to Chapter 112 of the Session Laws of Kansas, 1879, where is found resolutions in relation to those Indian raids. It is evident that the insurance by plaintiff in error on the life of Hillmon was taken in lieu of an accident policy (r. 1498), and as shown at record 750, 751, 752, and defendant in error offered to return to plaintiff in error its said policy, because Hillmon was going to drop it on

his return (r. 751–2) if it would give back the premium therefor, but Selig, its agent, declined to do this, (r. 750–1) because the premium had been paid and sent to the home office of the plaintiff in error, and that she would have to take the policy, and that she had better keep it because Hillmon was down in a wild country, and suggested that she did not know what might happen before he got back (r. 752). He (Selig) having that policy, gave it her (r. 752), and was agent to receive premiums, etc., as shown at record 1524 and 1496, and to deliver the policy sued on (r. 1506).

Levi Baldwin, from the evidence, appears to have been an energetic farmer, and afterwards a stock man.

And there is nothing in the record showing he did anything other or different than such a man, a cousin of defendant in error, naturally would and should have done upon receiving news of Hillmon's death; he would have been less than a man if he had done less than what he did do in behalf of defendant in error, when we consider their relationship and acquaintance; it was natural that he should sometimes be with Hillmon, and afterwards, at the request of the defendant in error, that he and his brother should go and get the corpse of Hillmon. (R. 753, 792, 721.)

John H. Brown is shown to have been nothing more or less than an ordinary man, doing what thousands of others in those days did in that section of the country to make a living. If Hillmon and his wife lived more economically than wealthy city men do, that is no cause for suspicion or calumny to a disinterested person, and was not to the insurance companies when they were getting premiums.

In relation to any remarks about notice of death of Hillmon to his wife, etc., we refer to record 756, where plaintiff in error, by its attorney, stopped defendant in error from testifying in detail upon that subject, and having done so it is not for it to complain about any lack of fullness in the evidence concerning such notices.

And as to her demeanor when being questioned as a witness at the Lawrence inquest by counsel for the insurance companies, being such as struck certain insurance witnesses

otherwise than favorably, is a matter of opinion too trifling to urge against her, considering those attorneys sought to cast derision on her testimony by trying to get her to compare a comparatively bald head with a head of full nice hair, as shown at record 1887, in a proceeding before the coroner in which the same attorney who represented the insurance companies in the suit had the control of the proceedings, except that notwithstanding all the efforts of plaintiff in error to support a claim that defendant in error was represented by an attorney, dwindled to the statement by Mr. Green to the effect that Mr. Borgalthous, to quote the language of Mr. Green at record 596, amounts only to this:

"Q. Did he ask questions of any of the witnesses?
"A. He did not; yes, he asked a question, but——
"Q. (interrupting) Of what witness?
"A. I don't remember now which witness."

Which matter relating to Borgalthous' action at the inquest is further and fully explained by reference to record 810, where it is shown that all the part he there took was to *shame* those attorneys of the insurance companies whilst engaged in their *investigations*, soon hereinafter mentioned, for trying to force defendant in error to identify a trunk, which she could not, as shown at record 810, have reasonably been expected to recognize or in any manner identify.

And defendant in error, after the commencement of her suit, in which she recovered judgment as above mentioned, married one James C. Smith, which explains why her name appears sometimes as Sallie E. Smith in the record and index thereto (r. 151).

The before and hereinafter mentioned Theodore Wiseman commenced the matter of insurance on the life of Hillmon by soliciting him to insure his life at the office of John Eldridge, in North Lawrence (r. 304, 305–6), where some papers connected with insurance, a friend's statement, was signed, dated of the 31st of October, 1878 (r. 305–6), the date of the first made medical examiner's certificate shown in the record (r. 198), at which time Hillmon was measured at that office as being five feet eleven inches (r. 306).

Theodore Wiseman, in the employ of one or more of the insurance companies from before the dead body had been brought to Lawrence (r. 884–5–6–7), on his way back from Medicine Lodge to Lawrence, whilst at Hutchinson wired a telegram (r. 901–2) to G. W. E. Griffith, an agent at Lawrence of one of the insurance companies (r. 1478), directing Griffith to see the defendant in error *immediately* and get from her a description of her husband (r. 1492), and in pursuance thereof Griffith on the 1st of April requested her to call at his office (r. 1482), and procured the attendance of A. L. Selig, agent of the other insurance companies interested (r. 1496), to attend the anticipated interview, and when she called at his office they proceeded to try to get from her a false description of Hillmon (r. 1885–6–7), and dispute arising between them she left (r. 1885–6–7 and 1892–3) without having signed whatever Griffith wrote on the subject (r. 1893), although Griffith wrote something there then, but it was not produced at the trial, *which of course it would have been if they had not failed* in the scheme to entrap her into failing to give a correct description of Hillmon.

On the arrival of the dead body (r. 1540) that very day, in the morning, such proceedings in relation to cutting up the body, including removal of the vaccine scab or sore from the arm of the corpse, occurred as above mentioned, and the body to a considerable extent cut to pieces, as though that would help in the matter of identification, instead of being an obstacle.

Mr. James W. Green, one of the attorneys for plaintiff in error, was, when that dead body was brought to Lawrence, County Attorney of Douglas County, Kansas, in which county Lawrence is situated (r. 576, 588), and was by plaintiff in error employed as an attorney in the matter somewhere from the 12th to 15th of April 1879 (r. 589, 576–7) and Mr. George J. Barker, who signed the aforesaid answer (r. 19), was employed as an attorney in the matter for one or more of the insurance companies by Wiseman before the Lawrence inquest (r. 892–3, 895), as was also Mr. Green, and was further so employed about that time by the third insurance company (r. 576).

And those two were the only attorneys authorized to appear at the Lawrence inquest for any person. Defendant in error was not there represented by any attorney (r. 764–5, 810 and 596), and they, Mr. Barker and Green, appeared at that inquest and examined witnesses (r. 575, 495) (after two previous inquests held in the county where the accident occurred), the object of which inquest held at Lawrence being, as shown by the testimony of Mr. Green in answer to questions asked him by Mr. Barker (r. 589) *to investigate the question as to whether the dead body* was the corpse of Hillmon (and not as to whether a crime had been committed or not, be that body whose it might), thus using public machinery contrary to the spirit of the law, for the private use and purposes of plaintiff in error and its cointerested insurance companies.

That *such was* the object of that Lawrence inquest, and so understood by both Mr. Barker and Mr. Green, is quite clearly shown by Mr. Green answering: "It was to *still further investigate the question* as to *whether* that was the body of John W. Hillmon or not," to the question of Mr. Barker as to what was the nature or character of his employment, his *first duties*, and as to what was the first thing required of him (r. 589 and see r. 577) as such duties would not have been *to still further* investigate unless such had been the previous object, etc.

And under the power and pretext of that Lawrence inquest, defendant in error was required by the Sheriff of the county to attend and testify at it, and bring there with her all the letters and photographs she had of Hillmon (r. 759, 798, 807–8) including a front view (r. 761–2), good picture, tintype (r.760–1, 807–8) of Hillmon and also of Brown (r. 761) standing side by side (r. 759, 760, 761, 800) taken a short time before (r. 762, 800) which tintype she gave to the County Attorney, Mr. Green, or to the Coroner, Dr. Morris, they being there together (r. 763–4, 807–8) and Mr. Green there had it (r. 760) and the same disappeared forever, although she used all reasonable means to get the same back from Mr. Green and the Coroner (r. 762–3–4, 807–8, 798) which *tintype* was an *important item* of evidence to *compare with* the picture of the

corpse in evidence, and also because of the contest at the trial as a matter of identity of the corpse with Hillmon on the question of height of Hillmon and the length of the corpse, and by comparison with the height of the still living Brown (r. 507) and it could, but for the objection of the plaintiff in error and the Mutual Life Insurance Company, have been shown by evidence at the trial that such tin type, recently taken before the death of Hillmon, showed Hillmon to be the tallest of the two, the trial Court on such objection excluding such point of evidence from consideration by the jury (r. 761–2, 835, 238–9, 240–1); if such tintype had not disappeared, its presence in the court would naturally, from the above description thereof, have obviated the grounds of such objection, as shown at record 761, that is, as to how the parties in the picture stood. But whether it would or not, it was competent evidence for many purposes for defendant in error, and the loss or *suppression thereof through* and *because* of so getting it out of her possession and control and not returning it to her (so done with the help of a proceeding helping them to so *investigate* as aforesaid) surely plaintiff in error when it caused exclusion of such evidence became *responsible* and *subject* to the charge of having *suppressed* or *destroyed* evidence *favorable to defendant in error*, on the *question* of *identification* of the dead body as the corpse of Hillmon—a loss occasioned by such as above shown improper use of inquisitorial powers to help the insurance companies investigate a question, surely still failing under such circumstances to produce the missing tintype, it stands against them that they wrongfully *suppressed* or *destroyed* evidence *favorable* to defendant in error in that matter.

Which matter of destroying and suppressing evidence favorable to defendant in error was not abandoned by the representatives of plaintiff in error until the character of John H. Brown for truth and veracity was injured by procuration of the written statement (r. 1284–6) obtained by use of means and in the manner herein referred to, and the disappearance of the aforesaid ring at one of the trials followed those other misfortunes, and the scratching about the figures 5 feet 11 inches on one of the medical examiner's certificates

showed up at the trial of 1895, by which evidence, favorable to defendant in error, in relation to the matter of height of Hillmon, was damaged, as shown at record 156 to 160, 138, and elsewhere, as shown at the parts of the record referred to *ante* in connection with the matter of HILLMON'S HEIGHT, LENGTH OF CORPSE, ETC., after the hopelessness of establishing the evidently manufactured theory of plaintiff in error that Hillmon was less than the height stated in the certificates had become apparent, unless something was done to cast a shadow of doubt on the height as given therein.

When the dead body arrived at Lawrence, Mr. Barker employed, and the inquest there organized, as above shown, John H. Brown having arrived there (r. 347), was interviewed in the office of Mr. Barker (r. 363, 371–2, 375, 511).

And he was also sworn and testified as a witness on that inquest (r. 413, 429, 575), *and there testified that the dead body was that of Hillmon* (r. 575), and after remaining (absent over Sunday) there several days (four or five), (r. 429 to 431), and until about the 10th of April, Mr. Barker told him he was through with him, when he left about 7 o'clock A. M. (r. 431–2) on the railroad and went to his home (r. 433a, 1006, 347a, 72), his father's place near Wyandotte (now Kansas City), Kansas, and from there to his brother, Reuben Brown's place, in Platte County, Mo., a few miles from Kansas City (r. 433–4), and from there starting for Roachport (a place near by), where a bridge was being built (r. 545, 556–7), work of a kind he before had assisted at (r. 352). After being at different places he arrived at Lexington, Mo., May 1, 1879 (r. 436).

And in relation to this matter of Brown's whereabouts and of the efforts of plaintiff in error to scare and induce him to go away, and still farther away, with apparent intention of hoping to get rid of his testimony, and excuse to charge him with fleeing, see what we hereinafter say in relation to assignment of error No. 97 on that subject, including that Barker did not deny telling Brown he was through with him, and thus in practical effect telling him to go whither he would, although Barker testified in the case, as shown at record 1735, in relation to the matter of that inquest.

AND THROUGHOUT THE CASE IT SHOULD BE BORNE IN MIND THAT JOHN H. BROWN DID NOT EVER GO AND SEEK AN ATTORNEY OR THE ADVICE OR HELP OF ANY LAWYER, EITHER BUCHAN OR ANY OTHER, OR GIVE ANY INDICATION THAT HE EVER THOUGHT HE NEEDED ANY ASSISTANCE OR PROTECTION, EITHER FROM BUCHAN OR ANY OTHER—but that, on the contrary, the insurance companies, through Walker, their employee (r. 884–5–6; 1066–7), brought the father of Brown to Buchan (r. 1250) in the spring of 1879, and that thereafter, as shown by the testimony herein, they (the insurance companies), by Buchan, their therefor paid employee (r. 1250, 1262, 1268–9, 1247–8, 1288; r. 1250 to 1288, etc.), pursued Brown until they, by use of the means, methods, influence of Buchan, and wrongful acts, threats and doings, amounting practically to unlawful duress of Brown, wrongfully obtained the false written statement set forth at record 1284–6, Brown passively submitting to the importunities and influence of Buchan, who pretended, notwithstanding his employment and promise of payment by the insurance companies (r. 1262, 1250, 1227, etc.), to Brown to be acting and advising in and for the interest of Brown, claiming to have been employed by the father and a brother of Brown, and thus plaintiff in error, and its assistants, caused and procured Brown to accommodate it and them with that paper, rather than have the threatened use of the great money power of the insurance companies applied in an effort to send him to the penitentiary (r. 473–4, 477, 457–8), to do which *only needed* changing *accidental* to *intentional* killing of Hillmon, and Brown had no witness to the accident, and he had at all times admitted the killing—all used, threatened and applied, as shown by testimony herein particularly referred to.

And any claim of plaintiff in error that Brown made that written statement voluntarily because he wished so to do, or that Brown sent for or wished to see Buchan or through him to communicate with plaintiff in error, or any of the insurance companies, as well as any statement or testimony of Buchan to that effect is, we contend, shown by the evidence in the case to be beyond any reasonable doubt unfounded and false, not merely by considering the testimony of John

H. Brown and Reuben Brown, but also by the testimony of Buchan and of other witnesses called by plaintiff in error, irrespective of any testimony introduced by defendant in error.

And in this connection, to draw attention particularly to the fact that plaintiff in error and its assistants sought the interviews of Buchan with Brown for the purpose of getting such false written statement, we, to state the facts in form of questions, ask why did Walker, the employee of the insurance companies (r. 1066–7), bring the father of Brown to Buchan (r. 1250), and then Walker and Buchan having failed to see Brown (r. 1247, 1281), why did Buchan write (r. 1227, 545–6–8) to Reuben Brown and get him to go with him to try to help get such different (from Brown's previous testimony) and written statement from Brown, as shown at those pages and elsewhere; and why did Buchan commence on and talk to Brown as he did at their interviews; and why did Buchan, Barker, Green and Munn have their several interviews herein referred to in relation to Brown; and why, after Brown had made the so-called proofs of death of Hillmon (r. 1258), did Munn, Barker, etc., urge Buchan on in the matter of getting such written statement, as shown by the testimony of Buchan hereinafter cited; and why did Buchan take pen, ink and paper with him (r. 1269) with which to write it; and why did he take Ward, the officer, along with him on the trip when he procured that document; and why did the insurance companies pay Buchan for all he did (r. 1262, 1247–8, 1288, 1250, etc.) if Brown would or did make that written statement other *than in practical effect on the mind of Brown under duress* and *fear* of being *prosecuted* by the insurance companies for *killing* Hillmon, testimony in relation to all which matters are hereinafter more particularly referred to.

AND THEREFORE THAT DOCUMENT, SAID WRITTEN STATEMENT, WAS IN LEGAL AND EQUITABLE EFFECT FOR ALL INTENTS AND PURPOSES AS BETWEEN PLAINTIFF IN ERROR AND DEFENDANT IN ERROR, ON AND AS TO ALL QUESTIONS OF FACT, AS WELL AS OF LAW INVOLVED IN THIS CASE, THE WRITTEN STATEMEMT, DOCUMENT, ACT AND DEED OF PLAINTIFF IN ERROR, MADE AND PROCURED BY IT, AMONG OTHER THINGS

TO WRONG AND INJURE DEFENDANT IN ERROR, the thereby crushing of the character and reputation for truth and veracity of Brown being a mere incident so far as it affected Brown, which plaintiff in error and its agents seem to regard with indifference, if with help thereof they can save a few dollars to plaintiff in error, by destroying evidence favorable to defendant in error, and with the help thereof otherwise injuring her and her case, and defeat a recovery on the policy, subornation perjury on the part of those who paid for and procured the same being escaped because that paper was not sworn to in any proceeding specified in sections 5392–3, R. S. 1878, a matter duly considered before it was procured (r. 473a, 1295, 457–8a, 1224, 479a, 1347.)

John H. Brown, being up to that time and under the circumstances an important and unimpeachable witness to the fact of the accidental killing of Hillmon, it was evident to the plaintiff in error and its representatives, that unless something could be done to destroy his reputation for truth and veracity, and to cause and procure him to go back on and abandon the truth, and testify falsely, it could not reasonably hope to defeat a recovery on the policy, and thereupon as a chief strand in the web which plaintiff in error and its co-interested insurance companies, by its and their agents, tried as shown by the evidence herein to wrap about and mystify the claims of defendant in error on the policies, it and they commenced to put in operation their scheme to obtain from Brown such false and different statements in writing, and one contrary to what he had sworn to at the inquest, and such an one as that set forth at record 1284–6, as a *weapon* against defendant in error and her claims on the policies, including with which to impeach the credibility of Brown, and thus to injure her.

And by what was done in that matter, plaintiff in error and its associates and its and their agents, itself and themselves, as shown by the evidence hereinafter referred to, INTRODUCED into the case said *written statement*, and made it, and the manner and means by which it was *invented* and *obtained*, and by plaintiff in error and those insurance companies *paid for*, and the wrongful use as a weapon offensive

and defensive it was put to, a part of the case and of its history.

And to assist the Court to understand all that, and our contentions in relation thereto, and to the release pleaded by plaintiff in error (r. 19), we request the attention of the Court to the devious trail, shown by the evidence we hereinafter refer to, made by plaintiff in error, and its assistants, in the matter of procuring that written statement and the release, as a matter necessary to understand before and when considering the matter of that "statement in writing," the "Munn paper," the "release," and the claims of plaintiff in error in relation to conspiracy, and the wrong, unfounded, contrary to fact and unjust claim of plaintiff in error that Brown fled, all made by asking divers refused instructions, as well as to assist the Court to understand why the Walters theory was worked up by Wiseman and others, to fill with Walters the place in said written statement left vacant and delusive after the "Joe Burgess" invention therein became a boomerang on plaintiff in error, as shown in what we hereinafter say in relation to assignments of errors Nos. 105, 74 to 77, etc.

And now resuming our statement, where we left John H. Brown at Lexington, Mo., on May 7th, 1879 (r. 436), two or three days after which date, William J. Buchan, to help manufacture such mentioned web, and to assist in inventing, manufacturing and placing therein, both as a strand and weight, such a written statement, sought out and met Brown at that place (r. 436, 548 to 550, 556, etc). Brown afterwards met Buchan at Parkville, Mo., (r. 439) and he afterwards again, on the 4th of September, 1879, met Buchan, where the written statement set out at record 1284–6 of that date was written by Buchan in his (Buchan's) own language, with pen, ink and paper taken with him (Buchan) when he went to get the same, accompanied by Ward, the Deputy Sheriff of Wyandotte County, Kansas, with no one present other than Buchan and Brown, Reuben and Deputy Sheriff named Ward being near by; Reuben, who assisted Buchan to get Brown to sign such statement, perhaps passing through the room once or twice whilst it was being written, (r. 1236, 1269, 1270,

439, 440, 459) Ward remaining practically with them until after that statement was sworn to at Parkville. (R. 456–7.)

Buchan was a practicing attorney at law at Wyandotte (now Kansas City, Kan.) (r. 1227) acquainted with the whole Brown family (r. 1227), and having been soon after the Lawrence inquest employed by the father of Brown, pretendedly became and was in pretense to Brown such attorney of and for him from then until after the consummation of the matter of procuring that statement from Brown, and the releases from defendant in error (r. 1250–1 and 1247–8), but when we consider the acts of Buchan, it is evident he was really acting for the insurance companies from the time he met Walker, if not before, and *prima facie* Walker brought Brown's father to employ Buchan because sent by Wiseman and others so to do, as shown at record 1250, before Buchan had the interview with Brown at Lexington, Mo., about May 3, 1879.

In April, 1879, Buchan and the before mentioned Walker, who accompanied Wisemen in the interests of the insurance companies to, and was at the time and place when the dead body was exhumed at the Medicine Lodge cemetery (r. 883-4-5-6-7) sought an interview with Brown (r. 1247, 1281), but failed (r. 1247). Brown is not anywhere asked as to whether he knew of that Walker and Buchan's effort to see him unless at record 438a, 1076 about an effort he did not know of.

From and at the time of so with Walker failing to see Brown, Buchan acted as agent, and in the interest of the insurance companies, including plaintiff in error, as shown by his mentioned connection with Walker and by what followed, including their paying him for what he did (r. 1262, 1247-8, 1288, 1250), and having so failed, he (Buchan) through information obtained on his own solicitation (r. 545 to 548, 556-7) from Reuben Brown, learned John H. Brown (still claiming he had so killed Hillmon and that the aforesaid dead body was the corpse of Hilmon) (r. 547-8) would be at Lexington, Mo., on a certain day (r. 561), then without any arrangement having been made for a meeting with John H. Brown (r. 561) and because he, Buchan, *must* see John H. Brown (r. 560) (*why must see him* unless in the interest of the insurance companies) induced Reuben Brown to go with him (Buchan)

to Lexington, Mo., to see if *they*, Buchan and Reuben, could not get a *statement* from John H. Brown, "*different from what he had made, and have the matter straightened up* (r. 548).

Thus clearly alluding to the testimony of John H. Brown at the Lawrence and previous inquests that the dead body was the corpse of Hillmon, and expressing a desire to get the equivalent of the aforesaid written statement, set forth at record 1284-6 (afterwards by the efforts of Buchan and Reuben with the assistance and presence of a Deputy Sheriff obtained as shown).

And then Buchan and Reuben Brown went to Lexington, Mo., and there met John H. Brown about the 3d of May, 1879, (r. 436, 548 to 550, 556,) and then tried to get such *different statement* from John H. Brown, Buchan among other things to scare Brown into making such *different statement* saying to Brown he had got himself into a bad scrape (r. 562) and that his (Buchan's) object was to satisfy the insurance companies, and that if he (Buchan) got such statement, they would let him (Brown) alone, and that there was a *warrant* out for him, (Brown) and that he was liable to be *arrested* at any time, and that he (Buchan) wanted him (Brown) to make some kind of a statement so he (Buchan) could have a, by Buchan, pretended warrant stopped, or stayed for a while at least (r. 548-9), and that if he did not the insurance companies would never pay any attention to what he (Brown) said, and would hunt him (Brown) down and make him out a murderer and a liar, and that he (Buchan) himself was keeping them off the track (meaning of course keeping the insurance men from prosecuting Brown), and that his (Buchan's) object was to satisfy them, and that then meaning if Buchan got from Brown such different statement they (the insurance companies) would let him (Brown) alone, and by doing, saying and urging such further acts and things, as shown by the hereinafter copied questions and answers, (part of the deposition of John H. Brown) and elsewhere on the same subject in relation to the matter of why and how Buchan as agent of the insurance companies procured the written statement and release.

In this connection and throughout the case, including particularly when considering the matter of said copied part of the testimony of John H. Brown and the matter of the 105th assignment of error, it should be borne in mind not only that there was not any competent or other evidence of any warrant having ever been actually issued for the arrest of Brown, or of any criminal proceedings having been actually commenced against him, either for killing Hillmon or for killing any person, or of any actual intention or desire on the part of the insurance companies or their representatives, or of any person or officer whomsoever to have such warrant issued, or if issued, to have the same actually executed by the arrest of Brown, or of actually instituting or prosecuting any such criminal proceedings, but, and also that on the contrary, that all the talk of Buchan about any such warrant or criminal proceedings was evidently only to scare Brown into making such *different* statement, and to induce Reuben Brown to assist him (Buchan) to scare and induce John H. Brown into making such false and *different* statement, and further as Mr. Green, one of the attorneys for plaintiff in error, was County Attorney of Douglas County, where the last inquest was held (r. 576), and as there was as shown by the evidence plenty opportunities to execute any such warrant if desired, or any there was, by arresting John H. Brown, yet there is no pretence that any such warrant, if one really existed, was ever used otherwise than as a scarecrow to operate with on Brown, the lawyers, Messrs. Barker, Green and Buchan, well knowing there was no cause for criminal prosecution against Brown, either on a charge for killing Hillmon, or for killing or as being accessory to the killing of any person of name known or unknown, therefore this matter of pretence about a supposed warrant is important to bear in mind throughout the case so far as it relates to the talk and actions of Buchan and Brown in relation to the matter of the written statement or release.

And in this same connection, and with reference to the matter of refused instructions No. 23, at record 1908; No. 25, record 1909, mentioned in assignment of error No. 98, record 2002; No. 26, record 1909; No. 40, record 1913, mentioned in

assignment of error No. 102, record 2005; and No. 43, record 1914, mentioned in assignment of error No. 40, record 1913, and the conditional agreement of plaintiff in error and other insurance companies, made by Munn, its and their agent, copied at record 580, not to prosecute Brown, etc., made with the assent and without opposition of Messrs. Barker and Green—Green, the County Attorney of the county where that Munn paper was made (r. 576).

We submit it is apparent that plaintiff in error, and all its representatives, including Messrs. Buchan, Munn, Brown and Green, throughout the case, understood and believed that the aforesaid dead body was that of Hillmon, and that such written statement was false, and was made and obtained as and for the purposes in the aforesaid third cause of reply alleged, because if they believed that written statement to be true, it can readily be seen what an improper act each of them did, or assented to, by making, or assenting to the making or accepting, of that so-called "Munn paper" of 6th September, 1879. We are not willing herein to either claim or concede as against any of those men, or as against plaintiff in error, or any of its officers or representatives, that it or they ever actually believed said dead body was that of any person other than that of Hillmon, because of the position they are by their own acts placed in by reason of that "Munn paper" and other acts and doings of theirs herein mentioned, if they did not, at all times, *actually believe* that said dead body was the corpse of Hillmon—this because, considering the whole case as it is, plaintiff in error, and its respective agents and representatives are, by and because of that "Munn paper," and said written statement and release, and of the means and methods and circumstances and reasons under and because of which the same were respectively made and obtained, placed in the position by their own acts, conduct and testimony, of having either attempted to beat a widow out of what they must have believed to be her just dues on and because of the aforesaid paid for policy of insurance, or of doing such extremely wrongful and improper—compromising to them—acts, wrongs and things, as by the aforesaid refused instructions Nos. 23, 25, 26, 40 and 43 plaintiff in

error sought to induce the Court to relieve them in the minds of the jury of any suggestion of, and of thus white-washing plaintiff in error, and its representatives, from the disagreeable position it found itself in when all was exposed by the testimony, and the color and marks placed on it and them, by and because of its and their acts, and what it and they, as its representatives, did, and caused and procured to be done, in and about the matter of that "Munn paper" and said written statement and release; and of Buchan, as attorney for Brown, having done by him, as the testimony of Buchan himself, corroborated by the testimony of John H. Brown and Reuben Brown, herein referred to, shows he did, as paid employee of plaintiff in error, by procuring from and causing Brown, his client, to make that written statement in the manner and under the circumstances the evidence—even his own testimony—shows he did. But as plaintiff in error, and its said agents and representatives, intentionally and voluntarily placed themselves in the position in relation to those matters they found themselves in, when the testimony was all before the Court, we will, as to this part of our brief, leave them on such horn of the dilemma they thus placed and found themselves in, as they may think best for themselves, until it shall be made to appear, as is hereinafter shown, that *as a matter of fact they believed and knew* said written statement to be false, and obtained it to use for the purposes in said reply alleged, and for other wrongful purposes, including destroying, at least injuring and depriving, defendant in error of the otherwise unblemished reputation of Brown for truth and veracity, as well as that of getting Brown to take the part he did—after they had bound and practically placed him at their control and mercy because of that written statement being in their possession—in helping Buchan to get the release from defendant in error.

But Brown, at Lexington, refused to make any such *different statement*, telling Buchan that he had before told the truth, to-wit, that he had so killed Hillmon, and that said dead body was the corpse of Hillmon, and did not fear anything at all from it (r. 548–9), and that he (Brown) had done

what he had and could not help it, and had told the truth (r. 474).

When Buchan at Lexington found that he could not then there get from Brown such different statement, he begged for smaller favors (anything), and persuading Brown that it did not amount to anything if he asked where a dozen Hillmons were at, induced Brown to satisfy and favor him (Buchan) by giving Buchan the exhibit "B" set forth at record 584, 776, 483, dictated by Buchan, as shown at record 482–3, 493–4 and 549, 550, 565, which Buchan did not ever deliver to defendant in error (r. 766), but, on the contrary, gave the same to attorneys acting against her (r. 1264–5, 584, 592–3, 341, 482).

And finding Brown wished to go to his brother Reuben's place (r. 474), Buchan tried to induce and scare Brown into going farther away (r. 474, 550), but Brown knowing his innocence of any crime, and not fearing, as shown by his acts, did return to Reuben's place near Parkville.

Having, by getting that exhibit "B," done that much better than Walker and he did on the previous effort, Buchan within a day or two thereafter, went to Lawrence to communicate with other representatives of the interested insurance companies (r. 1222–3, 1253–4, 1256, 1260), and from that time on until the whole scheme of undoing Brown as a credible witness against those insurance companies and of getting releases from defendant in error, he was, as occasion seemed for the purposes of the scheme to require, in communication with representatives of those insurance companies, Mr. Barker, Green and H. B. Munn (r. 1254, 1256, 1259, 1260–6), Barker at Buchan's office in Wyandotte once or twice (r. 1260), Green at Buchan's office two or three times (r. 1261–2–3).

Buchan having received a letter from either Barker or Green asking him to meet them at the Coates House in Kansas City, (r. 1255–6) did so (r. 1256, etc.) twice (r. 1268) and there Mr. Barker and Munn informed Buchan that Brown had made proofs of death (meaning that Brown had made

affidavits—doubtless three, one to serve on each of the three insurance companies—that the aforesaid dead body was that of Hillmon so by Brown accidentally killed as aforesaid) record 1258, and then they wanted Buchan to go and see Brown, *and find out about it and see what he* (*Brown*) *was going to do about it* (r. 1258, 1261, 1268) and *what he* (*Buchan*) *was going to do* (r. 1258, 1261–2, 1268), and promised to (and did) pay him, Buchan (r. 1262.)

And as Brown had at inquest sworn that the dead body was that of Hillmon, and Brown had made such proofs of Hillmon's death *it*, of course, appeared to those four gentlemen, representatives of the insurance companies, that if Brown was to be either choked off the witness stand or prevented from testifying as he had before done, or his credibility as a witness destroyed, and the value of his then and previous unblemished character for truth and veracity taken from defendant in error, it must be done *quickly* and *as effectually* as possible, after the last of those interviews had at the Coates House on the 3rd of September, 1879 (r. 1268) —and thereupon on the next day (September 4th) Buchan—showing and having made up his mind *what he was going to do*. Taking Ward, a Deputy Sheriff of Wyandotte County, Kansas, with him, and who remained with him until he had got the statement of 4th September, (r. 1291, 1281, 1234–5, 1238, 455, 571, 417, 439, 478, 479, 551, 553, 554) and also taking *pen*, *ink* and *paper*, *with which* to *write the same* with him, (r. 1269) and a fast team (r. 1291) and buggy he (Buchan) went and found Brown at Reuben Brown's place engaged in *honest labor* (r. 439, 551), notwithstanding the previous unsuccessful effort of Buchan to get Brown to go farther away (r. 474, 550), and of an effort of Wiseman at the time of the Lawrence inquest to run Brown off (r. 1252–3–4), from all which we see any effort of plaintiff in error to claim Brown *ever fled* is not only unfounded but made to unjustly increase prejudice against him, and then they (Buchan and Ward) with the team and buggy, went to where Brown was working and brought Brown to Reuben's house (r. 551, 474, 568).

And to help induce and persuade Brown to let him (Buchan) write such *different* statement for him (Brown) to

sign and swear to as Buchan wished to procure, he (Buchan) among other things as a lawyer and attorney for Brown in substance and effect, informed and said to Brown, and also advised him *as his lawyer and friend* thas he was not doing anything wrong *at all*, and as to such (*different*) *statement not being true*, it did not make any difference at all; that he, Brown, was not throwing himself liable, and that it could not be used in law (r. 473, 479), and that he would insure him such statement would never be against him in law anywhere, and as he was acting as his attorney, he would stand between him and all danger (r. 457); that it was not lawful and could not be used in law, and that it was only to please the insurance men (r. 479), evidently referring to the fact that it was not being made under such circumstances or in such proceeding as to make it being false swearing thereto, perjury within the meaning of Section 5392, R. S. 1878, page 1059.

And that *he* (BUCHAN) and *every one he knew*, unless he excepted the insurance men (r. 473), believed Brown's *previous statement to be true*, but that the insurance men would break it down, as THEY *had the money to do it with*, but if they got such statement they, meaning the insurance men, would be satisfied (r. 473), and that *it would be better* for *them* to make *such statement* than it would be for Brown to be *arrested* and put in *jail*, and probably go to the *penitentiary* (Buchan still having the aforesaid exhibit B [r. 580, 766, 1231, 1265] like unto a set of fetters on Brown), and that if the insurance men once got him in jail, they would make him out a *liar* and *murderer*, and if he (Brown) didn't give him such statement he (Buchan) couldn't do any more for him; that he had been trying to do all he could for him, and that he was only advising him for the best, and that Brown would have to do something (then) *now or never;* that Ward, the Deputy Sheriff of Wyandotte County, would probably take him (Brown) (then) now (r. 457–8), and that he would not advise him to do anything but what was all satisfactory, secretly meaning of course to the representatives of the insurance companies, and would back him in it, whereupon (and after such further talk and proceedings between the four, Buchan, Ward, Reuben and Brown, as herein referred to), Brown, in his lack of legal

and worldly knowledge, relying on Buchan in what he (Brown) not unnaturally, considering all the circumstances, supposed his helpless condition, and he being so pressed and given away by his legal adviser, who he of course then supposed was acting in good faith, succumbed to his, then to him apparent fate, and giving himself into the power of an enemy he supposed to be his attorney, and not as he really was in the employ of plaintiff in error and the other insurance companies, as shown at record 1262, 1250, told Buchan that if he thought it was right he would just leave it to him, and then they went into the house to which Buchan and Ward had so brought Brown from his labor as aforesaid, and Buchan pulled out the table and wrote the said statement of 4th of September, 1879 (r. 473, 440, 553) *in his own language* (r. 1236–7, 1261, 1269, 1270). He (Buchan) *when* and *before he wrote* the same, knowing that Brown had, at inquests held in Lawrence and Barber County, previously sworn that the aforesaid dead body was that of Hillmon, and had made the aforesaid proof of death (r. 1258, 1264, 1283, 1288, 575, 427) and not knowing of any evidence against Brown, his client, in relation to the matter (r. 1264), and he (Buchan) so himself invented *and wrote* the same (that statement of 4th of September, 1879), the same being a false statement (r. 418, A. 777; 519, A. 130), as Buchan as herein shown (r. 473–4; 517, A. 115), conceded it would be *without* Brown having ever told him (Buchan) that he (Brown) had not killed Hillmon (r. 436–7, A. 1059, 1068, 1069), and without Brown having ever told him (Buchan) any such things as stated in that written statement of 4th of September, 1879 (r. 436–7, 441–2–3, 444–5–6–7–8–9, 450, 452–3, 472–3–4, 477–8, questions and answers 1059, 1060, 1112 to 1146, 1175–6, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350, and r. 502–3–4, A. 53 to 60 and 70 to 77). But on the contrary, Buchan *so invented* and so *wrote* the same after Brown had time and again told him (Buchan) that he (Brown) killed Hillmon accidentally (r. 405, A. 630; 473–4, A. 1298) and had before (meaning at the inquest, etc.) made true statements (referring to his statements at the inquests and elsewhere that he so accidentally killed Hillmon) (r. 548, 552–3, 569, 570–1), and he (Buchan) really believing such previous statements of

Brown that he had so killed Hillmon to be true (r. 473-4; 517, A. 115), wanting it, such invented and different statement with which to get big money from the insurance companies (r. 473).

And after they, Buchan and Brown, had had such conversations, and Buchan had used such arguments, inducements, statements, means and threats, both covert and direct, to Brown of his (Brown's) being pursued by the insurance companies and immediately *arrested, put in jail and tried for murder and sent to the penitentiary* (because of power of the insurance companies) as shown by the testimony, including and as shown by the following copied parts of the deposition of John H. Brown, testimony not properly cross-examination, but brought out by questions asked by attorneys for the insurance companies when the deposition of Brown was taken about January 1882, under the notice at record 341 and agreement at record 318, some of which questions and answers are as follows, to-wit:

"Q. 1223. At whose request, or by whose directions, was it destroyed?

"A. 1223. By Buchan's and myself both, that I should destroy it; that was his promise to me when I made the statement out.

"Q. 1224. What was his promise to you when you made the statement out; what was said about the destruction of it at that time?

"A. 1224. He said that he would insure me that his statement would never be against me in law anywhere, and to convince me that it wasn't lawful and if I would allow him, for us, to make this statement he would give it back to me and I could destroy it; that to convince me that it would never be used against me, there would not be a scratch of a pen contrary to the two testimonies that I had testified before, and as he was acting as my attorney that he would stand between me and all danger. He told me that it would be better to allow him to do that than it would be to be arrested and put in jail and probably go to the penitentiary, and that if the insurance men once got me in jail that they would make

me out a liar and murderer; and if I didn't, he couldn't do any more for me; that he had been trying to do all he could for me, and that he was only advising me for the best, and that I would have to do something now or never, that Ward, the deputy sheriff of Wyandotte county would probably take me now.

"Q. 1216. The defendant's attorney here repeats the question: What was his promise to you when you made the statement out; what was said about the destruction of it at that time?

"A. 1216. He said that he would hand it back to me, and that I could destroy it myself." (R. 457–8.)

"Q. 1294. State anything else which was said to you by Buchan relative to your making or signing that statement, giving the time and place where the conversation occurred.

"A. 1294. He told me if I would submit to that statement, or allow him to make that statement it would be the best thing that I could do, and that they then would let me alone; and if I didn't, they never would. And as far as that statement, the insurance men would have to pay him damn big money for it; and that he would give my brother, Rube, $100 for a horse that he had over there, and for me to ride it over the next time I came over and that he would buy the horse from him and give him to me; that is about all I remember of now.

"Q. 1295. State anything else in regard to that matter, which you remember.

"A. 1295. And that he would pay me about $40 that his brother had owed me, and more too, because I had befriended his brother when he wasn't able to; and that he wouldn't persuade me to do anything wrong for all the money the insurance company had got, and only advised me as my lawyer and a friend, and assured me that I wasn't doing anything wrong at all; and as to the statement not being true, it didn't make any difference at all, that I wasn't throwing myself liable and that it couldn't be used in law, and to convince me of that he would return me the paper and I could tear it up; and that he was satisfied and everyone else he knew, except

insurance men, that my true statement was so, and that everybody believed them; but the insurance men would break it down as they had the money to do it with, but if they got this statement they would be satisfied and there would be no more of it; I don't recollect of anything else just now.

"Q. 1296. When and where did this conversation between you and Buchan, which you have mentioned in your last two answers, first occur or take place?

"A. 1296. The conversation in general took place at Fulton's mill in Platte County, Missouri, and on the way to my brother's and about his stable and house. That's as near as I can tell you where it occurred.

"Q. 1297. When did Buchan first speak to you about making a statement in this matter?

"A. 1297. At Lexington, Missouri, in May, 1879.

"Q. 1298. State what Buchan said to you at that time about making a statement.

"A. 1298. He first said he had come down here to see me; that my father and brother Thorn had employed him to act as my lawyer or attorney in this Hillmon trouble between her and the insurance men; he asked me how it was, and I told him just as near as I could; and he said he knew that and had heard of it before, and told me that wasn't the point he wanted to get at, and that I stood in a rather dangerous place; that the insurance men would never pay any attention to what I said, and that his object was to satisfy them, and then they would let me alone, and that they would not until he did satisfy them; and that all this difficulty and trouble was left with him and no one else, and whatever compromise was made would be satisfactory with them, and what he wanted to get a statement from me to make it appear that it wasn't Hillmon who was killed, but some one else. And I told him that that was something that couldn't be done, that I had done what I said and couldn't help it, and told him I didn't see how I could do it. He said he could in several different ways; that he could find somebody froze to death or find somebody killed and that all that would be changed

in the testimony would be by making out that there was someone else killed besides Hillmon. I told (———) that (———) couldn't be done; says I, Bill, you know that that cannot be done. Says he, John, you know that I am a lawyer and could plan out anything of that kind a good deal easier than I can. I told him that I couldn't help that, that I had done what I did, and to help it I couldn't. He told me that if I didn't do something of that kind the insurance men would hunt me down and make me out a murderer and a liar. He told me that he couldn't do anything for me unless I would (believed) and paid attention to him, and that it was the only way I could ever keep the insurance men away from me or off of me, and that they was hunting for me and had been, and that it was himself keeping them off the track, and that if I didn't do anything now, to keep away from Parkville or Wyandotte. I then wanted to go up to my brother's and drive team for him; he wanted me to. Says he, John, for God's sake, don't do that; for to get away from Lexington. He says, I have got a hundred dollars here and I will give you fifteen dollars; that will take you away from here and find you a job somewhere else, and he wanted to know where I was all the time. I told him he could find out through Rube, that I was writing backwards and forwards to him once and a while; that was about the substance of the conversation there at Lexington at that time.

"Q. 1299. Was there anything else said by Buchan at that time about your making a statement?

"A. 1299. He said that he had it all pictured out, and he could make it appear very easy in his statement that this fellow had got into the wagon to ride with us was the man killed and not Hillmon; I don't remember of anything else just now. (R. 472–3–4.)

"Q. 1332. State what part of the conversation between you and Buchan, on or about the 4th day of September, 1879, took place at or near Fulton's Mill, what portion between there and your brother's house, and what portion at or near the stable on your brother's farm?

"A. 1332. His conversation with me at the mill the first time was in regard to me and him making out a statement,

and that it had to be now or never, as he had kept them fellows off just as long as he could, and that he was only trying to get me to do just what anyone else would, and if I would consent to let him do it it wouldn't take him a great while, and that I wouldn't have any more trouble about it. And the conversation was that (talked about in general) from there all the way to my brother's stable and the house. (R. 477.)

"Q. 1346. State what was said between you and Buchan in regard to this matter at or near the barn after dinner, when you say your brother was present?

"A. 1346. Buchan asked my brother if he didn't think he had offered fair with me; if he didn't think he could smooth this all over and make it look plain and satisfactory without a doubt; whether it wouldn't be the best to consent to it, and if I did he could go to the house and do it up in a little of no time, and that he had paper, pen and ink with him, and I told him that I would.

"Q. 1347. Was there anything else said at that time between your brother and Buchan or yourself and Buchan?

"A. 1347. My brother asked him if he didn't think I would be laying myself liable by doing anything of that kind. He told him no, and that it wasn't lawful and couldn't be used in law, and that he would stand between me and all danger; that it was only to please the insurance men. I told Buchan if he thought it was right I would just leave it with him. He told me he wouldn't advise me to do anything but what was all satisfactory, and would back me in it.

"Q. 1348. Have you stated fully now all that was said about that matter when your brother was present?

"A. 1349. All that I recollect of now.

"Q. 1350. What did you and Buchan then do?

"A. 1350. Went to the house, pulled out the table to commence writing." (R. 478–9.)

And in this connection we refer to some of the testimony of Reuben Brown on the same subject, corroborating the foregoing, set forth at record 552–3, 569–570–1.

It will be noticed that all along Brown conceded he had accidentally killed Hillmon—and that to make that killing *murder* of his friend and sole companion only required *ignoring* of the one word "accidental," and plaintiff in error by its paid agent (r. 1262; 1247–8, 1288) Buchan, under pretence that Buchan was acting in the interest of Brown and as his (Brown's) attorney, pretendedly employed by his father, with the help of the presence of the officer (Ward) bluffed and scared Brown into signing the written statement rather than risk the, by plaintiff in error through Buchan, its agent, threatened use of the money power of plaintiff in error and its assistants to bunco those who sometimes misadminister justice (an important element of the case in the mind of the average man) into ignoring the "accidental" part of the sad affair which happened on the banks of Crooked Creek, and push him (Brown) into a cell in the penitentiary for killing Hillmon, unless he would give plaintiff in error the supposed benefit of the tissue of falsehoods set forth in the written statement, by plaintiff in error misnamed "Brown's affidavit, statement or confession," instead of designating it by a name descriptive of the facts and methods used to produce it by calling it "A document or club which shows as applied to the testimony in the case what a corrupt use of money can do with the help of misapplied genius, reckless audacity and disregard of duty," and which written statement thus obtained is still waived by the plaintiff in error as shown by its 105th assignment of error as a banner to be proud of, and under which it hopes yet to march to victory; itself evidently being unable because of some peculiarity in its organization to comprehend the position it is in, because of the facts in relation to the matter of the document, including payment for its procuration after the employment of Buchan, shown at record 1262, 1250, etc., and of the collapse of the edifice of conspiracy, murder and fraud by help thereof, it attempted to construct, caused by the refusal of the "Burgess called Joe" to remain dead, referred to hereinafter in relation to the matter of that 105th assignment of error, and of the misfit of his proposed substitute (Walters) to answer as an original of the corpse, referred to hereinafter in relation to the matter

of the 74th to 77th and 84th assignments of error relating to the so-called Walters theory, as well as in the foregoing part of this statement part of this brief.

It can readily be understood that Brown, because of his not being acquainted with procedure in courts, could be easily led by Buchan into the belief that courts could be used as a means to carry into execution his threats about the use of money, power, etc., shown by the before copied part of the deposition, and of course notice will be taken of the common belief such things are sometimes done, all of which of course operated on Brown when he yielded to and gave way under and because of those threats so made, under the circumstances in which Brown was situated, by plaintiff in error through its hired agent, Buchan, record 1262, etc., and all which matters plaintiff in error evidently hopes and expects will, because of its exalted position and assumed attitude in this contest between it and a woman from the prairies, be ignored, forgotten, and remain unmentioned as against it, and that Brown will be made a scapegoat of to bear alone all the infamy shown by the invention and use made of that written instrument.

Buchan, having got the statement, went with Ward, the Deputy Sheriff, and Brown, to have it sworn to (r. 571, 456, 1237, etc.), by which actions of Buchan and Ward and the threats and representations of Buchan, attorney of Brown so made—Ward, an officer, being there (Brown of course would not under the circumstances, consider or count on a state boundary question in relation to the matter of arrest)—*Brown was practically placed in duress*, and so held until the release from defendant in error was obtained.

And the acts of Buchan and Brown, including the statement of Buchan to Brown, made a few days afterwards at Wyandotte, after Buchan procured the RELEASE, to the effect that he (Brown) *was free* to go anywhere (r. 501–2a, 50), shows that both Buchan and Brown considered that from the time Buchan and Ward found Brown at work at Reuben's place and took him to the house there, at the time Brown signed said STATEMENT, on the 4th of September, 1879, that he (Brown) was practically in duress, and that Brown sup-

posed himself bound and that he had to do and say whatever Buchan might request him to do or say.

Reuben Brown, evidently, did what he did in the matter of helping Buchan get that statement from Brown out of fear of his brother being unjustly, viciously persecuted by the insurance companies (r. 571–2), and that he so assisted Buchan because of such fear, is shown by his deposition (r. 544 to 575).

And further, that statement of 4th September, 1879, bears on its face evidence, conclusive evidence, we claim, that it (said statement) *was false*, and that *it was invented* and *manufactured* by a representative of the insurance companies, by *use therein* of the words, "he said his name was either Berkley or Burgess, or something sounding like that; we always called him Joe" (r. 1285), coupled with the testimony of the aforesaid agent of the insurance companies, Theodore Wiseman, a witness called by them (r. 854), who, as shown at record 903–6–8, testified to the effect that the representatives of the insurance companies acting in the matter were proclaiming the dead body before mentioned was the corpse of one "Joe Burgess" or Nichols, but finally found those two men were still living, and gave that claim up (r. 903–6–8), but too late to place any other name in lieu thereof in that statement; the coincidence of the name — Joe Burgess — in such connections can only be accounted for by conceding that the statement was falsely *invented* and *manufactured* by a representative of the insurance companies (in communication with Wiseman), as shown by the testimony of Reuben and John H. Brown. And the matter of that *name*, irrespective of other evidence on the subject, proves that so obtained written statement was *not a truthful* statement, or made as such, but a mere manufactured invention, made and invented by plaintiff in error and its assistants, by Buchan, the paid employee of the insurance companies, including plaintiff in error (r. 1262, 1247–8, 1288) to destroy the credibility of John H. Brown, and to compel him to help procure the releases and to be used in obtaining them, as alleged in the aforesaid third cause of reply — all as more fully hereinafter shown in

connection with our argument in relation to the matter of assignment of error No. 105.

After having on the 4th of September so obtained that written statement shown at record 1284–6, and thus answered the questions and supplied the wants of the insurance companies asked and expressed the day previous through Mr. Munn and Barker at the Coates House, *as to what he* (*Buchan*) *and Brown were going to do about it* (alluding to Brown's having made such proofs of death after all that had been done in behalf of the insurance companies to run him off and coerce him, as before shown) (r. 1258, 1260–1–2, 1268), for the next step in the program or scheme to defeat the policies and any claim thereon, the insurance companies having so ascertained Buchan could do *some things, they*, by H. B. Munn, on the next day, September 5th, gave him written authority, set forth at record 1249, as follows:

"Ex. H. Nov. '99, W. C. E. Judge.

"*W. J. Buchan, Esqr.*

"DEAR SIR:—On behalf of the Mutual Life, New York, Connecticut Mutual Life, I hereby authorize & employ you to procure the surrender of the policies of insurance on the life of John W. Hillmon. H. B. MUNN.

"Kansas City, Sept. 5, 1879."

And on the next day, September 6, 1879, those insurance companies, including plaintiff in error, by their agent, H. B. Munn, gave to Buchan a further paper, set forth at record 580, as follows:

"The undersigned attorney, representing the Mutual Life Insurance Company of New York, the (The) New York Life Insurance Company of New York, and the Connecticut Mutual Life Insurance Company, hereby stipulate and agree, so far as said companies are concerned, to desist from any further pursuit and prosecution of John W. Hillmon, John H. Brown, or any other parties in connection with the Hillmon cases, provided the respective policies are surrendered and order for their delivery executed and all claims under the same released to said companies by Sallie E. Hillmon, wife

of said John W. Hillmon and beneficiary under said policies, and in so doing represent their officers and agents everywhere.

"LAWRENCE, KANSAS, September 6th, 1879.

"H. B. MUNN."

Which last copied paper Buchan required before he would leave the said statement of 4th of September with Munn or the other representatives of the insurance companies, or give them benefit thereof, as shown at record 582, 1238–9, 1271–2–3–4, 577 to 584, 592, and there was soon a more formal agreement made between the insurance companies by Munn, their agent, and Buchan that he should be paid for getting up the policies if he could, but that nothing should be paid defendant in error therefor. (R. 581, 592.)

And Buchan informed Brown of said Munn paper of 6th of September, 1879, and explained the effect thereof to him (see the proviso therein) (r. 1279, 1290), and then Buchan proceeded to get the release, including that (r. 19) plead and relied on herein by plaintiff in error.

Buchan having and of course using the proviso in that Munn paper of 6th of September as a spur on Brown, Buchan holding the aforesaid exhibit B and said statement of 4th of September, 1879, apparently to Brown, practically a rope around his neck.

And then through Brown Buchan obtained an interview with defendant in error at Leavenworth, as shown at record 496-7-8-9, 517, 768-9, 817-18-19; and when to keep the arrangement for such interview defendant in error arrived at Leavenworth, Buchan met her as she came on a train at the depot (r. 769) in time to prevent her going alone to the office of Clough & Wheat, which they afterwards visited, and at his request they went to the Planters Hotel (r. 770) and there he and Brown procured the releases in the manner, under the circumstances, and by the use of such means and methods as shown in the part of our brief and argument herein in relation to assignments of errors 27 to 32, 59 and 105, relative to the matter of the release "Munn paper" and the aforesaid written statement procured from Brown as before mentioned; and

that part of our brief is here referred to in this connection as a statement of the facts relating to those papers respectively, and from which it will be seen that the releases were obtained from her without consideration, without her knowing what they were, and when she was sick and prostrated and wholly subject to the orders and directions of Buchan, coming on her in all its force after she had failed during a long interview to partake of dinner further than to drink a cup of tea Buchan brought her *himself*, instead of by an hotel waiter.

Having so obtained those releases on the next day, September 16, 1879, Buchan handed said statement of 4th September, 1879, to Brown, and such conversation occurred between them, as shown by Brown's testimony at record 502, in the words following:

"'Here, John, is that paper that I promised to return back to you.' And he said I could take it and destroy it or tear it up, or do as I pleased with it, and I tore it up and put it in the stove, and then Buchan told me that that now was forever settled, and that there wouldn't be any more trouble about this matter at all, and that that was the end of it, and says he: 'John, there ain't the scratch of a pen against you about this difficulty anywhere,' only my true statement that I had made at Lawrence, and that I was free to go anywhere, was about the substance of the conversation, as well as I can recollect now."

And then that statement was torn and put in the stove, used as a waste basket, in Buchan's office in Wyandotte, in pursuance of the before made promises of Buchan to Brown, to the effect that when it should have answered the purposes for which it was obtained it might be destroyed, and that be the end of it. (R. 502, 520, 457–8, 464, 1276, 1246.)

On the 13th of September, 1879, evidently in contemplation of the (by Buchan) promised return to Brown of that written statement, Buchan and Green made the (by them) certified copy thereof (r. 1275–6–7, 1283–4–5–6–7, 1901–2) as a sort of guaranty (r. 1283), (guaranty of what Buchan slid away from saying), evidently to help in the matter of, whilst

apparently by such supposed destruction of that false written statement, keeping to Brown the promise of Buchan that it should be returned to him to destroy (r. 502, 520, 457–8, 864), and nothing left but his before made *true* statements made at Lawrence, etc., to the effect that he had so killed, and that the dead body was that of Hillmon (r. 502, 457–8), they might, by having such certified copy—and the torn original to be as it was rescued by Buchan—to hold and use as occasion might require, which we see they did not fail to do.

But—and faithful to the insurance companies, including plaintiff in error, who employed and paid him for what he did (r. 1247–8, 1250–1, 1262, 1288)—Buchan afterwards, in the absence of Brown (r. 1280), took (fished) the *same* (that torn statement) out of the stove and preserved it (r. 1276, 1277–8, 1280) until he afterwards—when Brown's deposition was being taken—gave it to the attorneys for the insurance companies (r. 1278, 1280, 1283–4, 583), and at the same time gave to those attorneys the aforesaid Exhibit B (r. 1289, 1290, 584), who produced both of the same at the trial (r. 584, 1283–4). But they (those attorneys) asked Brown questions, as shown by that deposition, as to the contents of that written statement, without showing it, or any part thereof, or his signature thereto, or the before mentioned certified copy thereof, to him.

And further, the statement of Buchan in that last before copied part (r. 502) of said deposition, to the effect that Brown was—then on 16th September, 1879—"*free* to go *anywhere*," itself proves that one of the objects and purposes of Buchan and the other representatives of the insurance companies in getting that statement was, among other things, to use it and Brown to assist them in so obtaining such releases, as well as to ruin the credibility of Brown and his character for truth and veracity if possible so to do, and thus to injure defendant in error and destroy evidence against the insurance companies—and that such was the purpose and object of getting that statement from Brown is further and fully shown by the statement of Buchan at record 1294, as follows:

"As I understand it, as I recollect it, I had this copy, this copy—in my handwriting—when I returned the policies. I got it from Green, and had it in my possession until the taking of John Brown's deposition."

By thus using the words, "returned the policies," he of course meant "delivered the releases and order," as by him mentioned at record 1247 (as there is no pretense he ever had the policies).

And when Buchan had completed his work of injuring defendant in error and the evidence in her expected cases on the policies against the insurance companies, by reason of that statement, so obtained, and with help thereof (with their great moneyed power, explained by plaintiff in error by its agent, Buchan, to Brown (r. 473, A. 1295), and to defendant in error (r. 771; 500, A. 36), as a means by use of which right, truth and justice could and would be thwarted and rendered of no avail, suppressed, trampled under foot, caused to be ignored, recovery on the policy prevented, and which, included among other things, a threat to use money, if needed, to produce disagreement of juries—and disagreement occurred at four trials, no matter how caused—and had also in the manner, and as shown, wrung from defendant in error, when she was thus overwhelmed, sick, etc., those releases, those insurance companies, including plaintiff in error, paid Buchan for what he had done (r. 1247–8, 1888, 1262, 581, 592), and when occasion required, plead the release to plaintiff in error. (R. 19.)

And—in addition to the fact that Buchan, as shown at record 1262, 580, 581, 592, and elsewhere, had been expressly employed to get such false statement and releases—those insurance companies including, by making such payment, as well as again by pleading such release, plaintiff in error accepted, approved and ratified as and to be their own acts respectively—all that Buchan, Munn, Barker, Green, Wiseman or Ward did or said in or about the matter of procuring that statement of 4th September, 1879, or any of said releases, as well as what John H. Brown did and said to get the releases, and also what Reuben Brown did and said to induce

John H. Brown to give Buchan that statement, to such extent that plaintiff in error stands charged with all thereof, as to all questions and points, either of law or of fact, in this case, the same as any individual party would in similar case.

And if for plaintiff in error the equivalent of the words, "*flight of Brown*," shall be used in brief or argument, we, for response thereto, request attention to our answer herein to the 97th assignment of error.

BRIEF OF THE ARGUMENT FOR THE RESPONDENT AND DEFENDANT IN ERROR.

OBJECTIONS TO JURISDICTION IN THIS COURT TO REVIEW THE RECORD IN THIS CASE.

We assume it will be conceded that this is a court of limited jurisdiction as to the class and kind of cases of which it has jurisdiction, and that it has not jurisdiction of any case unless given it by the Constitution, or by Act of Congress, and that there is not now in force any Act of Congress giving it jurisdiction in this or any similar case, in which, in an action at law the facts have been tried by a jury and judgment rendered thereon in the trial Court, and such judgment has been affirmed by the Court of Appeals, unless jurisdiction is given this Court to review the record and determine this case by the hereinafter copied paragraph in Section 6, of the Act of March 3,1891, 26 U. S. S. 828, which includes the words, "by certiorari or otherwise."

And we contend that said Section 6 is, if it attempts to give such jurisdiction *void* as to this and any similar case, for many reasons, among others, because the substance, spirit and effect of the Constitution and Laws of this country are, among other things, to the effect, that all persons as to all such matters as any question involved in this case are, and shall be equal, and have the same rights, without special favors to any, and that there shall not be discrimination either in favor of or against any person whomsoever, for any purpose

whatsoever in any respect, or power given to any Court or officer to so discriminate.

And in support of that proposition we refer without specific designation or reference to title of case, to the numerous decisions of this and other Courts, to the effect, that there shall not be any such discrimination, or *power* given to make it, and that any law by which it is attempted to give such discriminating power, is to that extent void.

And we contend that said Section 6 is obnoxious to the rules and principles of law enunciated by such cases, and indicated by the genius, spirit and intent of the foundation principles, Constitution and Laws of this country, to the effect that all persons as to such matters and questions as are involved in this or any similar case, are equal, and shall have equal rights before the Courts and everywhere, in all respects, without favors to any, and that power to discriminate or *grant favors to any* shall not and cannot be given unless, nor further than as, a *right* is given to all persons similarly situated to have such *favor* or *benefit*.

If that part of said Section 6 is applicable to this or any similar case, then we submit that the words therein, "certiorari or otherwise," is a misnomer, and should have read "writ of favor," because said Section 6 does not purport to give a *right* to plaintiff in error, or to any person, in cases similar to this, to have the record reviewed in or by this Court, no matter what may be the nature of the question involved, but on the contrary, if that section is applicable to this case, it purports to give this Court power to review the record in this and in cases similar to this, if it sees fit, *elects* or *chooses* so to do, not because plaintiff in error or any applicant had or has a *right* to require this Court to review the record and determine any question involved or made in the case, but merely and only because this Court chooses, elects and sees fit so to do, leaving it to this Court to reject the application of any *other applicant* for a review of a *similar* record *if the Court chooses so to do*, thus making the matter of a review by this Court of this, or of any record involving similar questions, a mere matter of *favor granted* or *not*, as this Court may *see fit*. And we contend that any attempt on the part

of Congress to *grant such power* is *not within* a legitimate exercise of any legislative authority conferred on or existing in Congress, and that if the language used in that Section 6 is, as to this Court, applicable to this or any similar case, then that Congress has thereby attempted to create a power to discriminate between individuals, to *grant* favors to one and *deny* similar favors to another, a power possessed only by an absolute monarch in a country in which *his will*, as to favors, and not any *established rule of law*, is *that* which *controls* and *determines* the rights of persons and property, and not applicable in a country which purports to be governed by *laws* and *established rules*, determining the *rights* of persons and parties, without special favors to any.

And we contend there cannot be, and has not been, any legislation in this country more obnoxious as attempting to create or authorize favoritism or to distinguish between persons, classes of persons, or their rights, of the kind called class legislation, or by any other term, than said Section 6 is, if applicable to this or any similar case, and therefore we claim that if said Section 6 is by its terms applicable to this or to any similar case, it is to that extent void. If that Section 6 is applicable to such cases as this and valid, then it follows that all persons obtaining judgments in the trial court and a judgment of affirmance thereof in a court of appeals, hold their rights thereto subject not to a *right* of the defeated party to have a review of the record in, and determination by, this Court of the question as to whether reversible error was committed, but to the question as to whether this Court *will* or *will not*, as it may *elect*, favor such defeated party with a review of the record and determination of the case, and that in one case to one applicant, it may, so far as that section is concerned or goes, say *yes*, that it will examine and consider whether it will relieve from what it considers error in the record by reviewing and determining the same, whilst in *another* and *similar case* leaving this Court to say *no*, and that it will not examine or review the record, or consider whether wrong or error has been committed or not, although the questions involved and the parties to the *respective* records may, in *legal effect* and as to rights and *questions*

involved, be the same in each case. In this case there is not any question involved or law under or because of which it can be claimed that this Court has jurisdiction other than because of the part of said Section 6 which includes the misused words "certiorari or otherwise," which we contend should have read "writ of favor," to have described the same by language appropriate to the discriminative power attempted to be granted.

It is, of course, always a great favor for a party to have a *chance* and *right* to have the record reviewed in a case in which the party has been defeated, but we submit any law which leaves it to any officer or court to say whether the review shall be had or not *as such officer or court may elect*, is and of right ought to be held void, and is contrary to the principles and against the meaning, terms and effect of constitutional government, and governments regulated by law, in which the rights of parties are made to depend upon the *laws* and *rights* given by *law* instead of depending upon the *will* or pleasure of any officer or court, and this question and objection does not affect the rights of any person to have a record reviewed by a higher court to determine whether a reversible error has been committed or not, *if the right* to such review for such purpose is given by *law* instead of being attempted to be given *if* some officer or court *chooses* or *sees* fit *so to do.*

And we contend that the questions involved in this case are not any of them such as should give excuse for claiming that there ought to be power in Congress to enact such *discriminative legislation* as to give this Court jurisdiction to act on the record herein, *without* at the same time enacting that *every person* defeated in a Court of Appeals shall have right to have the record reviewed and the case determined in this Court, no matter *what* or *how commonplace* the *questions involved* may be, such only being the nature of the questions involved herein.

By the referred to part of said Section 6, the axiomatic principle of our government expressed by saying, "Equal rights to all, special privileges to none," however covertly attempted to be given, is slaughtered, and placed high on

the shelf of things to be used as occasion may render agreeable.

And it is no answer to all this to claim this Court will do justly in the matter, because the question involved is as to whether "there shall or shall not be special favors to any," or whether it can be left to any branch of the government in the exercise of discriminative power attempted to be given to say "whether there shall be or not."

Second. And further and irrespective of anything before said on the subject, we contend this Court has not jurisdiction to review the record herein or determine this case, because in this case, the same being an action at law, the facts were in the trial court tried by a jury, and they found for the plaintiff in that Court, defendant in error here, and on their verdict that trial court rendered judgment to the effect that she have and recover of and from plaintiff in error the amount of that verdict, $11,034.00 and costs of suit (r. 117–18, 1928–9), whereby she in legal effect, became and was entitled to, and possessed of, property rights, that is, the tried and *judicially determined right* to that sum of money and costs, and to have, collect and receive the same from, and out of the property of. plaintiff in error, secured to her by that judgment, subject to a right in plaintiff in error to require the Court of Appeals to review the record, which it did, and on the 3d of April, 1901, affirmed said judgment of the trial court (r. 2030).

And by the 5th amendment to the Constitution, defendant in error is secured against being *deprived* of her said *property rights* otherwise than by *due process of law.*

And we contend the proceedings under and because of which this case is now claimed to be in this Court is not *due process of law*, within the meaning of that 5th amendment, but merely because this Court has seen fit to *give* plaintiff in error a *chance* to get away from those judgments and the effect thereof, without any *right* in plaintiff in error to require this Court to review the record or determine any question involved therein, and this although if the parties to the litigation were reversed this Court *could* refuse to *give* such

chance to defendant in error, and therefore we submit the proceeding herein in this Court is not *due process of law*, for the same reasons before urged against power in Congress to confer such discriminative power on this Court as attempted by said Section 6.

And we contend that if our objection to the jurisdiction sought to be exercised herein shall be overruled, that by such ruling the claim that this is a government of law for the enforcement of "equal *rights* to all, special *favors* to none under whatsoever pretence sought to be hidden," will be ignored and utterly wiped out and the principles established by the many cases before referred to ignored and overruled, however silently they may be passed by, and this be proven to be a government in *great part* for the *benefit* of *those* who can *succeed* best in getting *special favors*, without any right whatever thereto in this case, at the cost and expense of defendant in error, and to her damage, merely because this Court *elects* to *favor* plaintiff in error with a trial to which it has not a *right* except as a *favor given* it by this Court, in relation to certain commonplace questions, as to which she would not have had a *right* to such trial in this Court if she had been defeated in the Court of Appeals, nor would the defendant in any other similar case in which similar questions of exactly same magnitude, importance and nature were involved have *right* to a similar trial in this Court.

And of course the objection to the validity of so much of said Section 6, as is claimed to *give* this Court at its *election* jurisdiction in this case, would not be any greater, though perhaps more readily appreciated, if power to grant or refuse *privilege* and *favor* to plaintiff in error to have the record reviewed and the case determined by this Court, had been by that Section 6 lodged in some appointee of both or either House of Congress, or the President, or by commissioners elected or appointed in any other conceivable manner.

All this because it is the effect and practical operation of a statute, rather than the language used to frame it, that is to determine whether it is within the legislative power of Congress so to enact or not, or whether the claimed to be axiomatic

rule of, "equal rights to all, special favors to none," in this government, supposed to be of law and not of special favors, has been by the obnoxious attempt at legislation invaded or not.

SELECTION BY THIS COURT UNDER THE HEREINAFTER COPIED PARAGRAPH OF THE AFORESAID SECTION 6 AS TO WHICH IF ANY OF THE CASES THEREIN MENTIONED IT WILL TAKE JURISDICTION OF, IS EXERCISE OF LEGISLATIVE POWER IN CONFLICT WITH THE CONSTITUTION.

Third. In addition to the foregoing reasons why this Court has not jurisdiction of this case, there is still another and greater reason, because by the Constitution the powers intrusted to the government are divided into three departments, executive, legislative and judicial, with certain *specified* exceptions, which exceptions mark the limits of each respectively.

Kilbourne vs. Thompson, 103 U. S., 190–1.
Constitution U. S., Articles 1, 2 and 3.

The matter of creating Courts and giving them jurisdiction is in this country exercise of legislative power, and none other, is a truism that we assume none will either deny or in any manner question—such legislative, or in other words law making power, may and can only be in this country exercised either in and by creating a Constitution, which is but the highest or ranking law, or by enacting statutes or laws by the legislative power or department of government within the limit of power conferred on, or given thereto.

And our claim and contention that power to exercise the functions of either one of the three cannot be by statute conferred on either of the other of those three great departments of government is too well and firmly established to require citation of authorities to sustain, or to be either ignored, silently passed by or overruled, howsoever often they may have been successfully either *evaded* or *trampled* under foot, (see meaning of last paragraph on page 191 of 103 U. S. in opinion of this Court).

And that Congress, by the paragraph in the aforesaid Section 6 (26 U. S. S. 828), which reads as follows:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals *it shall be competent* for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

[If that paragraph is not for reasons before urged void as to this case, and similar cases,] attempted to transfer to, and endow this Court with, so much of the power of Congress to legislate as to which, if any of such cases as in said paragraph mentioned might be reviewed or determined in or by this Court, not requiring any thereof to be so reviewed or determined in or by this Court, even though such review should be applied for by the parties interested, or any thereof, but to exercise such attempted to be given legislative power by granting such special favors, as before mentioned, as this Court might from time to time, as thus favored suitors might apply, see fit to thus legislate in favor of, and declare this Court would exercise jurisdiction over, or as to the records and cases in or by which they are interested or their interests affected, is, we contend, clear and certain, although by the language used sought to be disguised and passed off as exercise of a judicial function, and if we are wrong in that, then it follows that *right* to have this case reviewed or to review the same or the record herein, or to determine the case in or by this Court has not been pretended or attempted to be conferred or given by legislative power, or by any attempt at or pretended exercise of legislative power, and therefore as *said attempt* to give this Court such, or any, legislative power is void, said paragraph is void, at least so far as this and any similar case is concerned or thereby affected, and this Court without jurisdiction herein, and therefore we ask that this case be dismissed from this Court for want of jurisdiction in this Court to review the record herein or to determine the case.

Fourth. And if by any sophistical argument or contention it shall be urged that by said copied paragraph Congress gave to *every defeated party*, in any court of appeals, a *right* to have the record reviewed and the case determined in and by this Court, then as against any such argument or contention, we refer to the numerous rulings and decisions of this Court in effect and operation to the contrary, and also to the evident intention of Congress shown by the passage of the act of which that paragraph is a part, as well as to the plain reading and meaning of that paragraph, which is to the contrary and square in the face of and opposing to any such argument or contention.

And further, if this Court overrules our objections to the exercise of jurisdiction herein, we contend it will, by so doing, overrule all the decisions heretofore made to the effect either that one of the three great departments of government cannot exercise the powers of either of the others; or, that a party cannot be deprived of property without due process of law; or, that this is a government of law in which all have equal rights, and in which special favors cannot be granted to any by exercise of power by the courts.

There is not any question but that the Circuit Court of the United States for the District of Kansas had jurisdiction to try the case and render the judgment plaintiff in error complains of, and even if there was, still the making of such question would not give this Court jurisdiction to investigate any other question.

And all of the questions hitherto made in this case in this Court by plaintiff in error, or by its assignments of error, are merely as to whether the said trial court did or did not at the trial err in rulings by it made in relation to matters that did not in any manner affect or refer to its jurisdiction in the case; that such questions as are presented by plaintiff in error in this case could not at common law be considered by a reviewing court on certiorari proceedings, is shown by the following authorities:

Doolittle v. Galena and Chicago Union R. Co., 14 Ills. 381, 383.

Hauser and another v. the State of Wisconsin, 33 Wis. 678.
Williamson v. Carnan, 1 Gill and Johnson, 197.
Healy v. Kneeland, 4th N. W. Rep. 200, 202; s. c. 48 Wis. 497.
Commonwealth v. James, 21 Atlantic, 805 (Pa.); s. c. 142 Pa. St. 32.
State ex rel Teasdale v. Smith et al., 14 S. W. Rep. 108; s. c. 101 Mo. 174.
Monreal v. Bush, 46 Cal. 80.
Deer v. Highway Com'rs., 109 Ills. 379, 383.
Hamilton v. Harwood, 113 Ills. 154.
4th Ency. of Pl. and Pr. 254, etc. (title, Certiorari, 3, extent of review.)

POINTS.

OBJECTIONS TO THE SUFFICIENCY OF THE RECORD.

We have hitherto objected, and still object, to that part and so much of the printed volume, which consists of 2,033 printed pages, called the record in this case, which is between the side paging or figures 221 on page 129 thereof, and the side paging or figures 206 on page 1927 thereof, consisting of about 1,798 printed pages, being for any purpose whatever considered as part of the record herein, and submit that it ought not to be. It does not purport on its face, or by the entitling thereof, or any file mark thereon, to be a bill of exceptions taken in the case No. 3149 in said trial Court, in which plaintiff in error was defendant, and the complained of judgment was rendered, or to be a bill of exceptions taken in any case in or to which plaintiff in error was a party, but, on the contrary, in a case in and to which it was not a party (r. 129, 1927); and further, it is not shown by the record to be a copy of any original actually existing document or bill of exceptions in any case, but, on the contrary, is affirmatively shown, as to an important and particular part thereof, not to

Please insert the following next after the list of cases on page 62 of the brief for the respondent in case No. 94, October term, 1902, to wit:

And in addition to the foregoing we contend that any claim or argument—to the effect that jurisdiction can be here maintained in this or in any similar common-law case, tried by a jury, because of, or on grounds similar or equivalent to reasons for which an injunction or other relief is sometimes granted by courts of equitable or other extraordinary jurisdiction, as well as exercise or maintenance of such jurisdiction herein because of any supposed discretionary power,—is in conflict with the seventh amendment to the Constitution.

And we also contend that the seventh amendment prohibits re-examination by a court of review of the record of any such common-law case as this, tried by a jury, otherwise than on a writ of error, or its equivalent, obtainable as a matter of right by any person claiming to be aggrieved.

And as to questions of *magnitude*, *importance* or *general interest* it is only for the law-making power to determine, and to maintain jurisdiction for any of such supposed reasons, is, we contend, to legislate, this because Congress—the law-making power—has not enacted that either *magnitude* or *importance of*, or *general interest in*, any question shall be ground of jurisdiction in this court to review any such case as mentioned in the referred to part of said section 6,—and as it has not, it is not important to consider whether any such supposed grounds of jurisdiction would be maintainable,—and further for Congress to attempt to give jurisdiction on any such supposed ground would also be subject to our contention against said quoted part of section 6, for many reasons, including that if jurisdiction could be or have been as a matter of right for any of such reasons given or maintained in this case to review the record and consider the several assignments of error herein, then, there will probably no case be ever decided by any court of appeals wherein such reasons would not be equally applicable as in this case.

Also on page 36 please change 1222–3, to 1232.

copy of any known bill of exceptions or of any known
g; and as to the remainder, or parts thereof, not thus
natively shown not to be a copy of any known thing, it
ft without being in any manner authenticated as a copy
ıything.

On the 11th day of May, 1900, a writ of error was issued
of the Circuit Court of Appeals for the Eighth Circuit,
cted to said Circuit Court for the District of Kansas, in
tance and effect commanding it to send to said Court of
eals the record and proceedings in the aforesaid case
3149, in which defendant in error was plaintiff, and
ntiff in error was the sole and only defendant (r. 2); but
before the return of that writ of error, and on the 7th of
e, 1900, one of the judges of said Circuit Court of Appeals,
ne instance and request, and on motion of plaintiff in error,
le such an order, as shown at record 2012–13, which is an
er in substance and effect permitting the plaintiff in error
ıave its case submitted and heard upon a bill of excep-
s claimed to have been allowed in another case, in which
defendant in error was a party, but to which the plaintiff
rror was not a party, upon the alleged ground that a bill
exceptions had been allowed in each of said cases, and
t said bills of exceptions were identical. At the time this
er was made neither of said alleged bills of exceptions
been filed in the said Court of Appeals and no return to
writ of error had been made, and the finding of the judge
king said order was not based upon an inspection or com-
ison of any records in his court.

Section 305 of the Code of Civil Procedure of the State of
nsas, G. S. of Kansas, 1868, page 687, in force when and
r since said action was commenced, is as follows:

"Sec. 305. Exceptions taken to the decision of any court
ecord may, by leave of such court, be withdrawn from the
s by the party taking the same, at any time before pro-
dings in error are commenced."

And because of Section 914, R. S. 1878, and other acts
l statutes of Congress, said copied section 305 became and

was applicable to this case and to the matter of said order of June 7, 1900.

Smith vs. Cockrill, 6 Wallace, 756.

And we submit that notwithstanding whatever other force or effect that order has (if any), it, together with the motion of plaintiff in error on and in pursuance of which it (said order), as thereby shown was made, amounts in substance and effect to a withdrawal from the record and proceedings in said case No. 3149, wherein plaintiff in error was a party and sole defendant, by plaintiff in error with leave of court of any such bill of exceptions (if any there really was), in said order mentioned, as had been signed, settled or allowed in or by any judge of the Circuit Court for the District of Kansas in that case, and that from thenceforth the whole matter, record and case stands and should be considered and treated the same as though there had not ever been, in that case No. 3149, any such bill of exceptions ever signed, settled or allowed by that last named court or by any judge thereof.

And the Clerk thereof, after said order of June 7, 1900, had been so made, sent and returned with said writ of error a transcript of certain parts of the record and proceedings in that court in said case No. 3149, consisting of and constituting 304 typewritten pages, as therein numbered consecutively from 1 to 304, which transcript did not include said objected to part of said volume, and there is not in the record herein, or in said volume, anything which shows that said objected to part of said printed volume was sent or returned to said Court of Appeals with said writ of error, or with or as part of said partial transcript or at all.

And an examination and consideration of that printed volume of 2,033 pages, and of the affidavit of John D. Jordan, Clerk of that Court of Appeals, filed herein on the 18th of November, A. D. 1901—even an examination of that volume irrespective of said affidavit—shows that George F. Sharritt, the clerk of the trial court, did not by his certificate appearing at record 2007, certify to any transcript which contains such objected to matter, and further, said certificate of said Sharritt (r. 2007) itself, by the *exception* therein made,

shows that he excluded therefrom, and did not pretend to thereby certify to, that part of the aforesaid printed volume consisting of said objected to 1798 pages, or that anything whatever was a copy of any bill of exceptions in any case, or that it, said interpolated part of said printed volume, was a copy of anything whatever; and further, there is not in said printed volume, called the record herein, any certificate of the clerk of that trial court which shows or certifies, or pretends to show or certify, that said interpolated part—that is, said 1798 pages—is or ever was a copy of any bill of exceptions. And in this connection we refer to the affidavit of said George F. Sharritt, clerk of said trial court, filed herein on the 18th day of November, A. D. 1901, which shows that the name The Mutual Life Insurance Company of New York is in the *only* bill of exceptions filed in said case No. 3147 in said Circuit Court in A. D. 1900, or within several years before that time or since then (other than certain exceptions taken on behalf of defendant in error of date of 2d of April, A. D. 1901), in the place therein which corresponds to where the name of plaintiff in error appears on page 1926 of said volume, but and said Sharritt, clerk of that trial court, has not, and does not, in or by that affidavit, or in or by any certificate or otherwise by anything shown in or by the record, state or certify that said interpolated part of said printed volume is a copy of either the bill of exceptions in his said affidavit mentioned, or of any bill of exceptions ever filed, made, taken, signed or allowed in or by said trial court or by any judge thereof.

And we submit that said Circuit Court of Appeals did not on said 7th day of June, 1900, before the return of said writ of error and such transcript as aforesaid, have power or jurisdiction under or because of Section 921 R. S. 1878 or of any law, to investigate, find or determine whether any such two supposed bills of exceptions as mentioned in its said order of that date had even been signed or allowed or were indentical or not, but and that whether it did or not, that it did not then or ever have jurisdiction or power to *substitute* as, for or in place of any bill of exceptions in said case No. 3149, a supposed copy of a bill of exceptions made, signed,

settled or allowed by any judge or court in any other case, or the objected to part of said printed volume, and that any attempt so to do, whenever or however made, is and always was, utterly void and inoperative, and not binding or obligatory on or as against defendant in error.

And further, if because of said order of June 7, 1900, this Court shall hold that there were two such *identical* bills of exceptions as therein mentioned, still it is not by that order or otherwise shown that said objected to part of said printed volume is a copy thereof, or of either thereof; said order was made on the 7th of June, 1900, long before the certificate to said transcript was dated on the 20th day of June, 1900, (r. 2007) and long before that transcript consisting of such 304 consecutively numbered typewritten pages, was on the 2nd of July, 1900, filed in said Court of Appeals (r. 2007.)

And we submit there is not any reason shown why said interpolated part of said volume should have been printed, placed and interpolated in said printed volume between two separated and dismembered parts of said 304 consecutively numbered typewritten pages, which constituted the transcript so as aforesaid returned with said writ of error to said Court of Appeals, if that transcript had been printed as returned altogether, without such dismemberment and separation thereof, as it should have been, then even if said objected to part of said volume had also been printed by itself, whether both were placed in one cover or not, our objections would be at once and thereby made manifest and plain; and we submit plaintiff in error should not be benefited or have advantage because a transcript has been separated into different parts, and such objected to part of said volume printed or placed between the severed parts of the said transcript.

And further, by reference to said pages 129 and 1927 and said order of June 7th, 1900, it will be seen that if both supposed bills of exceptions in that order mentioned *were identical*, that then *both* were taken in the case of defendant in error against the Mutual Life Insurance Company of New York, case No. 3147, in the trial court.

And thus it stands and is made to appear that if two such *identical* bills of exceptions actually exist, they were both taken

and entitled in that last named case, and from said affidavit of George F. Sharritt, it further appears that plaintiff in error was not named in either thereof, if there were two, and both were *identical* at a place corresponding to where its name appears on said page 1926, and if we are not correct in this, *then* we submit there were not two *identical* bills of exceptions.

And further, if the finding of the judge of the Court of Appeals, to the effect that there were two such bills of exceptions as he found were *identical*, shall be sustained, then on consideration of the affidavit of Sharritt, clerk of the Circuit Court for the District of Kansas, it is certain that the name of plaintiff in error *does not* appear in either thereof at the place *corresponding to that where* the name of plaintiff in error appears on page 1926 of said printed volume, but *that on the contrary* the name of the Mutual Life Insurance Company of New York is in such corresponding place in each thereof.

And as such difference in name is very material and important and goes to the question as to on whose behalf any such bill of exceptions was made, signed, settled or allowed, as well as to whom leave was given and time extended, as indicated on said page 1926, it follows that no such bill of exceptions, certainly not the one in case No. 3147, which, as we understand, plaintiff in error seeks to have said objected to part of said printed volume treated as a copy of, was prepared, made, signed, settled or allowed by, for or at the request of plaintiff in error, or that leave was given or time extended for it so to do or have done for it, and such variance being shown in such important matter as of the name of the party who prepared and as to whom such leave was given and time extended and for whom the bill of exceptions in said case No. 3147 was signed, settled and allowed, an unauthorized change amounting, if intentionally done, to a crime, is shown, which in addition to showing that plaintiff in error was not the party by or for whom the same was prepared, signed, settled or allowed, or to whom such leave was given or time extended, also discredits the whole document, that is, all of said objected to part of said printed vol-

ume, and is cause sufficient to, and requiring, according to the rules of law relating to altered or false instruments and records, and copies thereof, that all of said objected to part of said printed volume be disregarded and not considered for any purpose.

And further, in this connection, we refer to the case of U. S. v. Jones, 149 U. S. 262.

Which case shows the law to be that as there is nothing in the record showing *time* was extended or given to plaintiff in error to take, submit, prepare, have settled, or allowed any bill of exceptions in said case to which it was not a party, that is, in case No. 3147, outside of said objected to part of the pretended record, it follows that said objected to part cannot be considered, used or referred to herein as part of the record, and on this subject we refer to the order of Court of 20th November, 1899, at record 120-1, which is the only order of the trial court shown in the record relating to any bill of exceptions and that was limited to a bill of exceptions in case No. 3149, and the exceptions of defendant in error, set forth at record 125 to 128, which do not relate to any bill of exceptions taken in case No. 3147, but and the same shows that defendant in error did not consent to such bill of exceptions if any as was actually signed in case No. 3149, notwithstanding anything said at record 1926-7. The June term, 1899, of the trial court ended before the November term thereof, 1899, all before any bill of exceptions was signed.

And here let us as and for an object illustration of our argument sever said printed volume at first into three parts, making the first point of severance at the end of the 205th side paging thereof, where said figures 221 appear and commence on said page 129, the second point of severance at the place where the figures 206 commence on page 1927 thereof, and then lay the objected to part of said volume aside, and put what is before and after that objected to part together, and then we will have as it should be and should have been printed, a printed copy of the aforesaid transcript as it came from the Circuit Court for the District of Kansas, consisting of 304 consecutively numbered typewritten pages once more

together, and then it will without necessity of argument be apparent that nothing therein, neither any of the recitals or certificate of Sharitt, clerk, or filing endorsement of Jordan, clerk (r. 2,007) have any reference whatever to the objected to part of said volume, said 1798 pages thereof, thus discarded and taken from a place where it has improperly intruded, and it will also then be apparent that said order of June 7, 1900, does not in any manner identify or authenticate said objected to part of said volume as, or to be, a copy of any supposed bill of exceptions in that order mentioned, or of anything, and it will then also on inspection of the then two parts of what is now said volume be without necessity of argument or further illustration apparent beyond contradiction that said objected to part, said 1798 pages, is a mere *waif*, not in any manner authenticated as or shown to be a copy of any bill of exceptions ever signed, settled or allowed, but and on the contrary because of the aforesaid affidavit of Sharitt, clerk, it will be apparent and certain that whoever got up or framed any original of that objected to part, said 1798 pages, inserted the name of plaintiff in error where it appears on page 1926 without authority or excuse for so doing, and also that in and as to such important particular as the name of any party at that place that so much of such objected to part, said 1798 pages, as consists of the name of the plaintiff in error as there found, in the connection found, is not a copy of any bill of exceptions ever signed or allowed in the case in which it is entitled record 129, or filed record 1927, said case No. 3147 in the trial court, and further as said affidavit does not speak as to other parts of the bill of exceptions filed in said case No. 3147, said 1798 pages is not, as to any part thereof, thereby shown to be a copy of any bill of exceptions or of any part of any bill of exceptions ever filed in that case No. 3147, and thus it is apparent and affirmatively shown that said objected to part, said 1798 pages, is not only a mere waif, but is at least false and counterfeit as to an important part, and being so as to such part, it follows that it is under such grave suspicion as to the other parts thereof, that the rules of law and custom in relation to authentication of copies of records should not be overridden and disregarded for the purpose of

permitting plaintiff in error to have hearing on or as to said 1798 waif pages thus discredited, no matter who caused the same to be printed or intruded where found, or why it was so done, and it should be borne in mind that said Sharitt does not by his affidavit contradict any certificate of his found in said printed volume.

And further, it is apparent and certain that the trial court did not ever give plaintiff in error time or leave to file or prepare a bill of exceptions in said case No. 3147, and that there did not any judge thereof ever settle, allow or sign any bill of exceptions for or on behalf of plaintiff in error, in said case No. 3147, in which case said objected to part purports on its face to have been made, and in or to which case plaintiff in error was not a party. (R. 129, 1927).

And further, the trial court or the judge thereof or any Court or judge did not either pretend to, or ever have power or jurisdiction to allow, settle or sign any bill of exceptions for plaintiff in error in said case No. 3147, in or to which case it was not a party.

And further, we submit that the Circuit Court of Appeals ought to have disregarded said objected to part of said printed volume, but as it rendered such judgment of affirmance as it ought to have done if it had disregarded the same, it is not as to this question important to consider why it affirmed the judgment of the trial court complained of.

Sullivan vs. Iron Silver Mining Co., 143 U. S. 431.

And we ask that our objections to said objected to part of said printed volume be sustained, and if they be, then we submit that it follows that this Court ought to affirm the judgments complained of, as the several assignments of error are based on what is supposed to be found in said objected to part of said volume.

PRELIMINARY OBJECTIONS TO THIS COURT CONSIDERING ANY OF THE SEVERAL ASSIGNMENTS OF ERROR WHICH RELATE TO ANY OF THE INSTRUCTIONS WHICH THE COURT REFUSED TO GIVE TO THE JURY, OR TO ANY PART OF THE CHARGE BY THE COURT GIVEN TO THE JURY.

Assignments of error Nos. 85, 86, 87, 88, 89, 90, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106 and 107, set forth at record 1996 to 2007, relate to the refusal of the Court to give certain instructions asked by plaintiff in error, and assignments of error Nos. 91 and 92 (r. 1999, 2000) relate to parts of the charge of the Court given to the jury.

At the conclusion of the arguments to the jury, and before the Court had charged the jury, plaintiff in error requested the Court to give to the jury (r. 1904) a large number of instructions, including, as shown at record 1904 to 1915, paragraphs or subdivisions thereof numbered 1, 7, 9, 10, 11, 12, 13, 14, 18, 20, 21, 22, 23, 25, 26, 27, 28, 31, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 46, 47, 48, set forth at record 1904 to 1915. What the missing 2d to 6th, 19th, 24th, 29th, 30th, 32d, 35th and 45th paragraphs thereof, eleven in number, were, unless they were those of such numbers as set forth at record 84 to 94, and unless they were such numbered paragraphs as set forth at record 84 to 94, there is nothing to show that any refused instruction requested by plaintiff in error was signed by it or its attorneys; and unless the same were so signed, that it cannot for that reason, irrespective of any other, be here heard in relation to any refusal of the Court to give any thereof. See—

Morisette vs. Howard, 62 Kansas 463, 468.
R. S. of Congress, 1878, Sec. 914.

And the trial court charged the jury as shown at record 1915 to 1925, and thereby in substance and effect, and practically in language, adopted and gave to the jury as a part of such its charge to them, different parts of some of the instructions the plaintiff in error so requested to be given to the jury, and among other parts thereof the Court included in such charge those parts of Nos. 1 and 28 (r. 1904, 1909)

asked by plaintiff in error, which were to the effect as applicable to the evidence, that the real question in the case (meaning, of course, what was at that time left in controversy) was whether the herein mentioned dead body was the corpse of John W. Hillmon or not, as shown at record 1917, 1918, 1919, 1921. And the Court also in its general charge gave the No. 19 set forth at record 87, as shown at record 1924. Yet plaintiff in error makes its 85th assignment of error, notwithstanding the Court gave a part of the 1st, it requested and so gave the substance of said 19th, which irreconcilably conflicted with the refused part of the 1st.

And certain of the so numbered paragraphs of the instructions so asked by plaintiff in error, were plainly properly refused, including among others No. 1, at record 1904, which except as to the part thereof so given as herein shown, was we submit unquestionably properly refused because of what we hereinafter say in relation to the 85th and 99th assignment of error, and also because it was not proper to single out the matter of teeth to the exclusion of all other marks and methods of identity of the corpse.

Grand Trunk Railway Co. vs. Ives, 144 U. S. 433.

And also including No. 7, record 1905, by which plaintiff in error sought to have the Court usurp and invade the province of the jury and determine itself as matter of law, that a preponderance of the evidence was to the effect that the aforesaid dead body was not the corpse of Hillmon, (this in the face of a large preponderance of the evidence to the effect that it was the dead body of Hillmon, but of course that was not a matter for the Court to determine, as matter of law either one way or the other).

And also including No. 9, record 1905, by which plaintiff in error requests the Court to usurp and invade the province of the jury and determine as matter of law, among other things, that Walters disappeared during March, 1879, whereas the testimony of Charles W. Schott is to the effect and tends to prove that he saw Walters in Kansas City, Mo., long after such intercourse, if any, as Walters ever had with any Hillmon, must have occurred, record 1666, 1670 to 1673, and the

testimony of Arthur Simmons shows that Walters worked for him at Leavenworth, Kan., in May, 1879, long after said dead body had been brought from Barbour County to Lawrence, record 1856 and 1858, 1860, at which Leavenworth, Walters wrote his sister Fannie, record 1795, 1808, and also by which No. 9, record 1905, plaintiff in error further asked the Court to determine as matter of law, that if Hillmon was alive after March, 1879, he had committed murder by killing Walters, who was so shown alive as aforesaid after March, and attempted to swindle the insurance companies, whereas if Hillmon was alive after that time there can be no reasonable account given of his absence, considering the testimony of Schott and Simmons, and the evidence in relation to the identity of the corpse, including the proof referred to in the stating part of this brief to the effect that because of certain marks it was not Walters, and of course it is plain for many reasons that said No. 9 was properly refused.

And also including No. 10, (r. 1905), by which plaintiff in error asked the Court to instruct the jury that the evidence tending to identify the body as that of F. A. Walters, of Fort Madison, Iowa, is not contradicted by any direct evidence in this case, *whilst the contrary was the truth*, because of the evidence referred to in the statement part of this brief, and elsewhere, in relation to the testimony by which the dead body was identified as being that of Hillmon, and not that of Walters, including the testimony of many witnesses referred to, who knew Hillmon in his life time, and saw his corpse, some of them immediately after his death, including several men at Medicine Lodge, and defendant in error and others who saw it at Lawrence, and the testimony of John H. Brown to the effect that he himself accidentally killed Hillmon, and that said dead body was his corpse—and further as shown by the hereinafter part of our brief which relates to the 74th, 75th, 76th, 77th and 84th assignments of error, we submit it is beyond reasonable question that the so-called "Walter's theory" is exceedingly weak and gauzy, but however that may be, it is surely very certain that a great preponderance of the evidence was to the effect that said dead body was not that of Walters, but

whether so or not, it is, we submit, plain and certain that that instruction No. 10 was properly refused.

As to instructions Nos. 11, 12, 13, 14 and 18, we refer to what we hereinafter say in relation to assignments of error No. 93, r. 2000; No. 94, r. 2000; No. 95, r. 2000; 1st No. 96, r. 2001; 2nd No. 96, r. 2001, as plain and sufficient reasons why each of those instructions Nos. 11, 12, 13, 14, 18, were respectively refused.

And also including No. 22, r. 1908, by which plaintiff in error asked the Court to usurp and invade the province of the jury, and determine as matter of law that Brown fled—whereas we submit there was not any evidence that he fled, but whether he did or not was a question only for the jury, and not for the Court to determine, and therefore we submit that said instruction No. 22 was properly refused—all which we further show in the hereinafter part of our brief which relates to the 97th assignment of error.

And also including No. 23, r. 1908, which was an effort to get the Court to whitewash Mr. Buchan, who, as employee of and for plaintiff in error, obtained the statement set forth at record 1284–6 and the release set forth at record 19, 585, in the manner and by tne use of means as shown by the evidence in the case referred to in the statement part of this brief, and in the part hereof relating to assignments of error Nos. 27 to 32, 59 and 105, whereby it is shown among other things by his own evidence, as well as by that of others, that he did, as shown by the evidence do with and by his client John H. Brown, that which should prevent him from being by the Court painted white and dubbed clean and pure, after he had from the insurance companies accepted payment for what he did as so shown, as requested by that instruction No. 23—and therefore we submit it is plain and clear that that No. 23 was properly refused.

And also including No. 25, record 1909; No. 40, record 1913, and No. 43, record 1914, respectively, it is plain that those refused instructions were respectively properly refused; plaintiff in error was then there contending that the aforesaid dead body was not that of Hillmon, and if plaintiff in

error had been correct in claiming the dead body was not that of Hillmon, it follows that the "Munn paper" therein mentioned was part of what would be properly called compounding of a felony; plaintiff in error appreciating that with that "Munn paper," and the testimony in relation thereto, and to the releases and the so-called Brown statement, in evidence, that it was *prima facie* in the position of either having sought to wrongfully deprive defendant in error of the amount due her on its policy sued on or of having, by its representatives, compounded a felony, desired the Court to whitewash it and its representatives, in such manner as would not have been proper to have done by giving those refused instructions. And further, we refer to what we hereinafter say in relation to assignments of error No. 98, and Nos. 31 and 59, and the references to the record there made, from which it will be seen that the so-called "Munn paper" formed an important link in the chain of evidence connecting plaintiff in error with all that Buchan did at the instigation of plaintiff in error, acting by other representatives thereof, in relation to the matter of procuring the releases, he (Buchan) would not, but for that "Munn paper," as is there shown, have proceeded and got the releases—from all which it is very plain and certain that those refused instructions were respectively properly refused.

And also including No. 28, record 1909, a part of which, that is, so much thereof as was to the effect that the real question in the case was whether the aforesaid dead body was that of Hillmon or not, was given as shown at record 1917–18, 1919, 1921, and as to the other parts thereof we submit the same was properly refused, because the lapse of time therein mentioned was not immaterial matter, but might properly be considered by the jury as shown by the cases of—

Davis vs. Briggs, 97 U. S. 628, 634 to 636.

Whitely vs. E. S. S., 39 N. W. 369, and cases therein cited.

1st Greenleaf on Ev., Sec. 41 and notes.

And we submit it is plain that that No. 28 was properly refused, except as to the part thereof adopted and given in the charge of the Court.

And also including No. 31, record 1910, and we submit it is plain and certain that that No. 31 was plainly properly refused because of what we say hereinafter in relation to the 86th assignment of error.

And also including No. 33, record 1910, it is plain and certain that that No. 33 was properly refused, as it contained a statement which was not true, because by testimony set forth at record 151, it is shown that defendant in error had married since the commencement of the action, and that testimony was not in any manner contradicted.

And also including No. 34, record 1910, considering the evidence in the case, we submit it is very plain and certain that the Court properly refused that No. 34.

And also including Nos. 36, 37, 38, record 1911–12, and No. 47, record 1915, we refer to what we hereinafter say in relation to assignments of error Nos. 64 to 73, Nos. 87 to 92 and No. 106, and submit that those refused instructions Nos. 36, 37, 38, 46 and 47 were properly refused, and in this connection we also refer to what we say in relation to those referred to assignments of error in relation to the parts of the charge copied in assignments of error Nos. 91 and 92, and submit that it is certain that those parts of the charge were properly given.

And in this connection we request further attention to said refused instruction No. 47, record 1915, and to the fact that thereby plaintiff in error asked the Court to instruct the jury to the effect that if they believed from the evidence that the issuance of the policy by plaintiff in error upon the life of John W. Hillmon was fraudulently procured by said Hillmon alone, or by said Hillmon confederating and conspiring with Levi Baldwin and John H. Brown, then such policy is absolutely null and void, and that they should find for plaintiff in error, without therein specifying what would be such fraudulently conspiring or confederation, but leaving it to the jury to imagine whatever they chose to imagine, as being enough to constitute such fraud, confederation and conspiring, in other words by that instruction plaintiff in error requests the Court to tell the jury in substance and

effect to find a verdict for plaintiff in error if they wished to, and in view of the authorities hereinafter referred to in reference to what must be stated in a pleading to constitute cause for setting aside a written instrument as having been fraudulently obtained and of the proof necessary to sustain the required allegations in such a pleading, we submit that said refused instruction No. 47 was asked without any excuse for so doing, and that it is plain it was properly refused, no matter whether we are right with reference to any other question herein argued in relation to conspiracy and fraud or not.

And also including refused instruction No. 44 in relation to which we refer the Court to what we hereinafter say in relation to assignment of error No. 105.

And after the Court had charged the jury, as shown at record 1916 to 1925, plaintiff in error in the presence of the jury and before the jury had retired, as shown at record 1925, did as shown by that part of record 1926, which is as follows:

"The foregoing exception was taken at the time mentioned by Mr. Barker, of counsel for defendants, in the following language:

"We except to what you say on the subject of conspiracy. He also stated: "We except to the refusal to give the instructions which we requested."

"This was all that was said by counsel upon the subject of exceptions to the instructions requested and charge given."

—and from that copied part of record 1926, we contend that it is thereby clearly and fully shown that plaintiff in error did not, then or at any proper time, take any exception to the refusal of the Court to give the several instructions copied at record 1904 to 1915, or to any of the instructions mentioned in any of the assignments of error other than one single and general exception to the refusal of the Court to give all of the instructions copied at record 1904 to 1915, and that such exception was only a general one to the whole number of instructions which plaintiff in error, as shown, requested the Court to give to the jury, and that

such exception was to the whole thereof as a unit; that transaction shown by the copied part of record 1926, took place on the 18th day of November, 1899, the day when the jury were instructed by the Court and retired to consider of their verdict, and afterwards came into open Court with their verdict, as shown at record 117, 118.

And by the said copied part of record 1926, it is also made plain and certain that plaintiff in error did not, at that time, or at any proper time, except to any part of the charge so given by the Court to the jury other than to all thereof *as a unit*, which was on the subject of conspiracy.

But notwithstanding it is so made plain and certain that plaintiff in error did not, then on the 18th day of November, 1899, except to the refusal of the Court to give the above mentioned paragraphs or numbered instructions set forth at record 1904 to 1915, separately, as to any or either thereof respectively, yet when afterwards, about 135 days thereafter, and on the 2nd day of April, 1900, that which purports to be a bill of exceptions in the record was signed as shown at record 1927, there was placed therein next after and at the end of each respectively of the aforesaid several numbered paragraphs, instructions, an exception as though it had been by plaintiff in error and the Mutual Life Insurance Company, respectively, taken to each so numbered paragraph or instruction separately and respectively, at the time of the trial and before the jury so retired on the 18th of November, 1899.

An exception was also then to-wit: on the 2nd of April, 1900, allowed to be placed in such supposed bill of exceptions as to separate paragraphs of so much of the charge of the Court on the subject of conspiracy as is set forth and shown at record 1925, 1926, although the copied parts of the charge of the Court on the subject of conspiracy set forth at record 1925 and 1926, and referred to in assignments of error Nos. 91 and 92, was not all of the charge of the Court on the subject of conspiracy. More on that subject of conspiracy in the charge of the Court will be found by looking at record 1916, 1917, 1920, and also at

record 1921, and it is plain and certain that the Court did not as against plaintiff in error, err by anything it said on the subject of conspiracy in those parts of its charge on the subject of conspiracy not copied at record 1925–6.

And we also contend that it is at least certain and plain beyond controversy, that the Court did not err in or by refusing to give some of the above mentioned and numbered paragraphs or instructions asked by plaintiff in error — and if we are right in that, we contend it follows that plaintiff in error can not now here be heard to complain of the refusal of the Court to give any instruction by it or by it and the Mutual Life Insurance Company requested to be given to the jury, or that the Court erred in charging the jury as it did on the subject of conspiracy or on any subject whatever.

In this connection we request attention of the Court to the well settled rules of law in relation to construction of statutes, records and written instruments, to the effect that if the same conflict in different parts thereof, that which is said last therein controls, and that anything preceding which conflicts therewith must give way thereto, from which, as applied to this case, it is made plain and certain that the exceptions in relation to separate and different parts of the charge given by the Court, as shown at record 1925, 1926, were not taken at the proper time or when or before the jury retired, nor at all until long after the verdict was found and the judgment complained of was rendered thereon, nor until the 2d day of April, A. D. 1900; and also, that the several exceptions set forth at record 1904 to 1915, both inclusive, were not any of them taken until the last mentioned day, to-wit: on the 2d of April, 1900—long after the trial and long after the verdict and judgment had been rendered.

And further, we submit that by said copied part of record 1926, the judge of the trial court in substance says: That notwithstanding anything before stated, there was not any such exception taken by plaintiff in error, or either of the insurance companies, to the refusal of the Court to give instructions asked, or any thereof, or to any part of the charge

given to the jury, otherwise or further than as shown by this said copied part of record 1926, but—and I leave herein the hereinbefore written statements about exceptions on those subjects as thus qualified and in effect by me cancelled and struck out—lest whatever court may review the proceedings herein shall be of opinion that, because of what is shown by this copied part of record 1926, such before written statements about exceptions ought to be allowed to remain where they are, and therefore I state the facts and leave the effect thereof to be determined by such court of review.

And we contend that the record should be construed and interpreted and considered the same, and with like effect in all respects and as to every question involved, as though none of the exceptions found between record 1904 and the commencement of the above copied part of record 1926 were ever taken, made or allowed in any manner whatever, and from that, inasmuch as at least some parts of the charge of the court on the subject of conspiracy was correct, and not such as plaintiff in error could complain of (we claim all thereof was correct); and also, inasmuch as some of the aforesaid numbered instructions and paragraphs requested by plaintiff in error to be given to the jury were properly refused, and that the Court would have erred if it had given all thereof, it follows that plaintiff in error cannot now here be heard to complain thereof, or on or as to whether the Court erred in charging the jury as it did, or in or by refusing to give to the jury any instruction, or any part of any instruction, whatever.

And that such is the situation now here, we refer to the following cases:

Holloway vs. Durham, 170 U. S. 615.
R. R. Co. vs. Callaghan, 161 U. S. 91.
Thiede vs. Utah Territory, 159 U. S. 520.
Newport N. & M. V. Co. vs. Pace, 158 U. S. 36.
Block vs. Darling, 140 U. S. 235, 238.
Chateaugay Iron Co. vs. Blake, 144 U. S. 476, 487-8.
Rogers vs. The Marshall, 1 Wall. 644.
Bogk vs. Gassert, 149 U. S. 17, 26, and cases cited.

St. Louis, I. M. & S. Ry. Co. vs. Spencer, 71 Federal, 93.
Holder vs. U. S., 150 U. S. 92.

In St. Louis, I. M. & S. Ry. Co. vs. Spencer, 71 Federal, 93-4-5, the Court of Appeals of the Eighth Circuit among other things says:

"If the entire charge of the Court is excepted to, or a series of propositions contained in it are excepted to in gross, and any portion of what is excepted to is sound, the exceptions cannot be sustained, * * * *

"The charge of the Court was concluded and the jury retired to consider their verdict on January 26, 1895. The exceptions now urged to certain specific portions of the charge first appeared in the bill of exceptions, which was presented to and signed by the judge who tried the case on February 23, 1895. These exceptions are utterly futile."

Many other decisions are cited in the last case in support of the rule stated, and we cite the following recent cases from other Courts of Appeals to the same effect:

West. Union T. Co. vs. Baker, 85 Fed. 690.
Columbus C. Co. vs. Crowe Co., 98 Fed. 946.
Parks Bros. vs. Bushnell, 60 Fed. 583.
McCutcheon vs. Hall C. Co., 101 Fed. 546.
Stewart vs. Morris, 96 Fed. 703.
Yates vs. United States, 90 Fed. 57.
Waples vs. Turner, 83 Fed. 64.
Repauno C. Co. vs. Victor H. Co., 101 Fed. 948a.
Pittsburg Ry. Co. vs. Thompson, 82 Fed. 720.

By which as well as by many other cases not cited it is shown that it is established that a general exception to the refusal to give a series of instructions or to one instruction, is unavailing if any one of the whole series, or any part of either is unsound.

The absurdity and impropriety of such general exception to a whole series of forty-eight instructions becomes the more apparent when by analysis we find the several instructions asked to be utterly inconsistent with each other. To

illustrate: In its first instruction (r. 1904) defendant requested the Court to charge that, "In this case the question to be determined is whether the body brought to Lawrence in April, 1879, was the body of John W. Hillmon, etc." And again in its twenty-eighth instruction (r. 1909) it requested the Court to charge: "That the real question in the case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged, that is, from a gunshot wound at the hands of one John H. Brown at Barber County, on the 17th day of March, 1879."

In its general charge the Court substantially adopted these special instructions asked by defendant, saying (r. 1917–18):

"The principal question for your determination, and it may be said to be the crucial question in the cases, is whether John W. Hillmon died as claimed by the plaintiff, in March, 1879, and whether it was his body that was brought to Lawrence, Kansas, in April of that year, etc."

And it further charged the jury to the same effect, as shown at record 1919 and 1921.

And plaintiff in error did not except to the Court so charging the jury.

We submit that said proposition contained in said first and twenty-eighth instructions asked by plaintiff in error was given in a more proper form and in more appropriate language in the general charge of the Court than as asked. It is not available error for the Court to refuse to give even a proper special instruction requested where the same matter is covered by appropriate language in the general charge of the Court.

Western C. & M. Co. vs. Berberich, 94 Fed. 329.

And a special instruction requested, if adopted by the Court and incorporated in its general charge to the jury, cannot be taken advantage of by the party that invited the Court to give it, however erroneous it may be.

Walton vs. Ry. Co., 56 Fed. 1006.

Badgett vs. Johnson, Fife Co., 85 Fed. 408.

Although considering the issues and evidence in the case we submit it is clear the Court did not err in so charging the jury.

And we submit that where a party requests the Court to give a long series of inconsistent special instructions, and the Court has adopted and given to the jury in its general charge, the law as it is claimed to be in one or more of the said special instructions, such party is not relieved from the operation of the above rule, because he also asked the Court to give instructions inconsistent with those asked by him and adopted by the Court. In other words, a party cannot properly concurrently ask the Court to submit a certain question of fact to the jury upon the evidence, and also to instruct the jury that there is no evidence upon the subject or to disregard the same as the plaintiff in error in effect did by its 1st, 28th, 34th, 37th, 38th and 47th special instructions. (R. pages 1904–1915, and other inconsistent instructions asked.)

A general exception to the refusal to give a series of special instructions must necessarily be bad where that series contains four such instructions as the 1st, 28th, 34th, 36th, 37th, 38th and 47th, pointed out above, by some of which, to-wit, the 1st and 28th, the Court was requested to instruct the jury to the effect that the real question in the case was whether the aforesaid dead body was that of Hillmon or not, whilst by others thereof, to-wit, the 38th and 47th, the Court was requested to instruct the jury to the effect that such real question might be ignored and disregarded, and a verdict found for plaintiff in error if they believed the policy had been obtained in pursuance of a conspiracy, or with a fraudulent intent, even though it was not damaged, *whether Hillmon was dead or not*, by which we see that said 1st and 28th instructions irreconcilably conflicted with said 38th and 47th. Of course, it was not proper to give all those in the same case, on the same evidence, under the same pleadings, and others of the instructions asked were also inconsistent with some others that were asked, and of course the Court should not have given inconsistent instructions.

And further, we submit that the conflict between what is stated on the above copied part of record 1926, and what is

previously said between that and record 1904 about exceptions, is accounted for and explained by the improper practice sometimes indulged in of permitting parties to have *such* exceptions preserved in a bill of exceptions prepared after the transactions occurred to which the same relate as they may desire, the Court or judge thereof taking on itself, or himself, the liberty of giving the party the benefit of any exception it may choose to write in a bill of exceptions, no matter how long after the transactions to which it relates occurred, the necessity, propriety, object and purpose of requiring a party to state before the jury retire, exactly what their exceptions relate to, so that the Court can have in fairness to the other party, an opportunity to reconsider and determine whether the exception is well taken or not, is frustrated and rendered of no avail if the exceptions between page 1904 and the above copied part of page 1926 can be here considered, and further, the opposite party in this case, the defendant in error, has and had a right to hear and know exactly what the exceptions were, both to the charge and the instructions refused, so that if she had chosen so to do she could by her counsel at the trial had opportunity to suggest to the Court as to whether it should or should not give any referred to part of the instructions asked or charge given. And we contend that defendant in error had some rights in that respect, as well as plaintiff in error, and that it is not and was not either lawful or just, or right to her, to permit plaintiff in error after the lapse of about 135 days to subdivide the general exceptions to all of the charge of the jury on the subject of conspiracy as a unit referred to in the copied part of record 1926, and scatter the same over and make the same separately applicable to such different parts respectively of the charge of the Court on that subject as plaintiff in error saw fit, or wished to—or to subdivide and apply the general exception shown at record 1926 to the refusal of the Court to give all of the aforesaid requested instructions as a unit, separately to each respectively of those refused instructions, notwithstanding the only exception actually taken at the proper time at the trial was when taken, really only

taken to the refusal of the Court to give all thereof as a unit, as shown at record 1926.

And therefore we contend that the plaintiff in error has not any such exception to the refusal of the Court to give any of the aforesaid instructions or paragraphs of instructions to the jury, or to its having charged the jury as it did in relation to the part of its charge copied in the aforesaid assignments of error Nos. 91 and 92, or either thereof, as will entitle it to be heard in relation to the matter of either or any thereof, or as to whether the Court erred as claimed by plaintiff in error in or by its aforesaid assignments of error Nos. 85 to 107, or any thereof, or as will enable this Court to investigate or determine as to whether the trial court did or did not err as alleged in those several assignments of error or in any thereof, and we ask that the same, those several assignments of error be respectively disregarded, and we make these, the above shown objections, to each of said several assignments of error, instructions, parts of said charge and exceptions respectively, and ask that the same be applied and considered with like effect as though hereinafter repeated in each of such of the following parts of this brief as refers to any of said several assignments of error, or to any of the aforesaid refused instructions, or to the parts of the charge mentioned in said assignments of error Nos. 91 and 92, or either thereof, or to any part of the charge of the Court to the jury, of or to which plaintiff in error may in its brief refer or make complaint or objection — without necessity of further making any such our objections thereto respectively or to any thereof.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR IN REFERENCE TO THE ASSIGNMENTS OF ERROR OF PLAINTIFF IN ERROR AS NUMBERED BY IT.

If the Court shall overrule our objections to the jurisdiction of the court, and also to hearing the matter of the several assignments of error made by plaintiff in error, then and with reference to the whole case we refer to the opinion of the Circuit Court of Appeals, delivered by the Hon. Amos M. Thayer in deciding this case when it was in that court, shown in the case of

Connecticut Mut. Life Ins. Co. vs. Hillmon, 107 Fed. 834,

at pages 836 to 843, and submit that the same shows sufficient reasons why the judgment of the trial court complained of by plaintiff in error should be affirmed.

ASSIGNMENT OF ERROR No. 1. (R. 1931-2.)

Relating to Motion to Quash the Venire and Discharge the Panel of Jurors.

The evidence in relation to that motion, part of which is set forth at record 130 to 133, was not sufficient to require a sustaining of that motion, and there was not any cause shown why the motion should have been sustained.

And as plaintiff in error *did not exhaust* all of its peremptory challenges, but waived one thereof (r. 137), therefore, as hereinafter argued and shown on the matter of assignments of error 4 to 7 on the subject of challenges to jurors, plaintiff in error *waived* any question raised by that motion, and cannot now be heard in relation thereto.

And further, even if the trial court had erred in overruling that motion it could have proceeded to impanel a jury without issuing any new venire.

ASSIGNMENTS OF ERROR Nos. 2 and 3. (R. 1931–2.)

Relating to Consolidation of Cases for Trial.

By Section 921, R. S. 1878, the Court was given authority to consolidate the two cases for trial.

Insurance Companies vs. Hillmon, 145 U. S. 285, 292–3, which are cases wherein was reversed judgments rendered in 1888, in favor of defendant in error, one against said plaintiff in error, another against The Mutual Life Insurance Company, another against The New York Life Insurance Company, on separate judgments and verdicts against them, on separate writs of error, as shown *id.* 300.

Those reversed judgments were as to plaintiff in error and The Mutual Life Insurance Company on the same causes of action and pleadings on which the two cases were after the disposition and dismissal of the case vs. The New York Life Insurance Company, and on the 9th day of May, 1898, consolidated for trial, as shown at record 66.

The three cases having been at first consolidated for trial in 1882 (r. 25), left so at trial in 1885 (r. 33), left so at trial in 1888 (r. 41), left so at trial in 1895 (r. 43, 44), left so at trial in 1896 (r. 51).

The order of 1898 (r. 66) was by the Court continued in force, and the motion of plaintiff in error to set same aside overruled on 16th October, 1899. (R. 70.(

The agreement made in December, 1897, to set aside the consolidation (r. 135, copied at r. 134), could not control the Court in the matter of consolidation. It was shown to Judge Williams in May, 1898, notwithstanding which he caused the cases to be consolidated, as shown at record 66, which action was confirmed by Judge Hook (r. 70). Whether such cases should be tried separately or consolidated for trial was not matter for the parties to agree about or control, but for the Court to determine according to its discretion.

Insurance Companies vs. Hillmon, 145 U. S. 285, 293.
Toledo, St. L. & K. C. R. Co. vs. Continental Trust Co., 95 Fed. 506.

ASSIGNMENTS OF ERROR Nos. 4, 5, 6 and 7.

(R. 1932–3; 71–2; 136–7.)

Relating to Peremptory Challenging of Jurors.

As shown, the two cases of Mrs. Hillmon, one against the Connecticut Mutual Life Insurance Company, the other against the Mutual Life Insurance Company of New York, were consolidated for trial; the trial judge ruled that each of the defendant insurance companies was entitled to the same number of peremptory challenges as though no consolidation had been made, namely, three each, and that the plaintiff, Mrs. Hillmon, was accordingly entitled to three challenges, because of being plaintiff in each case, that is, six peremptory challenges in all.

The power of the Court to consolidate for trial *cases of a like nature* or *relative to the same question*, does not depend on whether the *same person* is *party* in the different actions.

That each *party* on each side of *each* case consolidated for trial is entitled to three peremptory challenges under Sec. 819, R. S. 1878, is, we submit, established by said case in 145 U. S. 285, 293–4—and that whether the *same* person is plaintiff or defendant in two or more of the cases or not is immaterial. The question of *persons—individuals*, is not to be considered on such matter, because the party, plaintiff or defendant in the meaning of that Sec. 819, may consist of but one or of fifty persons or individuals; if of fifty, they are still but *one party* for the purposes of challenging within the express terms of that section. And the party, no matter of how many persons composed, plaintiff and defendant in each case, is to be deemed a single party for the purpose of challenges under that section *merely* because of being *such* party. Sallie E. Hillmon was plaintiff in two cases consolidated. If John Doe had been plaintiff in the case against the Mutual Life Insurance Company, he would have been entitled to three such challenges as well as Sallie E. Hillmon as plaintiff in the other case; this because he would have been deemed a party for purposes of challenges under Sec. 819. And we submit that defendant in error was entitled to six peremptory

challenges, same as two different plaintiffs would have been if some other person had been plaintiff in one of the cases; this because the plaintiff in *each* of the two consolidated cases was entitled to three challenges because of being plaintiff in either, making six. We submit the cases cited by plaintiff in error on this point are not at all applicable to this case. If we are not right in this connection, then it follows that under said Secs. 819 and 921 the parties defendant are to be favored because of the consolidation.

Surely the cases when consolidated for trial were not merely *one* case for purposes of peremptory challenges *by the plaintiff therein only.*

They were separate for purposes of verdict, judgment, writs of error and exceptions, and also for purposes of peremptory challenges of jurymen by defendants in each case respectively.

Insurance Companies vs. Hillmon, 145 U. S. 285, 300.
Toledo, St. L. & K. C. Co. vs. Continental Trust Co., 95 Fed. 506.

From which it follows that defendant in error was entitled to three peremptory challenges because of being plaintiff in each case respectively, six in all.

The ruling of the trial judge giving the plaintiff six peremptory challenges, so far as we can learn, is in accordance with the rulings of the Circuit Courts generally, since the decision in the case of Insurance Company vs. Hillmon, 145 U. S. 285, but if the trial court was in error in holding that the plaintiff was entitled to six peremptory challenges such error was harmless and no ground for reversal, because there is no complaint or ground for complaint that the jury was not a fair and impartial one.

2d Objections to Jury Waived.

And further, we submit that plaintiff in error waived the matter of those assignments of error in relation to peremptory challenges of jurors by voluntarily accepting the jury as it was finally empanelled by not exercising its third peremptory right of challenge.

The attention of the Court is called to the fact that the Connecticut Mutual Life Insurance Company did not exercise its three peremptory challenges. (R. 136, 137.) It accepted the twelve men in the box when it still had the right to challenge peremptorily any juror that was unsatisfactory to it. (R. 137.)

After the jury were all in the box, the plaintiff in error still had, but waived a peremptory challenge, and thereby accepted the twelve men in the box; this was tantamount to a waiver of all objections to any thereof.

F. E. D. & W. V. Rld. Co. vs. Ward, 29 Kans. 354.

There is a wide difference between overruling a challenge that a party is entitled to and sustaining a challenge that a party is not entitled to, and it is generally held that it is not substantial error to excuse a juror upon a challenge based upon insufficient grounds where an unexceptionable jury has been obtained, and especially where the complaining party has not exhausted his peremptory challenges.

Stout vs. Hyatt, 13 Kans. 232, 241.
A. T. & S. F. Rld. Co. vs. Franklin, 23 Kans. 74.

And the above rule has been substantially applied by this Court in the case of Hayes vs. Missouri, 120 U. S. 68, 71, where it is said:

"The accused cannot complain if he is still tried by an impartial jury; he can demand nothing more. (Northern Pacific Rld. Co. vs. Herbert, 116 U. S. 642.) The right of challenge is the right to reject, not to select a juror. If from those who remain an impartial jury is obtained, the constitutional right of the accused is maintained. In this case it is not even suggested that the jury by which the accused was tried was not a competent and impartial one. He was allowed twenty peremptory challenges and it does not appear that he exhausted them."

And again in the case of Hopt vs. Utah, 120 U. S. 430, it is said by this Court:

"When a challenge by a defendant in a criminal action to a juror, for bias, actual or implied, is disallowed, and the juror is thereupon peremptorily challenged by the defendant, and excused, and an impartial and competent juror is obtained in his place, no injury is done the defendant, if until the jury is completed, he has other peremptory challenges which he can use."

And in Spies vs. Illinois, 123 U. S. 131, 168, the preceding cases quoted from above were referred to and the doctrine announced therein, approved and applied.

ASSIGNMENT OF ERROR No. 8. (R. 1933.)

Relating to Motion to Discharge Jury.

What we have said in relation to assignments of error Nos. 1 to 7 is also applicable and a sufficient answer to this.

ASSIGNMENT OF ERROR No. 9. (R. 1933.)

Relating to Challenge of Juror.

On the matter of overruling a challenge againt P. Botkin, called as a juryman, he was not one of the jurors finally impanelled to try the case (r. 72). Each of the different parties, plaintiff and defendant, challenged some jurors peremptorily; whether defendant in error challenged Botkin or not in using one of her first three peremptory challenges mentioned at record 136 is not shown. If we remember right, she did. It is not shown that the plaintiff in error or the Mutual life Insurance Company, either of them, peremptorily challenged Botkin, therefore it is not shown that plaintiff in error was injured by the overruling of that challenge.

But even if it had peremptorily challenged Botkin, still all question as to his fitness was *waived* and *abandoned* by plaintiff in error because both it and the other insurance company respectively waived their respective third and last peremptory challenge, as shown at record 137 and 136, and as though here repeated, we refer to what we have said

about *waiving* in relation to assignments of error 1 to 8, as though here repeated in relation to the Botkin matter.

And further, we submit the evidence did not show cause to sustain the challenge to Botkin (r. 135), and further, as to all which, see also—

Thiede vs. Utah Territory, 159 U. S. 515–16.

ASSIGNMENT OF ERROR No. 10. (R. 1933.)

Relating to Introduction as Evidence of Policy of Insurance.

Of course plaintiff in error was not wrongfully injured because the policy issued by it and sued on was received in evidence. Plaintiff in error may possibly regret it issued that policy, but that is not cause of error.

ASSIGNMENT OF ERROR No. 11. (R. 1933.)

Relating to Objection to Evidence.

Mr. Selig, there referred to, was one of the agents of plaintiff in error through whom its transaction in relation to the issuing of the policy was conducted (r. 1496), etc., and of course he was a proper agent of the company to deliver the policy for it to defendant in error.

ASSIGNMENT OF ERROR No. 12. (R. 1933–4.)

Relating to Objection to Evidence.

When defendant in error was first called as a witness at the trial commencing in October, 1899, she testified to the effect that her name was then Sallie E. Smith; that when the suit was brought her name was Sallie E. Hillmon; that since then she had married James C. Smith. The trial court instructed the jury to the effect that such last marriage was not evidence of the death of John W. Hillmon (r. 151), and therefore of course it was proper for her to explain how she

whose maiden name was Sallie E. Quinn (r. 744), and who married Hillmon on the 3rd of October, 1878 (r. 748, 782, 785, 787, 789, etc.), came to be known as Sallie E. Smith.

ASSIGNMENT OF ERROR No. 13. (R. 1934, 167.)

Relating to Objection to Evidence.

Mr. Green had not testified that he had ever seen John W. Hillmon measured, or that he was present at any time when John W. Hillmon was measured, nor had he stated that Stewart measured Hillmon, or what the measurement of Hillmon actually was, he had testified as shown at record 154 to 167, to the effect that Dr. J. H. Stuart, (sometimes misspelled "Stewart") had at the several trials of the cases had in 1882, 1885 and 1888, testified that he, Stuart, wrote the height of Hillmon 5 feet 11 inches, shown in the applications and medical examiner's certificates thereto set forth at r. 178, 184, 195, 198, and that there had not been any pretense before the trial of 1895, to the contrary — yet Mr. Green had not pretended or in any manner testified that he was present or of his own knowledge knew of Hillmon being actually measured at any time — and from his own testimony he had showed that he should have qualified the two last answers, "Yes, sir," at record 167, by adding thereto the words, "that is Stuart so stated or testified. I do not myself know of Hillmon having been actually measured" — but irrespective of those answers being so limited, it is certain that he, Green, had not as a witness stated or testified to anything which would make any proper answer to the objected to question competent, relevant or material.

And *further*, that objected to question was certainly irrelevant and immaterial, and incompetent, because whatever Mr. Green had testified to was *already* done, the Court and the jury *had heard the same*, all of the testimony he had given, and whether Mr. Barker, the counsel who propounded that objected to question, did or did not know what Mr. Green had testified to on the subject asked about, was certainly *irrelevant* and *immaterial*. If instead of the objected

to question Mr. Barker had asked Mr. Green *when any measurement referred to had actually been made*, then Mr. Green, if he of his own knowledge knew, could have made appropriate answer, but Mr. Barker did not ask *that* question; it is evident he was trying to get hearsay evidence before the Court and jury through the medium of, and as to what Mr. Green had heard on that subject, not limited as to what Mr. Green had heard Dr. Stuart state at some time or testify to at the trials of the cases — therefore the objections to that question were properly sustained, as well as for the further reason that what Mr. Green knew about the time when any actual measurement was made was immaterial and not relevant for many reasons, including that it was not pretended, stated or shown, or testified to, that Mr. Green of his own knowledge had stated or testified what the actual height of Hillmon was, or that he knew of any measurement being actually made.

ASSIGNMENTS OF ERROR Nos. 14, 15 and 15½.

(R. 1934–5.)

Relating to Objections to Evidence.

The witness, Dr. John D. Patterson, was a dentist, and as such had for the insurance companies made a model of the teeth and jaws of the dead body, and testified to the effect that one of the teeth in the upper left side jaw was short, and explained how that shortage would cause the mouth of the living Hillmon to appear as though that short tooth was missing—evidently the same tooth spoken of by Henry Hillmon at record 1094, Theodore Wiseman, record 861, 882 to 901, Claude Holiday, record 994 and 997 and Tinetta Cercadell, record 1038 (*lower corner seemed worn off*), and also explained that the mark on a finger of the deceased would be made by the ring referred to (r. 236 to 243, and 248 to 250). The matter about the teeth and the ring and ring mark, and the loss of the ring at a previous trial were all matters relating to the identification of the corpse (see r. 227, 231, 232,

242, 243, 249, 250, 779), ring lost at the trial in 1895 (r. 779), wherefore and for other manifest reasons we submit those assignments of error are not well founded.

ASSIGNMENTS OF ERROR Nos. 16, 17 and 18.

(R. 1935–6.)

Relating to Objections to Testimony About Height of Hillmon.

We refer to what is elsewhere herein said or shown in the record in relation to the height of Hillmon, and the length of the corpse, particularly in the foregoing description of his person, and the statements about his height in the applications, etc. It was claimed at the trial by defendant in error that Hillmon was 5 feet 11½ inches high, or about that, corresponding in height to the length of the corpse (r. 940, 926), whilst on the part of plaintiff in error it was claimed that he was much shorter; we submit it was proper to ask those objected to questions.

ASSIGNMENT OF ERROR No. 19.

(R. 1936 and 531 to 544.)

Relating to Objections to Evidence.

Mary Judson showed by her testimony at record 531–2 that she was competent and had had opportunity to know the condition of the teeth of Hillmon, whether any thereof were actually missing or not; she answered according to that knowledge on a matter that she knew about, as she properly might; the objected to question was only one way of getting at the extent of her observation and knowledge.

ASSIGNMENTS OF ERROR Nos. 20 and 21.

(R. 1936, 504.)

Relating to Objections to Evidence.

That the objected to questions were competent and proper is we submit shown by the opinion of this Court on the sub-

ject of intent, declarations, etc., in the case of the Insurance Companies vs. Hillmon, 145 U. S. 285.

And plaintiff in error on cross-examination of Brown asked for and obtained further testimony on the same subject (r. 381, Q. & A. 398) in a manner that showed it considered the same proper matter for Brown to testify in relation to, and thereby waived its former objection to similar evidence.

ASSIGNMENTS OF ERROR, Nos. 22, 23, 24, 25 and 26, r. 1936 to 1943, 339, 340, relating to questions Nos. 401, 402, 403, 404, 410, 411, 412, 413, 414, 622, 763, 773, 774, 775, mentioned at record 339, 340, *asking the witness, Brown, on cross-examination as to whether he had not made contradictory statements in a written instrument without exhibiting to him such writing.*

By those several questions plaintiff in error was seeking to prove the substance and contents, and words and language of and used in a written instrument, without having shown the same to have been lost or destroyed, for the purpose of impeaching the credibility and testimony of Brown given in his examination in chief to the effect that he had *accidentally* killed John W. Hillmon on the 17th of March, 1879, in their camp on Crooked Creek, in Barber County, Kansas (r. 344–5), and without having *shown* or *exhibited* the *same* to Brown when or before those questions were asked him, and without any proper foundation, reason or excuse having been laid for asking him such questions on such cross-examination, *without exhibiting* to him the written instrument inquired about, because of which and for the further reason that defendants in the trial court, through their attorneys, had it in their power to have shown to Brown when his deposition was being taken (r. 593), as well as when they wished said objected to questions to be read (r. 593), the paper writing alluded to in the questions—the objections to those questions were sustained only provisionally, that is, with the provision that if the original instrument should be produced or its loss accounted for the objections would be overruled (r. 339–40).

That the ruling of the Court on this matter was proper, see—

1 Greenleaf on Evidence, Secs. 463 and 464.

And as that written instrument was afterwards produced in court and read in evidence (r. 1283–6), plaintiff in error could then have read those objected to questions and answers thereto to the jury, and therefore, irrespective of any other reason, it cannot now be heard to complain because the trial court so provisionally sustained such objections.

Thiede vs. Utah Territory, 159 U. S. 511, 519.

Afterwards at the trial the writing alluded to was in pieces as torn up produced in Court by Mr. Green (r. 1283–4) and read to the jury from a copy made on the 13th of September, 1879, certified to be correct over the signatures of Mr. Green and Buchan (r. 1284 to 1287), but neither such certified copy or the original, neither whole or as torn or any part thereof, shown to Brown when he was testifying.

The testimony shows that Buchan gave the said torn written instrument to one of the attorneys for the insurance companies when the deposition of Brown was being taken, (r. 593, 1278, 1280, 1283–4, 583), which were afterwards produced as aforesaid by Mr. Green at the trial (r. 1283–4), and as Mr. Green had had and knew of said certified copy, of course the original instrument, with or without such copy, should have been shown Brown when he was thus cross-examined and attempted to be impeached by those objected to questions, thus provisionally kept out of evidence, but when the same had been read in evidence, as aforesaid, and as shown at r. 1284, etc., the provisional ruling out of those questions (r. 340) became inoperative, and plaintiff in error was then under permission to read the same in evidence, because of the provisional ruling shown at record 340, and therefore we submit the exceptions, assignments of error, in relation to those questions are not well taken, and should be disregarded or overruled, whether the Court was or was not right in first provisionally sustaining the objection, but we submit it was right in so provisionally sustaining the objections.

And further, even if the trial court had technically erred in sustaining provisionally those objections, such technical error was as to plaintiff in error harmless, and not reversible error because the answers thereto were such as would not have benefited plaintiff in error to have read the same, as shown by the answers in the record following those questions respectively.

And further, in the same deposition which contained those objected to questions, John H. Brown, on further cross-examination, testified to the effect that the statement asked about in those objected to questions was false (r. 418, A. 777; 519, A. 130), and that he did not tell Buchan such things as therein stated (r. 436–7, 405, 441–2–3–4–5–6–7–8–9, 450, 452–3, 472–3–4, 477, 478, questions and answers 630, 1059, 1060, 1112 to 1146, and 1175, 1176, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350), including that he (Brown) had not ever told Buchan that Hillmon was alive, or that he (Brown) had not so killed Hillmon (r. 404–5, A. 630; 436–7, A. 1059; 1068–9), and thus testified to all that oral evidence was competent on that matter of those objected to questions, and thereby, coupled with the further testimony of Brown given in answer to further questions on such cross-examination, Brown testified to the effect that he did sign and swear to the statement (r. 383, A. 406 to 409, and elsewhere). And as that statement was finally read in evidence (r. 1283–6), it follows that plaintiff in error is not in shape to claim it was injured by or because the objection to those objected to questions was thus provisionally sustained; surely from him they obtained all such oral evidence as was competent for him to give in relation to that statement, which we have seen they did not exhibit to him, although the paper could have been produced and shown to him (as well as the aforesaid certified copy thereof), which we see from 1 Greenleaf on Ev., Sections 463 and 464, they should have done—and could have done—and thus put themselves in position to have asked him such questions as were so objected to, or any other proper questions they might have seen fit—but in any event, it is sure that plaintiff in error was not injured by the provisional sustaining of said objections. An examination of each of those

objected to questions will show that in each thereof he was asked as to the contents of a written instrument, that is, as to all or a part of the contents of said written statement; but when he was asked as to what he had stated to Buchan, he denied, as above shown having stated to Buchan that which really was the contents of that written instrument, but on the contrary, testified to the effect that Buchan invented the same, but did not deny—but conceded—that he signed and swore to the same (r. 383, A. 406–7–8–9)—and there was no question at the trial but that he did sign and swear to the same, as shown at record 1283–6.

As to so much of the assignments of error at page 1943 to 1945 as refer to questions 1378 to 1397. It appears that they, except the two last, referred to the letter set forth at pages 483, 584, 766 and mentioned in the testimony of J. W. Green at page 584, and of Reuben Brown at pages 549, 550, and of defendant in error at page 766, from all which references it appears that Buchan kept that letter until he gave it to the attorneys of the insurance companies, plaintiffs in error, who produced it at the trial, page 584.

And the Court did not sustain any objection to any of those questions, but on the contrary the same were read to the jury—the insurance companies asked those questions, obtained the answers thereto—did not like those answers, wished to withdraw them, but defendant in error objected, and we submit they were properly read, as helping to prove how the release pleaded by the respective insurance companies were obtained, that letter, being in the nature of a halter around the neck of the witness John H. Brown, would of course assist those companies through Buchan to get Brown to sign the writing dated of the 4th September, 1879, and those two papers with the other influences operating on him of course induced Brown to assist Buchan to get said releases from defendant in error, as shown at pages 766 to 779, 812 to 825, 830, 831, 1897 to 1900, and 495 to 502. And in this connection we refer to, to what we elsewhere herein say in relation to assignments of error Nos. 27 to 32, 59 and 105, with which the matter of said assignments of error Nos. 22 to 26 should be considered.

THE ALLEGED RELEASE.

ASSIGNMENTS OF ERROR—No. 27, r. 1945–6, 546; No. 28, r. 1946, 576; No. 29, r. 1946, 577; No. 30, r. 1946, 578; No. 32, r. 1948, 580–1; No. 31, r. 1947, 580; No. 59, r. 1955, 835; and No. 105, r. 2006.

All Relating to the Alleged Release, Etc.

Those eight several assignments of error, Nos. 27, 28, 29, 30, 31, 32, 59 and 105, relate to the matter of the unsealed release pleaded by plaintiff in error, dated the 15th of September, 1879, set forth in its answer (r. 18, 19), as its third ground of defense, and to the respective causes of reply thereto of defendant in error, set forth at record 20–22, Nos. 1st, 2d and 3d. The 1st, a general denial of all the allegations in that answer; the 2nd (r. 20) that said release was without consideration; the 3rd (r. 20 to 22), that such release was obtained by fraud, there described, without consideration, and *to evidence supporting* those causes of reply, and which also includes the matter of the refusal of the Court to give refused instruction No. 44, referred to in said assignment of error No. 105, relating to the deposition of John H. Brown, set forth at record 341 to 520, and the written statement of 4th of September, 1879, set forth at record 1284, 1286, and those eight assignments of error are in their nature, when considered in connection with the whole case, pleading, evidence, and rules of law applicable thereto, so intertwined and related to each other as to make it necessary and proper to consider each thereof with the others, and with other parts of the record, to enable the Court to understand the matter of either thereof, notwithstanding any effort on the part of plaintiff in error to separate, or brief, argue, or present the same separately as independent matters, or as though that written statement had been read in evidence to prove the statements therein to be true, *instead of*, as the fact was, being read on and as part of the cross-examination of William J. Buchan, one of its witnesses, for the purpose, among

others (as was by all when it was read understood), to show what kind of a false statement it was he (Buchan), as agent of the plaintiff in error and others, had put in writing (r. 1236, 418, A. 777; 519, A. 130), and that it was such a writing as is alleged in the reply of defendant in error, was obtained and used by said Buchan to assist in the matter of procuring from her the releases (r. 20, 22), as shown by the evidence, by all which it is shown that among other things defendant in error was throughout the case *claiming* that said *written statement* was utterly *false* and *untrue* in every respect, and made, obtained and used to do her wrong and injury.

That Said Release Was Properly Defeated in the Trial Court.

That release was not sealed (r. 19), therefore any rule of law in relation to what cannot be pleaded or proven to defeat a sealed instrument of writing in the courts of the United States has not any application to this case, or to any question that can properly be raised or made by plaintiff in error, and therefore none of the cases that may be cited to show what cannot be pleaded in courts of the United States are in any manner applicable to this case.

Sections 6, 7 and 8, of Chapter 21 of the General Statutes of Kansas 1868, page 183–4, are as follows:

"SEC. 6. The use of private seals in written contracts (except the seals of corporations) is abolished, and the addition of a private seal to an instrument of writing shall not affect its character in any respect.

"SEC. 7. All contracts in writing, signed by the party bound thereby, or his authorized agent or attorney, shall import a consideration.

"SEC. 8. The want or failure, in the whole or in part, of the consideration of a written contract, may be shown as a defense, total or partial, as the case may be, in an action on such contract, brought by one who is not an innocent holder in good faith."

And similar sections of statutes were in force in Kansas whilst it was yet a territory (Laws of Kansas 1859, pages 301–2; Compiled Laws of Kansas 1862, page 351), and similar sections are found in all subsequent compilations of the laws of Kansas (continued in force without reenactment since 1868). That release was made in Kansas, and was therefore, of course, governed by the laws thereof, and any rights in relation thereto were, of course, to be allowed and enforced in the courts of the United States, the same and with like effect as though such matters were being investigated in a State court.

Since the the trial of the case in the Circuit Court, plaintiff in error has for the first time in the Court of Appeals, and here, been trying to make a question to the effect that the trial court did not have jurisdiction to investigate the question as to whether said release was fraudulently obtained or made without consideration, and the plaintiff in error is attempting, without having demurred in the trial court to the aforesaid second and third causes of reply, or otherwise sought to get the same out of the record, and without objecting in the trial court that it did not have jurisdiction to permit therein such investigation.

And in so doing plaintiff in error, in the Court of Appeals and in this Court, in its application for certiorari, claimed—and therefore we suppose it will herein further claim to the effect—that by those three quoted sections the Kansas law-making power *ousted* the courts of the United States held in that State, from, and prevented them from exercising jurisdiction to investigate such questions, that is, whether an unsealed instrument was obtained by fraud or made without consideration, seemingly overlooking the fact that its argument in that respect shows that a United States court could not be ousted by a Kansas statute of jurisdiction which it would have had if those three quoted sections had not been enacted.

And also overlooking the fact that it is here now trying to get this Court to put such a construction on its answer as would permit it to defeat the policy for fraud if it had made

necessary and proper allegations in its answer, which it did not, and even if it had, could not have proved the same.

At common law courts of law had jurisdiction to investigate questions as to whether a contract resting in parol — that is an oral contract, or an unsealed written instrument, had been obtained by fraud, or with or without consideration — and at common law — that is, but for those quoted sections, it would have been necessary for plaintiff in error to have pleaded and proved a consideration for that release — it not being a sealed instrument.

1 Chitty on Pl. (16 Am. Ed.) 300, 382, bottom paging.
4 Enc. Pl. & Pr. 928, 929.

(It is not important to consider whether the recital of the nominal consideration of one dollar in that release did by copying that instrument in the said 3rd defense (r. 19), in effect practically plead consideration or not—although such nominal consideration as that so named in the absence of such copied statutes are not usually enough to support unsealed writings which require a consideration to be shown, because the entire want of consideration therefor was clearly and beyond question shown by the evidence.)

It has not been held by any Kansas Court that those sections in effect *put a seal* to unsealed writings or contracts; whether written or not, they have simply given effect to those three quoted sections, and under those decisions those sections have, as applied to this case, been by Kansas Courts construed to merely change the burden of pleading and proof with reference to the matter of consideration of unsealed written contracts, made by private persons, yet plaintiff in error asks this Court in effect in the face of those three sections, and contrary thereto, to add a seal of defendant in error (when by law she could have none) to that unsealed release, and then to say, that because of the Court so doing, the trial court had not jurisdiction to hear the matter of said 2nd and 3rd causes of reply, whilst but for those three sections plaintiff in error, as we understand it, concedes the trial court had jurisdiction to investigate all

questions in relation to such fraud or want of consideration, thus practically claiming that by the laws of Kansas the Courts of the United States can be ousted of jurisdiction which they would otherwise have. Of course Kansas laws cannot take away any such jurisdiction — and has not attempted so to do.

Said Sec. 8 made special provision for making the defense of want or failure of consideration, either in whole or in part to any written contract, which left that matter as to said unsealed release in the trial court the same as it would have been at common law, except that because of Sec. 7, the release imported a consideration, (unless because of the recital therein of one dollar only such implication was rebutted) and imposed on defendant in error the necessity of pleading want of consideration as she did in her second and third causes of reply, &c.

Those quoted sections of Kansas statutes did not affect the common law in relation to matters of fraud. They have no bearing upon the question as to the manner of proving or pleading fraud in the obtaining of a written instrument.

That the want of consideration and fraud, alleged in said reply, could be pleading against said release without any previous rescission of the release, is shown by the following list of cases, the first two thereof being cases in the State where those three quoted sections were enacted, and the case tried under Section 914 R. S. 1878, page 174, applicable to the pleading and practice therein.

Railway Co. vs. Goodholm, 61 Kansas, 758, 761 to 766, the pleadings in which case are described at id. 759.
Railroad Company vs. Doyle, 18 Kansas, 59, 62.
Union Pacific Ry. Co. vs. Harris, 63 Fed. 800 to 804.
Silk vs. M. R. L. F. A., 28 Atlantic, 445.
Berry vs. A. C. Ins. Co., 39 N. E. 254; s. c., 132 N. Y. 49.
Platt vs. Continental Ins. Co., 19 Atlantic, 637, 638; s. c., 62 Vt. 166.

And see also the following additional cases which, with the six above named cases, are also cited in support of our

contention that plaintiff in error took the release, subject and liable to be defeated in the case and manner in which it was defeated, because of the fraud and want of consideration therefor stated in the reply.

Atlantic Cotton Mills vs. Indian Orchard Mills, 17 N. E. 496, 501; s. c., 147 Mass. 268.
De Souchet vs. Dutcher, 15 N. E. 460; s. c., 113 Ind. 249.
Crain vs. Hunter, 28 N. Y. 389.
Lawrence vs. Hand, 23 Miss. 103, 105.
Bower vs. Johnson, 10 S. and M. 169, 173.
V. S. M. Co. vs. Rheinschild, 25 Kansas, 537.
Fitzsimmons vs. Joslyn, 52 Am. Decs. 46; s. c., 21 Vt. 129.
Union Trust Co. vs. Phillips, 63 N. W. 903.
Albitz vs. M. & P. Ry. Co., 42 N. W. 374.
Michigan M. L. Ins. Co. vs. Naugle, 29 N. E. 393.
Fairchild vs. McMahan, 34 N. E. 779; s. c., 139 N. Y. 290.

And as to any argument or claim of plaintiff in error to the effect that the State of Kansas, could not by said Sec. 8 confer jurisdiction on Courts of the United States, we answer it *could not* by all or any of those three quoted sections take from such Courts any jurisdiction such Courts had independent of those three quoted sections, and also further, the sections of the Kansas statutes, particularly Sec. 8, surely in effect merely left and continued that rule of common law in force as to all Courts and cases. In the replies in this case it was alleged that the release was obtained by fraud and without consideration.

That the 2nd as well as the 3rd cause of reply (r. 20–22) were respectively sufficient and in proper form to admit of proof that the release was without consideration is shown by the case of —

Miller vs. Brumbaugh, 7 Kansas, 343, 348, 353,

whilst the 3rd cause of reply also was to the effect that it was obtained fraudulently without consideration.

And further, in addition to the foregoing, which shows that the release could be defeated in the case as it was, the insurance company did not demur to or in any other manner question the right of the defendant in error to so attack the release in the action at law, and no objection on the trial was made to the introduction of evidence in support of the replication on the ground that the release could not thus be proved in any action at law, or that a suit in equity was necessary to set it aside. It is, after verdict on a proceeding in error, that it for the first time is claimed by the plaintiff in error that the release is to be treated as an instrument under seal, and that it was not competent for a court of law to deal with it, but that recourse should have been had to equity. In answer to this contention, we claim that if such a question could be raised at all, it must have been done by demurrer to the reply or by some seasonable appropriate objection, *in limine* and cannot be done after verdict and after twenty years of litigation, and after a suit in equity to set aside and vacate the release would be barred by limitation. In the case of Union Pacific Ry. Co. vs. Harris, 63 Fed. 800, a similar question was raised, and the Court of Appeals, overruling the point, said:

"The chief contention of the plaintiff in error is that the issues arising on the replication to the defendant's supplemental answer should not have been submitted to the jury. It is said the plaintiff cannot in this action avoid the release for fraud, or show that he was mentally incapable of entering into a valid contract at the time he executed it; that the release can only be avoided upon these grounds by a suit in equity. This question was not raised in the lower court. The defendant did not demur to either of the causes of reply, or move to strike the same out of the reply, but acquiesced in the issues presented, and went to trial thereon, thus conceding that the Court could try the issues presented. These issues were tried to the jury without objection and it is now too late to object for the first time in the Appellate Court to that mode of trial. The objection that an action should have been brought at law instead of in equity, or *vice versa*, is

waived by a failure to interpose it at the proper time in the court of original jurisdiction. (Hollins vs. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Insley vs. U. S., 150 U. S. 512, 14 Sup. Ct. 158; Preteca vs. Land Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler vs. Savage, 143 U. S. 79, 12 Sup. Ct. 340; Reynes vs. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486.) If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the Appellate Court. The general principle is now well established that an Appellate Court will not entertain an objection to the form of the action, when the objection was not interposed in apt time in the trial court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one, and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial court will be deemed waived. (Elliott, App. Proc. Secs. 658, 679, 690, and citations; Brown vs. Lawler, 21 Minn. 327; Brown vs. Nagel, *id.* 415; Weaver vs. Kintzley, 58 Iowa, 191, 12 N. W. 262; Town of Mentz vs. Cook, 108 N. Y. 504, 15 N. E. 541; Buffalo Stone & Cement Co. vs. Delaware, L. & W. R. Co. [N. Y. App.], 29 N. E. 121; Sexton vs. Pike, 13 Ark. 193; Creely vs. Brick Co. 103 Mass. 514.) In what is here said, we are not to be understood as intimating that, if the defendant had interposed a timely objection to the jurisdiction of the lower court to try the issues presented by the replication, the objection would have been of any avail."

The decisions of this Court, cited by the Court of Appeals in the above case, fully sustain the principle of the decision and are conclusive upon the point that such objection must be taken *in limine* or it will be waived.

And in support of the same proposition, we refer to—

21 Ency. of Pl. and Pr. 666, Sub. 2.

Hooven *et al.* vs. John Featherstone's Sons *et al.*, 111 Fed. 82 (Syl. 8), 87.

And from the foregoing we see that the release *could* properly be *attacked* and *defeated* in the trial court as it was,

notwithstanding any objection plaintiff in error might have made in that court, but if we are wrong in that, then we see plaintiff in error *waived* any such objection, and cannot now here be heard on any such matter.

And still further the plaintiff in error not only did not by demurrer or otherwise in the trial court try to get rid of, or have struck out said 2nd and 3rd causes of reply (r. 20 to 22), but further it did not in the trial court object to any question asked any witness, or to any document or evidence on the ground or claiming that Court did not have jurisdiction to try the question as to whether said release was obtained fraudulently or without consideration, or in any manner make or raise any such question or objection in that trial court, and therefore from the last cited case and the cases therein referred to, it is shown that even if such an objection would have been good if made, it waived it by not properly making the same in that Court. It is true that to some of the testimony offered by the plaintiff in support of the reply, the objection that the offered testimony was "incompetent, irrelevant and immaterial" was made. No other objection was offered.

That any objection to any evidence, question, testimony or document actually made, either to any of the aforesaid questions or evidence mentioned in assignments of error Nos. 27, 28, 29, 30, 31, 32 and 59, or to any other question or evidence in the trial court was not sufficient to make or raise any such jurisdictional question in that Court or in this Court, see—

Ins. Co. vs. Miller, 60 Fed. 254.
Ry. Co. vs. Hall, 66 Fed. 868.
Western C. & M. Co. vs. Berberich, 94 Fed. 329.
M. K. & T. Ry. Co. vs. Elliott, 102 Fed. 96.

And further, by the evidence it was conclusively beyond question proven as matter of law to be determined by the court, that the release was void for want of consideration, and plaintiff in error (and the Mutual Life Ins. Co.) at the trial by its acts conceded such to be the case, by asking instructions accordingly, that is, they, the insurance companies,

including plaintiff in error, asked the Court to give certain instructions to the jury, substantially and in effect conceding and on the basis that it was proper for the court to instruct the jury as it did, as shown by the paragraph at r. 1921, 1922, consisting of the four lower lines on r. 1921 and the fifteen upper lines on r. 1922 including that part thereof in the words following, to-wit:

"As to the releases executed by the plaintiff and set up in the answers of the defendants. While under the law the execution of the written instruments of releases by the plaintiff imports a consideration therefor, nevertheless the undisputed evidence in this case shows that the said releases were wholly without consideration and therefore they are inoperative as releases, and do not constitute a valid defense, and the plaintiff did not, by any of them, release or discharge any cause of action or any other right that she may have had, etc." (R. 1921–1922.)

The insurance companies at the trial acquiesced in this action of the Court, and did not except to the Court so instructing the jury. The only exception taken at any time by the insurance companies or either thereof to the general instructions of the Court, was in the following language:

"We except to what you say on the subject of conspiracy." (R. 1726.)

That such an exception was not sufficient to raise any question as to the exclusion by the Court of the release to the petitioner from consideration by the jury, as such release is, we submit, too plain to require further observation. The Court did not exclude the releases so far as they might operate against the plaintiff in determining other questions, as is shown at r. 1922.

That it is proper for the Court, when the evidence conclusively and beyond question as matter of law proves any matter in issue to be true as alleged by either party—as this matter of want of consideration was so proven—for the

Court to instruct the jury accordingly, as shown by many cases, including the case of—

Marshall vs. Hubbard, 177 U. S. 416, 419.

The evidence in relation to the fraud alleged in the aforesaid third cause of reply not only tended to prove the fraud so alleged, but also tended to prove more, not merely *prima facie*, but conclusively and beyond all question proves the entire want of consideration of any of the releases, including the release to plaintiff in error (at r. 19) for some of the particular evidence sufficiently proving there was not any consideration for that release (or for any of the releases), see r. 773, 830, 831, 1241, 1243, and that there was not to be any consideration therefor see r. 581, 592.

And when the evidence had made it appear conclusively that the RELEASES were obtained without consideration, it was not necessary for defendant in error to offer or introduce any futher proof that they were fraudulently obtained, because either, that is, want of consideration or such fraud, would either by itself without the other, defeat the RELEASES respectively—but proving that the same were without consideration did not make it error to have admitted proof, or to admit further proof, of the alleged fraud in procuring the same—but all of the evidence introduced to help show the fraud alleged in procuring the RELEASES also helped and tended to show the want of consideration therefor, and was competent for that purpose.

Among which mentioned instructions so asked by plaintiff in error are Nos. 1 and 28, and we refer to what we say in relation thereto in connection with our argument herein on the subject of conspiracy, and submit that as the real question in the case was, as stated in those asked instructions, whether the herein mentioned dead body was that of Hillmon or not, that it follows such last mentioned jurisdictional question, as now claimed by plaintiff in error, was *not* in the case, and was not by plaintiff in error supposed to be in the case when it asked those instructions, or at any time whilst the case was being tried.

In further arguing the matter of the above mentioned eight (8) assignments of error, numbers 27, 28, 29, 30, 31, 32, 59 and 105, we will further refer to the matter of such want of consideration for the releases.

The matter in relation to those eight assignments of error and the evidence connected with the questions and answers therein referred to, including how and why the same were obtained and the circumstances under which they were respectively made, constitute and the same are part of a chain of evidence which proves that the aforesaid 2d and 3d causes of reply were true, including that the releases were without consideration and were fraudulently obtained as so alleged.

The record shows testimony among other things in relation to the matter of said 2d and 3d causes of reply, to the effect that Buchan went to see defendant in error at Lawrence about the case. She told him she could not tell him much about it, that he could go and see her lawyers, and when they went to one of them, Borgalthaus, Buchan had practically nothing to say (r. 768). Doubtless he there learned of Borgalthaus the policies were in the hands of Wheat in Leavenworth, who had received the same from defendant in error, in May 1879 (r. 823, 213), which explains why Buchan did not wish afterwards to meet her at Lawrence (r. 769, 817), but preferred Leavenworth where the policies were. Soon after that Brown having been sent by Buchan as elsewhere shown (see r. 496, A. 11, etc.) told her that he had made a statement contrary to his hereinbefore mentioned testimony at the inquests, and that in such statement he had said the aforesaid dead body was not the body of her husband, but was a body her husband had killed, and although asked by defendant in error to explain, Brown didn't explain much, but referred her to Buchan (r. 769, 818–9) and said that if she would go and see Buchan he, Buchan, *would explain it all* and show her the statement, and an appointment was made for a meeting at Leavenworth (r. 769, 818), and that when she arrived at Leavenworth, Buchan avoiding any chance of her going to the office of Clough & Wheat, hereinafter mentioned, met her at the depot

(r. 769, 819), and Buchan asked her to go to the Planters Hotel, stating that Brown would be there (r. 770). They then went to that hotel to a room therein (r. 1240), and there met Brown (r. 770, 820), and there although Buchan admitted that he knew and believed said dead body to be that of Hillmon (r. 517, A. 115) as he had before stated (r. 473–4), yet he among other things asserted and said to her that Brown had made a contrary statement to that he had so made (as herein elsewhere shown) at Lawrence and Medicine Lodge, and that therein Brown had stated that the aforesaid dead body was not that of her husband, Hillmon (r. 770, 820), and had sworn to it (r. 770), and that he being Brown's attorney, there being a warrant out for Brown, she had better surrender the policies (r. 820) (there was really no evidence of any such warrant having ever been issued) and that Brown had so done, that is, made such statement to protect and save himself (Brown) because of such (pretended) warrant (r. 770), and that Brown was frightened (r. 771), and that Brown could not ever be a witness for her (r. 770), and that if she ever did sue on the policies he (Buchan) would put Brown on the stand and that Brown would testify that that dead body was not the body of her husband, but was the body of a man her husband had killed (r. 821–2, 771–2), and that the insurance companies had *millions* where she didn't have *cents* (r. 771), and *never intended* to pay her (r. 771 and 500, A. 36). (Why that by plaintiff in error through its agent Buchan reference to its money power unless meant as a threat to obstruct due administration of justice?) and that Brown being her *main* witness *she could not recover* (r. 771–2, 821–2), and demanded that she surrender the policies (r. 771, 770), and told her she might as well, and had better and must do so (r. 771, 820), and he (Buchan) there also made such further assertions and statements as shown at r. 769 to 772 and 820 to 822, and at r. 496 to 502 and 511 to 520.

And Brown, trying to assist Buchan to get the policies, notwithstanding his opinion about the *stuff* they had made up, previously expressed to Buchan (r. 497), there said he had made such statement, and that he would have to stick to it. (R. 821, 770.) She asked him how he dared to do so. He

said to save himself (r. 770), and sat there with his head hung down as stated at r. 770, 820.

And that she, defendant in error, when thus talked to there at the hotel by Buchan and Brown, *asserted that the aforesaid dead body was that of her husband*, John W. Hillmon (r. 770, 820–1; 517, A. 115; 518, A. 119), and at first refused to give up the policies (r. 770, 820), and said that she would keep them (r. 821), (the interview as shown by the record stated was long) and that she was sick and did not have any dinner, having a headache and fever, and when they (Buchan and Brown) went to dinner, she laid down on a couch, and that Mr. Buchan himself turned waiter, instead of trusting the cup and its contents to a waitress, brought her a cup of tea (and she believed a cracker); that she drank the tea, and laid down, and thinks she took a nap and went to sleep. They were gone some time and then came back, after time for soothing influences of tea to operate. (R. 771.) It is evident that she was utterly overwhelmed, prostrated, sick, *and her capacity to transact business gone*, a young woman unacquainted with the ways and wiles and methods of the wicked or vicious; and they (Buchan and Brown) then came back to the room where she was in that hotel, and reiterated their aforesaid assertions and statements (r. 771, 821), Brown assisting as before (r. 821), and then, which is explained by her then sick, etc., condition, she believed the statement of Buchan, that by reason of Brown having made the aforesaid statement she could never prove her case (r. 771); she had then, because of being so sick, etc., evidently come into a condition to believe and do as Buchan should tell her.

And that towards evening (r. 772, 822; see also r. 501, A. 44), Buchan wanted her to sign some papers, and took the releases and order for the policies out of his pocket and put them on a little stand there (in the room in that hotel where they were) and wanted her to sign them, and that she told him she couldn't sign them, and he said she must sign them, and that she didn't need to read them, to just sign them (r. 772–3, 822–3), and that she signed them *because* Buchan *told her to without reading* or *knowing* the *contents* thereof (r. 772–3, 822–3), without consideration for any of them (r. 773, 830, 831; see

also 1241, 1243, 581, 592), the exhibits Nos. 16, 17 and 19, at said trial being some of those papers (exhibit 16 being the release to the Mutual Life Insurance Company, the exhibit 17 the release to plaintiff in error, by it plead and now relied on (r.19), both dated at Leavenworth the 15th of September, 1879, and copied at r. 585, the exhibit 19 being the order for the policies of the same date copied at r. 596, the releases mentioned by Buchan at r. 1243, 1247, and which Buchan delivered to the representatives of the Ins. Cos., as by him stated at r. 1247, and mentioned by Mr. Green at r. 584–5, the order, the exhibit 19 mentioned by him and copied at r. 596.)

As to whether those releases and order were signed before or after Buchan and defendant in error saw Wheat at the office of Clough and Wheat is not very material, but according to her recollection they were signed before (r. 774, 822), but Buchan testified that they were signed after they went to that office (r. 1241–2). But both of them show by their testimony that the releases were not shown or mentioned at that office or to Wheat. (R. 774, 822, 823, 1241, 1242.) And the same last referred to pages show there was not any such opportunity for her to say anything to Wheat about the releases, as one having either signed the releases or demanding the policies would avail themselves of; and what Buchan afterwards induced her to do in staying away from Lawrence (r. 774 to 778) and elsewhere, proves Buchan intended to keep her from informing any of her attorneys or friends of her having signed any release or of any intention to deliver the policies so long as he could prevent. It will be noticed that although when she demanded the policies, Wheat asked what it meant, she did not explain. For all of anything said at the office of Clough & Wheat, she might have intended to employ Buchan to prosecute her claim on the policies. Nothing was said to Wheat to the contrary, or to indicate she had or intended to abandon her claims on the policies. All they let him know was that she wanted Wheat to let her have the policies she had before in May, 1879 (r 213, 823), delivered to him. And there is not any evidence tending to show that anything was said at that office or to Wheat or any coun-

sel of defendant in error, at that time or until months afterwards, about any release or order for the policies (r. 774, 882–3, 1242.) From all which and the other evidence elsewhere herein cited, it is evident that any statement about *due deliberation*, defendant in error going with them (*meaning the releases*) *herself to the office of her counsel*, etc., is not only not sustained by evidence, but is contrary to the actual facts.

And each of them, by their referred to testimony, show that whilst there was not any intimation made to Wheat, or at the office of Clough & Wheat, that any such written statement had been made by Brown, or of any *intention on her part to abandon her claims on the policies*, or to surrender or give them up, still Buchan and her having so come to the office together, and her asking for the policies and declining to give any explanation as to what she meant, but merely saying she wanted the policies—Buchan staying with her all the time (r. 774)—Wheat said it looked to him like a fraud, and claimed the lien for the attorneys (himself and associates, of course, the amount of the claim, he stated, made effective *his charge of fraud*), declined to give them up (r. 774, 822; see also 1242), and they did not get the policies (r. 774, 882). And Buchan, having failed to get the policies, but having got the releases, he induced defendant in error to go to Wyandotte and remain away from her friends until about the holidays (r. 774 to 778), by telling her that she could not go back to Lawrence (r. 774, 777) or to her mother and family (r. 774, 778), and must not tell them anything she had done—must never tell anybody, any living soul, what she had done (r. 778)—and guided her course, keeping her from her mother until promising her a pass to Colorado, he let go his hold on her (r. 778), when, instead of going to Colorado, she went to her mother, and he procured and sent her such pass (r. 778), and having recovered from her sickness she became herself again (r. 778). He first induced her to go to Wyandotte, where she first stopped at the hotel, then went to his own home and stayed there for some time, as shown at r. 776, 777, 1248.

The release, referred to at r. 830, 1245-6, is a release (marked Exhibit 24) to another company than the petitioner, and was

executed ten days after the release in controversy in this case. It was a second release to the New York Life, and was executed while Mrs. Hillmon was still under the influence of Buchan, and was made at Wyandotte, and has no bearing upon this case, the New York Life Company having settled. And that also was shown to be without consideration (r. 830, 831), yet that is not material in this case.

And here, by way of and as argument and claim what the facts were, let us ask *why* Buchan went and staid until they came away (r. 774), with defendant in error when she went to the office of Clough and Wheat in the futile effort to get from Wheat those policies, *unless it was to prevent* defendant in error—by his presence and anything he might need to say by look, gesture or word—from explaining to Wheat (as it was reasonable to anticipate she would be there asked what she meant and why she then wanted the policies) why she wanted the policies and tell him all that Buchan and Brown had been saying and doing.

AND ALSO WHY Buchan, after having as herein shown obtained from her the releases, *induced* her, as shown at r. 774, 778, etc., not to return to Lawrence or to her mother, on the way to see whom she was when intercepted by Brown when sent by Buchan to get her to see him (Buchan) at Leavenworth (r. 814), or go back to Lawrence, and tell her she could not go back to Lawrence, or to her mother, or family, and that she must not tell them anything she had done, must never tell anybody, any living soul what she had done (r. 778), but to go to Wyandotte, and there after detaining her at a hotel a short time *take her to his own home* for a while (r. 777), (admitted by Buchan, r. 1248), she being a stranger to him and his family except as being thrown together in this transaction (r. 777), and when she evidently becoming dissatisfied with staying there, and comparatively restless, he still endeavoring to keep her from her mother and her home at Lawrence, did what he could in that respect until he could procure for her a pass to Colorado (r. 777–8), let her go to an aunt of hers at Trenton (r. 777–8), he having previously called her back from after a temporary visit to a cousin at Ottawa (r. 777), under pretense of wishing to cure a mistake in one

of the releases to the New York Life (r. 1244–56), and she thereafter about the holidays returning to her mother (r. 778), he sent her the pass to Colorado (r. 778), all as shown at r. 774 to 778, *unless* he did so at least at first to prevent such a *personal sickness*, and *condition*, of hers from immediately and *before her recovery* becoming known to her mother, etc., or at Lawrence, as would injure any claim or pretense he or the insurance companies might, if litigation over the policies and releases should arise, to the effect she had pursued him to get an opportunity to give him the policies or releases (see r. 1241–2–3) *and also unless* he did so to get her off to Colorado, and possibly lost to her mother, and friends, or *at least* to get her into a part of the country where if she should afterwards sue and attempt to recover on the policies, the insurance companies might with help of that written statement, try to make a claim, she went to see a living Hillmon, such as plaintiff in error alleged in its 2d supposed defense, apparently her aunt at Trenton helped to frustrate that scheme, and it like others concocted as shown by the evidence finally went amiss (as an ancient proverb says many another has).

AND ALSO WHY, if as claimed by Buchan and plaintiff in error, as shown at r. 1241–2–3 and elsewhere, defendant in error was seeking an opportunity to (or would when herself) give up or surrender the policies or make releases when she was in condition fit to transact business—she did not herself first go alone—or with her mother or other friend as she might choose, to Wheat, to whom she had in May, 1879 (r. 823) (when it was time to be making preliminary preparations for collecting the policies) delivered the policies, and ask him for them, giving or not giving him her reasons therefor, without Buchan going with her and *staying with her* throughout the interview with Wheat (r. 774, 1241–2).

AND ALSO WHY Buchan did not first retire *alone* from the office of Clough & Wheat, when Wheat declined to deliver the policies (r. 774, 1242) and gave defendant in error an opportunity to give the explanation to Wheat he asked for (r. 774), which propriety and common courtesy would have required him to, and as any one acting in *good faith*, would have done, instead of so *staying there* with her

without himself giving such explanation, and after leaving that office complainingly finding fault with her for not having *boldness* enough to insist on getting the policies (r. 774), and when she said she couldn't (r. 774) going back to the hotel with his *victim*, a woman in her then situation, and there and afterwards trying to complete *the* work he was engaged in for hire, as shown at r. 581, 592, 580, and elsewhere, and for which and for getting the written statement which so helped him to get the releases—that is for so trying to beat a woman out of her rights, the insurance companies in pursuance of the promises of its representatives paid him (r. 1247–8, 1288, 1262) *unless* it was because he knew, at least apprehended, that if he left her in that office with Wheat, without his presence, she under and because of what had occurred at the hotel to intimidate her would explain and state to Wheat the situation, and what Buchan and Brown had said and done, and what they wanted, and that Wheat would then show her the fraud, weakness and fallacy of all the doings, assertions and arguments Buchan and Brown had been performing and making; and that if Buchan is right in saying that the releases and order for the policies he finally obtained that day, were made after they returned to the hotel, after leaving Wheat (r. 1241–2–3), that he knew, at least apprehended, he would not get them; or if signed before visiting that office or seeing Wheat, that he apprehended and knew he would fail to take her to Wyandotte, and keep her at his home and elsewhere until she recovered from her sickness and he could get her off to Colorado or elsewhere, to get color for what he had (as herein shown) written in the aforesaid so-called statement.

AND ALSO WHY, if, as claimed by plaintiff in error and Buchan, defendant in error was, when well and in condition to properly transact business, as he found her when recently he saw her at the office of Borgalthaus, in Lawrence (r. 768), seeking an opportunity to give up and surrender the policies or release them, as shown at r. 1241–2, and elsewhere herein, and by the claims of plaintiff in error herein, did Munn, agent of the insurance companies, employ Buchan, as shown

at r. 580, 581, 592, 1249, and elsewhere, to procure the releases.

AND ALSO WHY—if it was supposed by the agents of the insurance companies surrender or release of the policies could be procured from defendant in error by fair or honorable means or methods (without payment of sufficient consideration)—did Munn, the agent of the insurance companies (r. 1254, etc.), with the approbation and approval of Mr. Barker and Green (Green then County Attorney of Douglas County, in which the paper copied at r. 580 was made), attorneys for the insurance companies, make that compromising and improper paper set forth at r. 580, and promise to pay Buchan if he should get up the policies, and pay him his expenses for making the effort if he failed (r. 581, 592)—all as shown at r. 575 to 597—the making of which Munn paper will be seen by reference to what we herein say in reference to assignments of error 31 and 59 was necessary, at least done to get Buchan to proceed, and after showing and explaining the same to Brown, with the help of Brown, get up (surrender) the policies, or failing that, their then supposed equivalent—the releases. All which helps to prove the fraud and want of consideration in said reply alleged.

And after the releases and order for the policies had by the insurance companies by their agents, including Buchan, been obtained as aforesaid by use of the means and methods shown by the evidence, that written statement having thus answered some of the purposes, that of helping to get such releases of the policies, etc., for which it was so obtained, was torn and thrown into the stove, used as a waste basket, in the office of Buchan at Wyandotte, as shown at r. 502, 520, 1246, 1276–7, to apparently keep the promise of Buchan made to Brown, shown at r. 457–8, but whilst thus keeping such last mentioned promise to the eye, Buchan broke it for the benefit of his principles, the insurance companies, for whom he was active throughout those transactions, by taking that torn statement out of that stove, and afterwards delivering it to the representatives of the insurance companies, as shown at r. 1276–7–8, 1280, 1283–4 and 583–4, who produced the same at the trial (r. 1283–4, 584); all of which, when considered

with the herein mentioned and referred to testimony of Mr. Green, one of the counsel for plaintiff in error, and of Mr. Buchan, and of defendant in error, some thereof referred to in the stating part of this brief, more in this part of our argument relating to the eight assignments of error we are discussing together, proves beyond reasonable doubt, certainly *prima facie*, which is enough for the purposes of this argument, that said written statement was obtained to injure defendant in error, destroy and render worthless testimony favorable to her, including the character of Brown for truth and veracity, and to get said policies or their then supposed equivalent, those releases, from her, as alleged in said reply.

ASSIGNMENT OF ERROR No. 27. (R. 1945–6, 546.)

Relating to Objections to Evidence.

The objected to question and answer in this No. 27, was but a part of the conversations and communications had between Buchan and Reuben Brown, *by means of which* Buchan *procured* the assistance of Reuben Brown to get, and in and about the matter of getting, the herein elsewhere mentioned false statement (r. 418, A. 777; 519, A. 130) set forth at r. 1284–6, from John H. Brown, as shown at r. 544 to 554, 559, 560–1–2–3, and elsewhere, particularly at r. 548 (top of page). Such conversations commenced by reason of Buchan by letters getting Reuben Brown to call on him, Buchan (r. 545–6), and continued until that false statement was procured by Buchan with the assistance of Reuben Brown, as elsewhere herein shown.

Reuben Brown, as shown by his testimony, set forth at r. 544 to 575, corroborated John H. Brown and testified to the effect that Buchan, wanting such false statement from John H. Brown as he finally obtained, solicited the assistance of Reuben Brown to get it, such false and *different* statement (r. 548, 552–3, 560–1, 565, 569, 570–1–2), and obtained such assistance because Buchan, an attorney, caused Reuben to believe it was necessary for John H. Brown to make such dif-

ferent and false statement *to please Buchan and the insurance men*, to avoid being persecuted, arrested, put in jail, and because of the moneyed power of the insurance companies, sent to the penitentiary for murder, he (Reuben,) knowing John had killed Hillmon.

In this connection, and also with reference to the matter of assignment of error No. 105, we request attention to the fact that Buchan, when talking threateningly with John H. Brown and Reuben Brown, or either of them, about the danger John H. Brown was in of being arrested, put in jail, prosecuted for murder and sent to the penitentiary, did not at any time to them, or either of them, say or assert or threaten that John H. Brown was in any danger of being arrested, prosecuted or convicted for the murder of any person *other than* that of John W. Hillmon, but that on the contrary, he (Buchan) so worded his language in that respect as to naturally convey the idea to both of them respectively that John H. Brown would be at the instance and because of the influence of the insurance companies and their money, arrested, tried and convicted of murder for killing John W. Hillmon—killing of whom was by John H. Brown admitted from the hour Hillmon was killed, when John H. Brown and Hillmon were alone—and to which killing he testified at the several inquests and by making the proofs of death of Hillmon as herein elsewhere shown, and that unless John H. Brown made such false and *different* statement as Buchan wanted [and was as herein shown employed to obtain and paid for obtaining (r. 1262, 1247–8, 1288)] the insurance companies would (as both Browns would readily comprehend danger of) cause John H. Brown to be arrested, put in jail, tried and convicted of an alleged crime of murder for killing Hillmon, he (John H. Brown) having *no evidence* other than *his own* to show that the killing *was accidental*, both he and Reuben Brown were scared, the one (John H. Brown) into signing such false statement as Buchan wanted and wrote in his own language (as herein shown), the other (Reuben Brown), as shown by the testimony herein, advising him so to do at the instance of Buchan. And whilst of course it was wrong for John H. Brown to sign such statement, as he

finally did under the advice and threatening demeanor of his attorney, Buchan (and paid destroyer of Brown's character for truth and veracity, acting under pretense of giving disinterested advice to John H. Brown, as his attorney), still we submit that it was much more wrong for Buchan to procure such a statement under the circumstances and by use of the influence which is shown he did, at the instance of Munn, Barker, et al. (r. 1262), and as they (Munn, Barker and others) did induce and pay Buchan for so doing, than it was for John H. Brown to yield to the pressure brought on him. And that the insurance companies did a still greater wrong in and by employing Buchan to and paying him for so doing.

And in this connection, we submit that legally as well as morally anything that can properly be said by way of animadversion on Brown should at the same time be applied to this plaintiff in error, and all its advisers and employees who helped it in the matter of the scheme which resulted in the procuration of said written statement and the releases, for surely it is no excuse to plaintiff in error that on its part it was done to get away from liability and to therefore ask to be excused from its share in the business, and this helps to illustrate why it should not have such use of the written statement as it claims by its 105th assignment of error.

ASSIGNMENTS OF ERROR—No. 28, r. 1946, 576; No. 29, r. 1946, 577; No. 30, r. 1946, 578; No. 32, r. 1948, 580–1.

Relating to Objections to Evidence.

The several questions and answers referred to in those four last referred to assignments of error were a part of the testimony in the case which connected the plaintiff in error with all of the acts and doings of William J. Buchan in relation to the written statement at r. 1284–6 and the release pleaded (r. 19) and the methods and practices used to obtain each of the same, and we here refer to what we have before and do hereinafter say on those subjects, particularly to what

we say in relation to the other four of the last mentioned eight assignments of error, as though here repeated, and particularly to the evidence of James W. Green, one of the attorneys for plaintiff in error at r. 575 to 597, Theodore Wiseman at r. 892–3 about employment of Mr. Barker, and at r. 884–5–6–7 about his own employment, all of which with evidence elsewhere herein cited, connects the insurance companies, including plaintiff in error through their attorneys and agents, with all that Buchan did in or about the matter of procuring the release shown at r. 19, or the written statement at r. 1284–6, as well as helping to show that said release was obtained by fraud and without consideration, and further by accepting and pleading the release and paying Buchan for what he did in about the matter of obtaining the written statement and release, as shown at r. 1262, 1247–8, 1288, plaintiff in error and the other insurance companies ratified, adopted and became to defendant in error responsible and answerable for all of the acts of the several persons through whom the same were respectively obtained, including what each said to help procure or to cause the same to be procured.

ASSIGNMENTS OF ERROR—No. 31, r. 1947, 580, and No. 59, r. 1955, 835.

Relating to Objections to Evidence.

The objected to written instrument referred to in those Nos. 31 and 59 was a part of the evidence which connected the insurance companies, including plaintiff in error, with all that Buchan did in or about the matter of procuring said release (r. 19). Buchan knew that Munn was agent of the insurance companies, including plaintiff in error, for which he, Munn, made the same (r. 1254), and that although he, Buchan, had procured the aforesaid written statement set forth at r. 1284–6, at the instigation of the insurance companies and their agents, including Munn, as shown at r. 1258, 1262, 1268–9, and elsewhere by evidence cited herein, still he (Buchan) would not, certainly did not proceed further

in the scheme of getting the policies or such releases from defendant in error until Munn gave him that objected to document (copied in said Nos. 31 and 59), as shown at r. 578–9, 580–1–2, 592, 1238–9, 1270–1–2–3–4, and had himself (Buchan) shown and explained the same to John H. Brown (r. 1279, 1290), and then in pursuance of the whole scheme from the beginning, Buchan being expressly told that nothing should be given defendant in error (r. 581, 592), Buchan, with the help of John H. Brown in the manner elsewhere herein shown, proceeded and got for the insurance companies the releases (r. 1243) and then delivered the same to the representative of the insurance companies, Munn, (r. 1294, 1247, 584–5), and the insurance companies paid him for so doing (r. 1247–8, 1288, 1262), and plaintiff in error having plead its release, so obtained. (R. 19.) Surely it was proper for the trial court to permit the jury to know of the document, said Munn paper, which performed so important a part in the whole scheme of getting the releases, to-wit: that of helping to keep Buchan and Brown safe as against anything the insurance companies or their agent, Munn, might attempt after getting hold of such false statement, set forth at r. 1284–6, in any direction, as well as to induce Buchan and Brown to proceed in the matter of getting the releases.

When Munn got hold of the written statement he had, as agent of plaintiff in error, employed Buchan to get (r. 1262), he became haughty and stuck it into his pocket, but Buchan, insisting on honor, even among men engaged in such scheme as they were, got the paper and temporarily withdrew until Messrs. Green and Barker—to use Mr. Green's language (r. 583)—*harmonized things*, and brought Munn back into working shape and to realize that to complete the object of all their toils more was to be done, and that if the means used to obtain that written instrument, as herein shown, should be exposed by a prosecution of Brown, it might do them and the insurance companies more harm than Brown (r. 582, 1238-9, 1271–2), and then Munn went into nearly, if not quite, as bad a position by his making the so-called "Munn paper" (r. 580) as Buchan was because of having done by his client (Brown) as he had by getting the written statement; and

Buchan, after the outbreak of Munn, wanting something that would cause all to stand by each other (as other gentlemen sometimes demand), would not proceed to get the releases or further treat with the man who had, as agent of plaintiff in error and the other interested insurance companies, as shown at r. 1262, 1268, etc., induced him to get the statement, until he got said Munn paper—all which is appropriate matter to consider why all of the refused instructions relating to either of those papers should have been refused, as well as the whitewashing instructions asked.

ASSIGNMENT OF ERROR No. 105. (R. 2006.)

Relating to the Refusal of the Trial Court to Give an Instruction in the Words Following as Well as to the Release.

"No. 44. The jury are instructed that the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown; and may also be considered as affecting the credibility of said Brown as a witness."

There was not any exception whatever taken in any form to that part of the charge of the Court to the jury which, as set forth at r. 1922 and 1923–4, is to the effect, among other things, that the jury might consider the matter of that written statement as affecting the credibility of John H. Brown, and that making it would not constitute perjury, because it was given *ex parte* and not in any proceeding in court, nor in any proceeding authorized by law, by which part of the charge, shown at r. 1923, the Court, in effect, gave so much of said refused instruction No. 44 as related to the matter of that statement affecting the credibility of John H. Brown. And we contend that the Court did not err in or by charging the jury as it did in relation to the matter of that statement, but whether it did or not, is not matter that can now here be

considered, because plaintiff in error did not except to the Court so charging the jury.

And in this connection we refer to the foregoing part of this brief, which relates to the matter of the want of any such exception to the refusal of the Court to give to the jury that 44th refused instruction, or any of the instructions asked by plaintiff in error, further than as incorporated in and given as part of its charge, as though here repeated, and we contend that plaintiff in error cannot now here be heard to claim it has any such exception on or because of which this Court can or will consider, investigate or determine as to whether the trial court did or did not err in or by refusing to give that instruction No. 44, to the jury, because several of the instructions (we claim all thereof) were certainly properly refused, and the exception really taken was to the whole series set forth at r. 1904 to 1915 as a unit. But if the Court shall be of the opinion we are wrong as to that, then we request attention to the following:

PLAINTIFF IN ERROR, WITH HELP OF THE OTHER INTERESTED INSURANCE COMPANIES, THROUGH ITS AND THEIR AGENTS, INTRODUCED THE WRITTEN STATEMENT INTO THE CASE.

That the plaintiff in error and the other insurance companies interested in 1879, through their and its agents, to work up a scheme to defeat defendant in error, by corrupt, vicious and reprehensible means and practices *invented*, MANUFACTURED, procured, wrote, *paid for* and *introduced* into the case, the written instrument (r. 1284–6) mentioned in that refused instruction No. 44, among other purposes, to use and operate, as it was used and operated, against defendant in error, as a weapon offensive and defensive, equivalent to a brickbat, slung shot, club or dose of poison, is shown not merely *prima facie*, enough for the purposes of this case, but beyond any reasonable doubt, and is cause and sufficient reason irre-

spective and independent of any other of which there are many, why that requested instruction should not have been given.

And having so done, and its wrongful and evil practices in that matter having been fully exposed, largely by the testimony of its own agent and witness, Mr. Buchan, it surely was not entitled to an instruction (as No. 44 was), to the effect that a part of the evidence which showed such, its wrongful acts and practices, should be treated and considered as affirmative testimony against defendant in error, as requested by that refused instruction, and we request attention of the Court to the irony, sarcasm and sophistry shown by requesting that instruction to be given the jury after exposure of what it, plaintiff in error, had done in relation to the matter of that "written statement" the "Munn paper" and the "release," coupled with evidence of a hope, that by sophistry and its own high and great presence and personality, it might cause the Court to overlook all its wrongful and evil practices, and consider the part of the exposed tangled web it had sought to weave around the case of defendant in error against it consisting of said so invented, made and manufactured written statement, as evidence against her.

When the action was instituted upon the policy, the release was pleaded as a defense thereto, and it became necessary, in order to defeat the release, to show the circumstances under which it was obtained, which could only be done by, among other things, putting the jury in possession of the facts with reference to the use that was made of this false statement of Brown's. After the making thereof, and the institution of the action upon the policy by Mrs. Hillmon, she gave notice to the insurance companies and took the deposition of Brown. In this deposition he reiterated what he had testified to at the coroner's inquest, and described in detail the accidental killing of Hillmon. He was subjected to a most thorough and searching cross-examination by the attorneys for the insurance companies; he was confronted with the fact that he had made this statement, but utterly denied the truth of the same, and explained the manner in

which it had been obtained from him. This deposition was introduced in evidence by the plaintiff, but the contents of the statement, which was brought into and became a part of the deposition by the cross-examination, was in effect put before the jury and introduced into the case by plaintiff in error; and it did so further by calling Buchan and examining him as a witness-in-chief, as shown at r. 1227 to 1250, and thus the matter of that written statement was fully introduced in evidence in the case by plaintiff in error. It is true the statement was read to the jury by the defendant in error on and as part of the cross-examination of Buchan after he had testified, as shown at r. 1227 to 1284, but it was well understood to be the evidence of the defendant insurance companies. The trial judge evidently so understood, and in its general charge the Court so treated it, saying:

"The deposition of John H. Brown was read to you *on behalf of the plaintiff.*

"*On behalf of the defendants*, evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you."

The assertion of the Court in this instruction that this statement was evidence *on behalf of the defendants*, was not excepted to in any way by the counsel for the insurance companies. Clearly, if the counsel for the insurance companies understood or believed this characterization of the statement signed by John H. Brown, as evidence on behalf of the defendants, to be erroneous and to have resulted from inadvertence or misapprehension of the judge, they should then and there have excepted and called attention thereto, that the trial judge might have corrected his error, or inadvertence, if any there was.

In any event, whether the statement of John H. Brown is to be treated as the evidence of the plaintiff or as the evidence of the defendant, we contend that the instruction of the Court correctly stated the law applicable to the case, and, especially in the absence of any exception by the insurance

companies, they ought not to be heard to complain of the same.

In some form it was necessary that the contents of the statement should be made known to the jury to enable the plaintiff to show the manner and means by which the plaintiff was induced to execute the release.

Any claim that the plaintiff, in reading this statement, was understood by the insurance companies, the Court or the jury, to introduce the same as evidence of truth of the facts therein stated, is in conflict with the entire theory of the case. The exact reverse was true and was so understood by all concerned. It was contended at all times by the plaintiff that this statement was false; that the insurance companies had corrupted the plaintiff's witness; that because of the obtaining of that false statement, and by other means, the plaintiff had been fraudulently induced, by plaintiff in error and its assistants, to sign the release without any consideration.

Now we respectfully submit from an examination of the circumstances under which this statement was read to the jury, whether it would not be a most violent and unreasonable construction of the conduct of the parties, their counsel and the trial judge, to say that the plaintiff intended to or did introduce the same as evidence of the truth of its contents, or to say that the defendant had reason to suppose or believe that the plaintiff so intended it or had any right to "rely" or did "rely" upon any such supposition, and whether the trial court, in view of its instructions and all of its rulings, believed or supposed at the time the same was read that the plaintiff intended to introduce it for any such purpose, or that the defendants or the jury understood that the plaintiff so introduced it, or had any right to rely upon any such supposition.

The insurance companies at all times understood, and the trial judge at all times understood, that the plaintiff claimed that this statement was wholly and absolutely false and corrupt, and was obtained by corrupt, vicious and fraudulent means for the purpose, among other things, of using it to

extort the release from Mrs. Hillmon. To say now that the insurance companies relied upon the belief that the plaintiff introduced the same for the purpose of proving the truth of its contents, or to prove the contents thereof to be true, we submit is absurd, and would give the insurance companies the advantage of a falsity in that when this statement was read the plaintiff did not expressly state that it was introduced for a limited purpose, although the defendant and the Court both so understood it, and surely under the pleadings it was not necessary so to do, and so to have done would not have had any effect, because how it was to be treated depended upon the issues in the case.

But if the *ex-parte* statement of John H. Brown, in the language of said 44th special instruction, is to be treated "as evidence of the facts therein stated under oath, against the plaintiff," still said 44th special instruction is vicious and misleading and invades the province of the jury, in this that said *ex-parte* statement signed by Brown is wholly and irreconcilably in conflict with the deposition of said Brown upon the same subject, and the instruction which required the jury to treat the same "with like effect as the deposition," eliminates and withdraws from the consideration of the jury all of the numerous tests, including cross-examination arising from the evidence, and proper to be applied by the jury in determining which of said two items of irreconcilable evidence it would believe.

We submit that it was the province of the jury alone, having both the statement and the deposition before them, to utterly discredit both and give neither any weight at all either for or against the plaintiff or defendants, or they were at liberty to believe that the *ex-parte* statement was obtained under duress and by means described in the deposition and in the other testimony, and that the influences and duress having been removed that Brown in giving his deposition had finally told the truth. The jury could not believe both the *ex-parte* statement and the deposition because they cannot be reconciled, and if the statement was to be treated as evidence as well as the deposition, it was the exclusive province of the jury to say what weight should be given to either or both of

these items of evidence, and it was not proper for the Court to say that the statement should be treated "with like effect as the deposition."

It is complained that Judge Thayer incidentally remarked, in the opinion in the Court of Appeals, that no exception had been taken to the charge of the Court upon this subject, and that, therefore, the Court of Appeals was relieved of the necessity of deciding whether there was anything misleading in that part of the charge referring to Brown's statement. The case of Long Bell Lumber Company vs. Stump, 86 Fed. 574, is referred to as holding that no exception to the charge is necessary where a special instruction asked embodying the same principle has been refused and excepted to. We respectfully submit, however, that the general charge of the Court upon this subject is very far from being a mere denial of the proposition contained in said 44th special instruction asked, and that under no circumstances could said 44th special instruction have been given without the clearest invasion of the province of the jury.

There was abundant evidence, independent of any of the testimony of Brown, that the dead body mentioned was that of Hillmon. The case did not at all necessarily turn on his testimony, and we submit that with reference to anything said or done by John H. Brown, that his said written statement, so far as the case related to the identification of the dead body, was only matter of impeachment as to whether he was a credible witness on the question of identity of the dead body, and was not evidence and could not be made evidence for any other purpose in relation to the matter as to who the dead man was, whether Hillmon or another, no matter which party read it.

To enable this Court to understand how the questions and matters relating to that statement and the release respectively arose and appeared and were presented at the trial to the trial court, it will be necessary for this Court to read, among other, the following parts of the record, to-wit: The deposition of John H. Brown, commencing at page 342 (except the parts not read, as shown at pages 339, 340, 341),

particularly pages 436, 437, 457, 458, 459, 472 to 477, 482 to 484, 493 to 519.

And the testimony of Reuben Brown, commencing at page 544.

And testimony of Sallie E. Smith (formerly Sallie E. Hillmon, the plaintiff), at pages 766 to 779, 795, 796, 816 to 830, 1892, 1893, 1898 to 1900.

And testimony of James W. Green, at pages 575 to 597, 1901 to 1904.

And testimony of William J. Buchan, a witness called by the insurance companies, and on and really as part of his cross-examination that statement was read after he had testified on examination in chief for the insurance companies, as shown at pages 1227 to 1250. Also to read page 1269 where he shows he took pen, ink and paper with him to write the statement, after he had been employed and urged to procure the same for the insurance companies, as shown at pages 1246, 1247, 1250 to 1269, 1262.

At pages 1247, 1248, 1250, 1251, 1288, it is shown Buchan was paid $500.00 and expenses by the insurance companies for what he did. (See also pages 1277 to 1288).

The evidence of Buchan conflicts with that of Reuben and John H. Brown and Mrs. (Hillmon) Smith. But from his and their testimony it is, we submit, clear beyond question that Buchan was in the employ of and acted in the matter for the insurance companies, including the plaintiff in error from some time in April, 1879 (see the parts of the record referred to in the stating part of this brief), until and after he obtained the releases, employed to ruin the character of John H. Brown for truth and veracity by procuring that statement, and also to obtain the releases; we submit that by any reading of said statement on such cross-examination, which of course was done as part of the cross-examination of William J. Buchan, not only for the purpose of showing what sort of a document it was, and as to how the releases were obtained, concerning both of which, so as to make such cross-examination proper, he had testified for and as a witness for the insurance companies on his examination

in chief, but also to effect and destroy the credibility of William J. Buchan as a witness because of his obtaining such statement written by himself (r. 1284, 1236), and making such use as he did thereof, on his own showing, and more so if he obtained it as shown by Reuben and John H. Brown, particularly so as to the matters in which he conflicted with any other witness in relation thereto. By procuring and making such use of that statement and the letter by him obtained from Brown, shown in evidence, he put John H. Brown in serious peril and great danger of prosecution for murder, either for killing Hillmon or being accessory to killing some one else. For Buchan to have done that when acting as attorney for Brown, as shown by the cited evidence, Buchan, of course, did that which, as such attorney, he should not have done no matter what the facts were in relation to the killing. But no matter what he should have done, his credibility was affected by his procuring and making such use as he did of that letter and statement.

And we submit that by such reading of the statement on such cross-examination, the defendant in error did not either become responsible therefor, or represent it stated any truth. and by so causing the same to be so procured and used, surely the insurance companies, including the plaintiff in error, became responsible therefor as their paper and statement, prepared by Buchan and signed by Brown as their agents and representatives, to injure defendant in error, and of course they are not entitled to have her held to have represented that the same was true because of so reading it under the circumstances and at the time shown by the record.

And further, the testimony of William J. Buchan being irreconcilably in conflict with that of Reuben and John H. Brown in relation to the manner in which that statement was obtained, and as to whose the statements therein made really were, that is, as to whether the statement was, as we claim, the invention of Buchan as the representative of the insurance companies and therefore the act and invention of the plaintiff in error or was the invention of John H. Brown, that was, of course, an important matter for consideration by the jury. And it was also material whether the statements as to

what John H. Brown told Buchan, as testified to by Buchan in his examination in chief, was true, or whether the testimony of John H. Brown and Reuben Brown on the same subject were true—as to which told the truth in relation to those matters was exclusively the province of the jury to determine—the Court would have invaded that province if it had given the 44th instruction asked, and therefore we submit it was properly refused as well as for other reasons.

Connecticut Mut. Life Ins. Co. vs. Hillmon, 107 Fed. 841.

To properly understand that refused instruction No. 44 (further than as given to the jury), it is necessary to understand and fully appreciate, not only the pleadings in the case, especially the petition, wherein defendant in error stated her cause of action, and the answer of plaintiff in error thereto, especially the general denial and the 3d defense therein, wherein plaintiff in error pleaded to the effect that on the 15th of September, 1879, defendant in error, by her written instrument, released it from the cause of action alleged in said petition (r. 19), and the reply of defendant in error to that answer, particularly the general denial therein of the allegations in said answer, and the 2d and 3d causes of reply specially applicable to the matter of that pretended release—the 2d to the effect that said release was without consideration, and therefore inoperative and void; the 3d to the effect that said release was obtained by fraud and without consideration, stating the facts which constituted the fraud, including, among other things, the matter of plaintiff in error having, by its agents and representatives, procured John H. Brown to make such written statement, therein and thereby making statements contrary to the truth, and such other matters as alleged in said 3d cause of reply, which, as set forth at r. 20–22, is referred to for a description thereof—proof of the fact stated in which petition still left defendant in error barred of her action by the release pleaded in the answer, unless and until defendant in error proved one of the—by her in her said reply—alleged causes for defeating that release. But, and further, for such purpose of understanding

that instruction, it is also necessary to understand not only the deposition of John H. Brown therein mentioned, but also the evidence of many other of the witnesses in the case, including that of William J. Buchan, Robert Brown, James W. Green, and defendant in error, so far as the same respectively relate to the matter of that written statement and the release pleaded, and the "Munn paper," mentioned in the 31st and 59th assignments of error, as well as much more of the evidence—all which is explanatory of *why* and *how* plaintiff in error procured that written statement and the use it made thereof, and *when* and *why* it was read in evidence—not to prove it or anything therein stated was true, but to prove the contrary, and to show what kind and sort of a document and *instrument* that written statement was, and by procuring and using which as it had done, plaintiff in error had wrought and accomplished such wrong and injury to defendant in error as alleged in said reply.

The common knowledge of all men teaches there are more ways than clubs used by thugs, or doses by the Borgia or their prototypes, to overcome a victim with, yet the fact of the existence of that written statement coupled with the open threats to use the millions of the insurance companies, and the open threats as to what Buchan and Brown would do, added to what took place at the Planters Hotel on the 15th of September, 1879, when defendant in error came into the condition she did before signing the release, might well have been, and become, the equivalent of an iron mace brought down upon the capacity of defendant in error to act for herself, think, reason or understand what she was doing, or the effect thereof, when, without reading or knowing its contents, she signed the release because Buchan told her to, as shown at r. 772–3, 822–3.

And if the instrument used to get her into such condition had been a bar of iron applied vigorously to the seat of her thinking organs, and if in such case such instrument had at the time when the written instrument was read to the Court and jury been shown in evidence, no one, not even plaintiff in error, or its representatives, would be found hardy enough to claim she might properly and ought there-

fore, that is, because she so showed such instrument in evidence, be again struck therewith; yet we submit the present claim of plaintiff in error made by asking the Court to give that instruction No. 44, is equivalent, and not at all less, than it would be to ask the Court in such other case to cause her to be again struck by such mace or bar of iron, because she placed it in evidence to help show what she was struck with to help get her into such condition as she was in when the release was obtained from her, and why did plaintiff in error, through Buchan, its agent, refer to its millions, as shown at r. 771, 500, A. 36, in connection with his assertion that defendant in error could not recover if she sued on the policy (r. 771, 821–2) unless it was to turn her mind to a contemplation of what as matter of common knowledge frequently disseminated through the public press and otherwise, all consider may be done with use of money, to prevent unanimity in a jury, or otherwise to obstruct a due administration of justice (and there were four juries that failed to agree), and because of those threats, a question naturally arises as to whether the equivalent of the $500 and expenses paid Buchan for his doings (r. 1247–8) operated to help hang these juries.

And we submit that because of the matter of the employment and payment of Buchan for what he did raises a presumption that his employers would do anything that could be done with their money, which they, through him as their agent, bragged of, as shown by the herein referred to evidence (r. 771; 500, A. 36; 473–4), and it should be borne in mind at all times that it was plaintiff in error through its agent, Buchan, that introduced this matter of *its money power into the case* to convince both Brown and defendant in error of the futility of trying to cope with it in the courts—all of which, when considered in connection with her condition, amounting to incapacity to act for herself, shown by what she did at the latter part of the interview at the Planters Hotel, and then going and doing for so long as Buchan wished, as shown by the evidence before referred to in relation to the matter of that release, was, we submit, enough to sufficiently prove that said written instrument, coupled with

what was said and done at that interview, was used on and against her as the equivalent of a club, and might be put in evidence to help show how she was hurt, without giving cause for *hitting* her again *therewith*, as requested by said refused instruction No. 44.

And if a party will through its agents thus *threaten* to use *its money*, or will *ratify acts* of *its agents done* by help in part of such *threatened* use thereof, it should not escape just consequences of so doing, or object to such matters now being shown.

TWO SIDES AND POINTS OF VIEW TO THE QUESTIONS INVOLVED IN THAT REFUSED INSTRUCTION No 44.

On the one side of that question, supported in favor of the defendant in error by a great preponderance of the testimony, among other evidence, was the testimony of Reuben Brown and John H. Brown and part of the testimony of William J. Buchan, tending to prove, more proving, not only *prima facie*, but beyond any reasonable doubt, that as between plaintiff and defendant, the written statement was the production and invention of plaintiff in error through its employees including Buchan (paid for so doing [r. 1262, 1247–8, 1288, etc.]), by it thus manufactured *as a weapon offensive* and *defensive*, with help of which used either way, improperly to work and do defendant in error wrong and injury. All which side and point of view of that question would by giving that instruction No. 44, have been for all practical purposes ignored by the Court, and the jury directed to disregard all that testimony, and to find their verdict on the basis that the written statement was read in evidence for the purpose only of proving that the matters therein stated were true, instead of being put in evidence as it really was to show among other things what sort and kind of a *bludgeon* plaintiff in error by its agents had procured, invented and manufactured with which to strike at her rights, injure and suppress and destroy testimony favorable to her and to help wrong and injure her, as alleged in her reply.

And surely it was not proper for the Court, because of being so requested by the plaintiff in error, as done by that refused instruction No. 44, to ignore the referred to testimony of Reuben Brown and John H. Brown, or said part of the testimony of Buchan, or assume that defendant in error, or Brown, testified falsely in reference to the matter of the procuration of the release or of the written statement, or as to the use made of the fact of its existence, as it would if it had given that instruction, or to ignore the question as to whose written instrument that was, that is, whether it was not more that of plaintiff in error than of Brown, as between plaintiff and defendant, as that also was a question for the jury, as is shown by said deposition and the other evidence bearing on that question, including that of Buchan, by whom, as its employee plaintiff in error procured both instruments, and for doing which it paid him, and then by pleading the release made all that Buchan said and did in the matter its act. And now in relation to the matter of that instruction, let us consider the deposition and some other of the testimony and the issues in the case.

The deposition of John H. Brown in that refused instruction No. 44 mentioned was taken at Wyandotte (now Kansas City), Kansas, about January, 1882, in pursuance of a notice to the opposite party (r. 341), in one of the cases tried, and an agreement referred to at r. 318, that the same might be read in the other case, etc., under the sanction and solemnity of an oath duly administered (r. 342, 520), a violation of which oath on the part of Brown would have subjected him among other things to the pains and penalties of perjury under Section 5392, page 1045, R. S. 1878, whilst said written statement (r. 1284) was taken secretly, as to defendant in error, and without notice to her, and was a mere *ex parte statement*, and although in form of an *ex parte* affidavit, was not in law or legal effect sworn to in any legal proceeding or under such circumstances as to render Brown liable under said Section 5392, or William J. Buchan, who, according to his own testimony, wrote the same in his own language (r. 1236, 1269, 1270, 1283–4) and went to Parkville where it was so sworn to for the purpose of having that done (r. 1270), liable to the

pains and penalties of subornation of perjury under Section 5393, page 1045, R. S. 1878, even though both he and Brown at the time knew and believed (as elsewhere shown) such written statement to be false, as Buchan well understood when he procured that statement in the manner herein shown, and so in substance informed Brown when and before that statement was made. (R. 473, A. 1295; 457–8, A. 1224.)

And when said deposition was so taken the insurance companies, including plaintiff in error, had opportunity to cross-examine Brown, which was exercised by the attorneys who signed the aforesaid answer for plaintiff in error (r. 19), as shown at r. 349 to 493, by asking him 1490 questions, and further as shown at r. 509 to 520, by asking him 147 more questions—altogether 1,637 questions.

At the taking of that deposition John H. Brown was called as a witness by defendant in error, and on his examination in chief, as shown at r. 342 to 349, he testified among other things to the effect that on the 17th day of March, 1879, in a camp on the banks of Crooked Creek, in Barber County, Kansas, he accidentally shot and killed John W. Hillmon (r. 345–6, 344) where they had camped, without any one else (r. 344, A. 44), on a trip they, unaccompanied by any other person, had made from Wichita, starting on the 4th or 5th of March, traveling by way of the route described at r. 344, A. 37–8–9 and 40, being made for the purpose of finding and locating a stock ranch suitable with range and water, without getting too close to farmers around on the creeks. (R. 345, A. 80; 344, A. 33.)

And thereupon after having so testified Brown was cross-examined, as shown at r. 349 to 493, by the aforesaid attorneys for plaintiff in error and other insurance companies, in which cross-examination in answer to questions asked him by those attorneys, he in that deposition reiterated that he so accidentally shot and killed Hillmon (r. 408, 411, 415, A. 762 and 756; 420–1, 423, A. 855) on such trip made only for the purpose of locating such stock ranch for Hillmon (r. 381, A. 398 to 401) and going alone (r. 393, A. 541), which going alone was corroborated by other evidence as follows: Julius

Draves, r. 1412, 1413, A. 62, 64, 68, 69, 70; Michael Mesh, r. 1562; Ben Helda, r. 1574; Updegraff, r. 665; Eli Smith, r. 662; Byerly, r. 656–7; Priest, r. 673).

And on such cross-examination, Brown further, among other things not material to consider in connection with the matter of the written statement, testified to the effect that on the trip on which Hillmon was so killed, he and Hillmon about the 4th of March, 1879 (r. 392, A. 524) with a team, wagon, and appropriate outfit for such expedition, started *alone* from Wichita on the road to Medicine Lodge and camped the first night at a place called Elm Creek or Cow Skin and remained there two or three days, and then left on said road and camped the first night thereafter at a regular camping place about two miles south of Kingman on said road 30 or 40 miles from Wichita (r. 392–3–4, A. 524 to 553).

And that on the first day's travel and about three miles out from Wichita another man got in company and went and rode with them from there to said Elm Creek or Cow Skin and staid with them whilst there (r. 393–4, A. 542–3–4), and who left them about noon of the day they left that camp and Brown, did not ever see him either before or afterwards (r. 502, A. 53 to 56; r. 399, A. 620–1), and that from that camping place 30 or 40 miles from Wichita they, Hillmon and Brown, by an appropriate route for persons looking for such location for such ranch, travelled several days until they arrived at Medicine Lodge (r. 394 to 397), where they (Hillmon and Brown) met some people who knew them, and then saw them there alone, that is, without any third person with them, as shown by the testimony of Updegraff, r. 665; Eli Smith, r. 662; Byerly, r. 656; see also the testimony about the dead body being recognized as that of Hillmon by them and several other witnesses who had before met and knew Hillmon and Brown at Medicine Lodge, referred to in the statement part of this brief under the heading of "IDENTIFICATION OF CORPSE AS HILLMON'S," and leaving there they were seen without any third person as they passed along the road by Byerly as they passed out of Medicine Lodge (r. 655 to 661), and by Priest as they were on the route further along (r. 673) to where Hillmon was so killed;

and from Medicine Lodge they continued on to where they, Hillmon and Brown, camped close to a farm house (r. 399) and remained there at the first camping place after they left Medicine Lodge over night (r. 405, A. 632), and proceeding, that they camped the next night 2 or 3 miles from Sun City (r. 405, A. 634–5), and camped there 2 nights (r. 406, A. 640), three persons (themselves and another) staying one night there (r. 405–6, A. 639), and from that camp they went a day's drive in a northeast direction and camped on a little stream called Crooked or Spring Creek (r. 406, A. 642) where Hillmon was so killed (r. 408, A. 680; 415, A. 762), and that when Hillmon was so killed Brown went and got Mr. Graves who lived half or three quarters of a mile from that camp (r. 418, A. 780), who came back to the camp where Hillmon lay dead (r. 418, A. 779, 781), who, that is, Mr. Graves, was the same man who had been at their said last camp during the day Hillmon was killed (r. 419, A. 799, 800; r. 408, A. 676–7–8–9); and then an inquest was held at that camp (r. 419, A. 801) and the evidence shows another inquest was held at Medicine Lodge (r. 324, 346) and another at Lawrence, as shown at r. 594–5, 429 and elsewhere, at all of which the evidence shows Brown testified.

And on re-examination of Brown by counsel for defendant in error, Brown in that deposition further reiterated some of the testimony given on his cross-examination, and testified among other things to the effect that the man who rode with him and Hillmon in the wagon, from two or three miles out from Wichita on such second trip, remained with them about two and one-half days, which, as they stayed two nights at first camp out of Wichita, shows he left them before their next camping place, and that he (Brown) had not ever seen him since (r. 502, A. 53 to 56), and that the man who stayed with them in their camp near Sun City came late in the evening and went away early the next morning, starting toward Sun City, and that Brown had not ever seen him before or since then (r. 502, A. 57, 60), and that John W. Hillmon did not vaccinate any person on that trip, and not the stranger who rode a few miles with them near Wichita (r. 503–4, A. 70 and 71), and that he (Brown) did not tell Buchan that

Hillmon vaccinated that stranger or man, but that Buchan suggested the idea of vaccination of such stranger (r. 504, A. 72–73), and that there was no other person than the two before mentioned in the camp of Brown and Hillmon at night, traveling with them during the trip from Wichita, (r. 504, A. 74), and that Hillmon did not trade clothing, or any article of clothing, with any person during that trip (r. 504, A. 75), and that he did not state to Buchan that Hillmon traded clothes, but that Buchan suggested putting such a STATEMENT into the paper, the statement of 4th of September aforesaid (r. 504, A. 76–77), and that he (Brown) did not ever have with Hillmon and Levi Baldwin, or either of them, or with any other person prior to the time he and Hillmon started in December, 1878, any conversation about the matter of insurance on the life of Hillmon, and that he never had any such conversation at all, and never heard them or any one else say anything about any such insurance, until at Medicine Lodge, on the first trip, he became acquainted with the fact of insurance through a letter received by Hillmon from Lawrence, from an insurance agent (r. 505–6), (which insurance letter was probably the application of 24th of December), and that he first learned of the amount of insurance after Hillmon was dead (r. 506, A. 85).

And on such cross-examination as first aforesaid, Brown further testified to the effect that Buchan wrote the statement, in said refused instruction No. 44 mentioned (r. 440, 479), as to which he was corroborated by Buchan, who, among other things, testified to the effect that he wrote the same in his own language (r. 1236–7, 1261, 1269, 1270), and after, that is, that Buchan so wrote the same after he (Brown) had time and again told him (Buchan) that he killed Hillmon, and could not help it (r. 405, A. 630; r. 473–4, A. 1298).

And further, in and by that deposition, on such cross-examination, Brown, in answer to further questions asked him by the aforesaid attorneys for the insurance companies, testified to the effect, and proved, so far as testimony given by him could prove, that said written statement of 4th September, 1879, was false (r. 418, A. 777), (and reiterated on re-cross-examination) (r. 519, A. 130), and that he did not

tell Buchan such things as therein stated (r. 436–7, 405, 441–2–3–4–5–6–7–8–9, 450, 452–3, 472–3–4, 477, 478, questions and answers 630, 1059, 1060, 1112 to 1146 and 1175, 1176, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350), including that he (Brown) did not ever tell Buchan that Hillmon was alive, or that he (Brown) had not so killed Hillmon, but on the contrary did, time and again, tell Buchan that he (Brown) killed Hillmon accidentally (r. 404–5, A. 630; 436–7, A. 1059; 1068–9; 473, A. 1298).

And several of those questions so asked Brown and his answers thereto on such cross-examination as aforesaid, including No. 1224 at r. 457–8, Nos. 1294 to 1299 at r. 472–3–4, No. 1332 at r. 477, and Nos. 1346 to 1350 at r. 478–9, as copied in the statement part of this brief, and other herein referred to parts of his said deposition are here referred to, to show, and he (Brown) on such cross-examinations thereby testified to the effect, that Buchan *invented* and *manufactured* that written statement himself, because he (Buchan) wanted to get a statement from Brown to make it appear that it was not Hillmon who was killed but someone else, to get what Buchan considered big money out of the insurance companies (r. 473, A. 1294) for a document statement which he (Buchan), being a lawyer, could plan (r. 474, A. 1298) and could make so easily (r. 474, A 1299), and that if Brown would consent to let him (Buchan) do it, it would not take him a great while (r. 477, A. 1332), and induced him (Brown) to sign and swear thereto on the assurance of Buchan as a lawyer, and understanding that such swearing was not lawful, and that he was not (thereby making) throwing himself liable, and that it could not be used in law (meaning, of course, not perjury within the meaning of the aforesaid Section 5392). (R. 473, A. 1295; 479, A. 1347; 457, A. 1224.)

And that although he (Buchan) and everyone he knew [unless he excepted the insurance company men (r. 473)] believed his (Brown's) previous statements (meaning Brown's statements, testimony at inquests and proof of death to the effect that the aforesaid dead body was that of Hillmon, and that he accidentally killed Hillmon) to be true (r. 473), yet that the insurance men would not pay any attention to what he

(Brown) said, and as his lawyer, threatened Brown in language under the circumstances practically equivalent to an assurance that beyond any hope of defense he (Brown) would be arrested, put in jail, tried for murder (Brown had himself sworn and stated that he killed Hillmon) and sent to the penitentiary unless he (Brown) consented that he (Buchan) should write out for Brown a *false* statement to make *it appear* that it *was not* Hillmon he (Brown) had killed, but someone else, and that if *he did so* THEN the insurance men *would be satisfied;* OTHERWISE, having the money to do it with, they would hunt him (Brown) down and make him out a murderer, etc., and that they had the money to do it with, and as to its (such false statement) not being true it did not make any difference at all, as it was not lawful (not perjury, etc.) and that it would be better to allow him (Buchan) to write out *such false statement* than to be arrested, put in jail and probably go to the penitentiary, and that if he would, he (Buchan) would stand between him and all danger, and that he (Buchan) had been keeping the insurance men off, but could do so no longer, and that it was *then* or *never*, that Ward, the deputy sheriff, would probably take him (Brown) then (r. 457–8, A. 1224; 477, A. 1332; 472–3–4, A. 1294 to 1299; 478–9, A. 1346 to 1350).

And then Brown, *frightened* (as Buchan exultingly informed defendant in error, as shown at r. 771), gave in, and that (so as herein shown to be false) statement was written (r. 458, 479, 1236).

WRITTEN STATEMENT WHY AND HOW PROCURED BY PLAINTIFF IN ERROR AND OTHERS.

Said written statement was by plaintiff in error, and the other interested insurance companies, by its and their agents and representatives, including William J. Buchan, procured from John H. Brown wrongfully, as shown by evidence herein cited.

In this connection we request attention to said deposition and other testimony in the case which proved that said written statement was procured for the improper purpose of suppressing, and to destroy evidence favorable to defendant in error, including injuring and destroying the character of John H. Brown for truth and veracity, as well as with help thereof to obtain a surrender from defendant in error of the policies or the then supposed equivalent of such surrender, releases thereof, and thus to wrong and injure defendant in error.

And in relation to that matter we here refer, as though here repeated for the purpose of this part of our argument, to what we have said and to the references to the record we have made in reference to assignments of error Nos. 27, 28, 29, 30 and 32, and Nos. 31 and 59; and in the stating part of this brief in relation to what occurred from the time of the accidental killing of Hillmon on Crooked Creek in Barbour County, on the 17th of March, 1879, until Buchan met John H. Brown at Lexington, Missouri, about the 3rd of May, 1879, and to what occurred thereafter until the releases were obtained, and said statement torn and thrown in the stove used as a waste basket in the office of Buchan on the 16th of September, 1879, when Buchan supposed said written statement had performed the services required, and answered the purposes for which it had been obtained, as shown at r. 1246, 1276.

John H. Brown and John W. Hillmon, having, as before shown, traveled together from Wichita by an appropriate route for one seeking a location for such ranch as afore-

said, to a place where Hillmon was so accidentally killed on Crooked Creek, and none other being present when Brown so accidentally killed Hillmon, he (Brown) was of course an important witness, and if his character for truth and veracity could be destroyed, and thus defendant in error be practically deprived of his testimony, and of the use and value thereof as a witness, to prove when, where and how Hillmon came to his death, it appeared to the representatives of plaintiff in error, and of the other insurance companies, that a great point and gain would be thereby made and gained by the insurance companies, through them as against defendant in error in any effort of hers to recover on the policies, and that we submit explains why Messrs. Buchan, Barker, Green and Munn did what they did as they did to procure such written statement—and among other things plaintiff in error, through Walker, etc., having got the father of Brown and Buchan together as before shown, and Buchan started to acting, pretendedly as attorney for Brown, he (Buchan), as shown by the evidence of Reuben Brown, set forth at r. 544 to 575, obtained the assistance of Reuben Brown to assist him to get a statement from John H. Brown *different* from what he had made, as shown at r. 548, 473–4, as Brown had before testified at the several inquests held in Barbour County and at Lawrence to the effect that the aforesaid dead body was the corpse of Hillmon, such desired and *different* statement could only have been such an one in substance and effect as the aforesaid written statement, and in the hope of getting from John H. Brown substantially *such* as said written statement, Buchan and Reuben Brown about the 3rd of May, 1879, (r. 436, A. 1055–6) went to Lexington, Missouri, and there saw and interviewed John H. Brown, and endeavored there to obtain from John H. Brown the equivalent of such as said written statement, but failed, Brown telling Buchan he had before told the truth, and that he had so accidentally killed Hillmon, and that said dead body was the corpse of Hillmon (r. 548–9), and that he (Brown) had done what he had and could not help it, and that he had before told the truth (r. 474). Buchan finding Brown wished to go to his brother Reuben's place

(r. 474) tried to induce and scare Brown to go farther away (r. 474, 550), but Brown knowing his innocence of any crime and not fearing or hesitating to be where he was well known, as shown by his acts, did return to Reuben's place near Parkville, not far from Kansas City.

Buchan, within a day or two after his interview with Brown at Lexington on 3d of May —which would have been the 4th or 5th of May, 1879— went to Lawrence to further communicate with other representatives of the interested insurance companies (r. 1222–3, 1253–4, 1256, 1260), and from that time on until the whole scheme of undoing Brown as a credible witness against those insurance companies, and of getting the releases from defendant in error had been accomplished, Buchan was, as occasion seemed for the purposes of such scheme to require, in communication with representatives of the insurance companies, including Messrs. Barker, Green and H. B. Munn (r. 1254, 1256, 1259, 1260–6); Barker at Buchan's office, in Wyandotte, once or twice (r. 1260); Green at Buchan's office two or three times (r. 1261–2–3); and Buchan, having received a letter from either Barker or Green, asking him to meet them at the Coates House in Kansas City (r. 1255–6), did so (r. 1256, etc.) twice (r. 1268), and there Messrs. Barker and Munn informed Buchan that Brown had made proofs of death (meaning, of course, that Brown had made affidavits that the aforesaid dead body was that of Hillmon (r. 1258), and then they wanted Buchan to go and see Brown and find out about it, and see what Brown was going to do about it (r. 1258, 1261, 1268), and what he (Buchan) was going to do (r. 1258, 1261–2, 1268), and promised to, and did, pay him (Buchan) (r. 1262)—(see also r. 1247–8, 1288, where it is shown that the plaintiff in error and the other insurance companies paid Buchan for all he did)— this last interview on the 3d of September, 1879 (r. 1268), and thereupon the next day (September 4th), Buchan having made up his mind, and to show what he was going to do, took Ward, a Deputy Sheriff of Wyandotte County, Kansas, with him, and who remained with him until he had got the written statement (r. 1291, 1281, 1234, 1238, 456, 571, 417, 439, 478, 479, 551, 553, 554); and also pen, ink and paper with which

to write such written statement as was desired with, with him (r. 1269), and a team and buggy (r. 1291); he (Buchan) went and found Brown at Reuben's place, engaged in honest labor (r. 439, 551), notwithstanding the previous unsuccessful effort of Buchan to get Brown to go farther away (r. 474, 550), and of an effort of Wiseman, at the time of the Lawrence inquest, to run Brown off (r. 1852–3–4); and then Buchan and Ward, with a team and buggy, went to where Brown was working and brought Brown to Reuben's house (r. 551, 474, 568)—from which time we see from other parts of the evidence referred to herein (particularly at r. 502, A. 50), Brown and Buchan both considered John H. Brown as practically under arrest, held and bound to do as Buchan wished him to, including signing and swearing to said written statement, until after the releases had been obtained from defendant in error.

And he (Buchan) making use of such threats, arguments and inducements, as shown in the statement part of this brief and by Brown's deposition, and elsewhere herein, induced Brown—practically by coercion and duress of Brown—to sign and swear to that written statement which he (Buchan) wrote in his own language (r. 1236–7, 1261, 1269, 1270), he (Buchan, attorney of Brown), when and before he wrote the same, knowing that Brown had, at inquests held in Lawrence and Barbour County, previously sworn that the aforesaid dead body was that of Hillmon, and had made the aforesaid proofs of the death of Hillmon (r. 1258, 1264, 1238, 1288, 575, 427), without knowing of any evidence against Brown, his client, other than what he (Buchan) himself claimed to have obtained from him in relation to the matter (r. 1264); and after John H. Brown had made to him (Buchan) such statements, as shown by the aforesaid deposition of John H. Brown, and by the testimony of Reuben Brown, hereinbefore referred to—some thereof in the statement part of this brief—the falsity of which written statement is also further shown by the reference therein to the name Berkeley or Burgess (r. 1285), coupled with the testimony of the aforesaid agent of the insurance companies, Theodore Wiseman (r. 854), who, as shown at r. 903–6–8, testified to the effect that the repre-

sentatives of the insurance companies acting in the matter were proclaiming that the dead body was the corpse of one Joe Burgess or Nichols—which proclamation we hereinafter see was wrong and amiss, to the great injury of any pretense that said written statement was made as a truth-telling document.

And having obtained that written statement Messrs. Buchan, Barker, Green and Munn met at Lawrence, Kansas, and there Munn, as agent for plaintiff in error and the other companies, gave to Buchan the written paper dated of the 6th of September, 1879, mentioned in assignments of error No. 31 (r. 1947, 580), and No. 59 (r. 1955, 835), and informed Brown thereof and explained the same to him, including of course the exception therein (r. 1297, 1290), and Buchan was, by the other agents of the insurance companies, then further employed to procure the releases and promised payment therefor, and payment for his expenses in any event, as shown at r. 580, 581, 592 and elsewhere.

William J. Buchan was the principal active, acting agent of plaintiff in error, in the matter of so procuring each said written statement and release respectively, and after Buchan had from Brown procured said written statement, as herein shown, he (Buchan) with the help of Brown, on the 15th of September, 1879, at the Planters Hotel, in Leavenworth, Kansas, procured from her said release by such improper, wrongful and fraudulent representations, actions and methods, as alleged in said reply, and as shown by the evidence set forth at r. 770 to 778, 818 to 824, 512 to 520, Buchan there admitting, said dead body was that of Hillmon, and she there asserting that the same dead body was that of her husband, John W. Hillmon (r. 770, 820–1; 517, A. 115; 518, A. 119), at first refused to give up the policies (r. 770, 820–1), but she being sick, having a headache and fever, *did not take dinner* further than to drink a cup of tea Buchan brought her (r. 771), after which she being *overcome* and *sick* and her *capacity* to transact business *gone*, she signed the releases without *reading* or *knowing* what the same were, as herein elsewhere shown, *because* Buchan *told her to*, and thereafter for a long

time did as he told her to, until she came to herself again, as herein elsewhere shown, all as alleged in said reply.

And plaintiff in error itself, by its witness (r. 1227) and agent, Buchan, informs the court and jury that said written statement was procured for such purposes as in said reply alleged and herein claimed, including that of, with help thereof, and of the fact of its existence, procuring the release (r. 19) from defendant in error by the testimony of Buchan, shown at r. 1246, 1276, to the effect that on the day after that release was obtained he tore up the written statement and threw it into a stove in his office, used as a waste basket, with remarks of his to the effect that he *guessed* it was all over and that he would tear it up.

WISEMAN, BUCHAN, JOE BURGESS THEORY.

(Which when exploded, supplemented by the misfitting, afterwards exposed, Walters theory.)

In this connection, as an important matter of evidence relating to the question as to whether said refused instruction No. 44 should or should not have been given to the jury, we request further attention to the clause in said written statement about "Berkley," or "Burgess," called "Joe," Joe "Burgess" or "Berkley," shown at r. 1285–6, and the testimony of the some time detective, Theodore Wiseman, mentioned in the testimony in the case, who, as hereinbefore shown, was at the grave in Barbour County when Hillmon was first exhumed, and who telegraphed Griffith, as referred to in the statement part of this brief, and who tried to get A. J. Phillips to scare John H. Brown into running away, as shown at r. 1851 to 1854, and who appears to have been active in the matter of working up the so-called Walters theory, as shown at r. 878 to 881, 887–8, and elsewhere, as shown in the argument in relation to the matter of the Walters theory. Said Wiseman, a witness called for plaintiff in error, testified to the effect, as shown at r. 903–6–8, that he was for a time working on the theory that one Joe Burgess might be in-

serted in the case as the original of the aforesaid dead body, but finding that he was alive and could be shown (r. 903), he (the detective) quit advocating the Joe Burgess theory (r. 903). It is of course appropriate to inquire why the name, Joe Burgess, etc., was used in that written statement, and we submit that it is clear beyond question that it was because of the Wiseman theory about Burgess, referred to at r. 903, etc., before Burgess was found to be so much alive that he would not keep out of sight communicated to Buchan through Munn and others, when they employed him as before shown (r. 1262, etc.) to obtain that written statement, as being a good name to insert therein, when he so took pen, ink and paper with him with which to write the same (r. 1269), as being the name of the man who was with Hillmon and Brown a short time on their trip, Brown having doubtless, when being sweated in the office of Barker, as shown at r. 371–2–3, 375–6, 397, and elsewhere, mentioned the fact of a man having been for a short time with him and Hillmon on the trip, but who as we see from said deposition did not camp with them after their first camp out of Wichita, and who was not, after about noon of the first day after leaving that first camp, ever seen by Brown. (R. 502, A. 53 to 56.) It is certain that if when that statement was written by Buchan he had known that Joe Burgess was not in fact dead, but would soon show up alive, he would not have inserted Burgess' name in said statement to describe the invented victim. Now, if said refused instruction No. 44 had been given, who were the jury to pick out to fill Joe Burgess' missing place in that written statement, and we ask could that written statement be of any force when, in connection with the testimony of Wiseman, shown at r. 903, it was utterly false and untrue so far as Joe Burgess was concerned? And we contend the only legal answer to that question is *No*, and we contend the maxims of the law require such answer, except that it might and ought to have been shown to the jury for the mere purpose of showing what sort of a thing it was that plaintiff in error procured with which as a weapon to hit defendant in error and her case. And this circumstance of the name of the pretended murdered man being inserted in the Brown state-

ment is one of those little bits of internal testimony that almost always can be found in *false statements* which demonstrate their *true character*. At the time Buchan was preparing *this falsehood* he doubtless thought it exceedingly clever to give the tale an air of circumstantiality by stating the name of the pretended victim, and that very statement is one thing in the vicious instrument that demonstrates it to be what John and Reuben Brown testified that it is, namely, a *false statement*, manufactured by plaintiff in error and its assistants, by Buchan, its and their paid agent, for his, its and their own purpose, and which he frightened John Brown into signing.

And so far as that part of the matter is concerned, we submit that if that refused instruction No. 44 had been given, more confusion would have been uselessly and erroneously added to an already and otherwise established falsehood, so far as that written statement was concerned, and we submit a verdict ought not to have been found, or the jury told they could find a verdict, on the supposition that a living man could be considered as the referred to corpse; but Joe Burgess was found by Wiseman to be still living and they gave up that claim (r. 903–6–8), but *too late* to *invent* and *place* in that written statement any *other* name than that of "Berkeley" or "Burgess," called "Joe" in the connection therein used.

The "statement" referred to in said 44th special instruction, and which plaintiff in error requested the Court to charge, should be considered "with like effect" as the deposition of John H. Brown contained an assertion that the person killed by Hillmon and Brown was Joe Burgess; yet the evidence is clear that Burgess was not killed, but was afterwards found alive, this fact being proved by the testimony introduced by the plaintiff in error. It follows that the most essential fact contained in this statement was absolutely and confessively false. And surely the trial court could not, with such undisputed testimony, given by a witness called by plaintiff in error, before it, have properly given that instruction No. 44, which as worded did, and if given would, include a proposition to the effect that the jury might find that the still living "Joe Burgess" was such victim, as stated in that

written instrument, there being no competent evidence in the case indicating he was or might be dead.

And further, we submit that to have instructed the jury that said statement in reference to the killing of Joe Burgess might be treated with like effect, as the deposition of John H. Brown, which contained many matters that were admitted to be true, would have been *equivalent* to instructing the jury that the deposition *should be* treated as wholly false. And further, a piece of evidence which was *confessedly false* in its *essential feature*, should have been considered false *entirely*, in accordance to the legal maxim to that effect, and should not have been submitted to the jury with instructions to treat it "with like effect" as another piece of testimony, the deposition, which in part stood admitted to be true and not in any manner denied, and which the defendant in error was insisting, and still insists, was wholly true.

And if plaintiff in error shall ask the Court to consider the *misfitting* Walters *theory* as a *substitute* for the *collapsed* Burgess theory, then we ask the Court in such connection to consider what we urge with reference thereto in our response to the 74th, to 77th and 84th assignments of error, from which, and the evidence there and in the statement part of this brief referred to, it will be seen that although the Walters theory was a *second* and *substitutive invention* and should *therefore* have been *an improvement*, yet that *in fact* it is at least an equally, if not more, apparent abortion than its predecessor, each *utterly* ruined by the continued appearance *among* the *living* of both Walters and Burgess, as well as the Walters theory being spoiled by other misfitting and evil qualities thereof; all this from inherent defects in each of those theories, irrespective and independent of the large preponderance of the testimony, which affirmatively showed the dead body was that of Hillmon.

ESTOPPEL.

That plaintiff in error is estopped from any right to ask the Court to give that refused instruction No. 44, because of the wrongful acts, means and methods used by it and its assistants to procure said written statement, to the damage of defendant in error, is, we contend, shown by the rules and maxim to the effect than no one "shall have advantage from any wrongful act or conduct done by or for them, or by one whose wrongful acts they are or have become responsible for, either because of previous employment or subsequent adoption or ratification, either by paying therefor or by accepting supposed benefit arising therefrom, or from a series of acts, of which those that were wrongful constituted a part;" and on this matter, to avoid repetition, we refer to what we urge on that subject in relation to the matter of the Walters' theory, made prominent in the case by the 74th to 77th and 84th assignments of error.

And it is no answer to this matter of estoppel to say that Buchan swore as a witness to the effect that Brown made the written statement "just because he wanted to"—because in addition to the fact that by his own testimony Buchan concedes to the effect that he procured the written statement by wrongful means, including because of being *hired* by plaintiff in error and its assistants *to do as he did* by and with his client, Brown.

And there is also the rule of law that the Court should not ignore the testimony of John H. Brown and Reuben Brown (corroborated to a great extent by some of the testimony of Buchan), to the effect that Buchan by *wrongful conduct procured* the written statement, as it would have done if it had given that instruction No. 44, and thus given plaintiff in error benefit and advantage from and because of all the wrongful acts and things done and said to procure that written statement, to the injury of defendant in error; and even if plaintiff in error would have been entitled to that instruction, if there had been no testimony conflicting with the most, to plaintiff in error, favorable part of the testimony of Buchan (which we deny), still, because of such opposing testimony,

which the Court would have ignored and in effect told the jury to disregard, whether they believed it or not, if it had given them that instruction, the Court would have erred if it had given it.

And plaintiff in error was not entitled to work such an *estoppel* against consideration by the jury of such evidence of John H. Brown and Reuben Brown by or because of anything that Buchan could utter after doing the wrongful things he did to and by his client, to the injury of defendant in error, for the money of plaintiff in error and its assistants, as it would have done if that instruction No. 44 had been given.

But on the contrary, it was the duty of the Court to leave the testimony of Buchan and of each Brown for the consideration of the jury, so far as the same related to the matter of that written statement.

Issues Made by the Pleadings and Why the Deposition Was Read in Evidence, and Why and For What Purpose and Under What Issue the Written Statement Was Read, Including That Said Written Statement Was Not Read as Being True, or as Containing any Truthful Statement, but on the Contrary to Show that it was such Statement in Writing as Plaintiff in Error, by its Agents, had Procured Brown to Make, Including That it Was a Document Containing and Consisting of Statements Exactly Contrary to the Truth, as Alleged in Said Reply.

Whilst defendant in error by reading so much as she did of that deposition in evidence thereby represented John H. Brown as being a credible witness, however much his credibility was affected by that written statement, and whilst she also read so much of that deposition, as she read, as and for testimony tending to prove, and to prove, that the truth

was and is in accordance to the testimony of Brown therein set forth, including among other things, that he accidentally shot and killed Hillmon on Crooked Creek in Barbour County, Kansas, on or about the 17th day of March, 1879, and also that he (Brown) was procured by plaintiff in error and its agents (Buchan and the other representatives of plaintiff in error, who employed and induced him to get that written statement) to sign said written statement for the purposes and as in the aforesaid reply alleged (r. 20–1–2), and that said reply, particularly the allegations in the 3d subdivision thereof is and were true, *which involved* the *proposition* and *fact* that said written statement was *false* and *untrue* in every respect material to the case, and that the same said written statement was obtained and made and the fact of its existence used, for the purpose of wronging and injuring her as in that reply alleged, including to procure from her the aforesaid release (r. 19) fraudulently and without consideration, and by reason and means of such false representations made under the circumstances and as in said reply alleged, yet she did not thereby affirm or represent that every statement made by him on other occasions, certainly not such statements as may have been made by him while under the influence of threats or fear or duress, applied by plaintiff in error through its agent, Buchan, were also true.

And from, by and because of said reply, and the allegations in the 3rd subdivision thereof, plaintiff in error knew, had notice and was informed that defendant in error would and did so read that written statement, *not as being true*, or *to prove* that the facts were as therein stated, but on the contrary to show that the same was contrary to, *and the opposite of the truth*, according to the substance and meaning of the allegations in the said 3rd subdivision of that reply, and as therein alleged, and that the same, and the fact of its existence having been made use of as alleged in that reply, show that thereby, and by and because of the false and fraudulent representations in that reply alleged she had been wronged and injured, and caused when sick and in such condition as therein alleged to sign the release without consideration, and we submit that any argument or pretense that defendant

in error read said written statement in evidence to show or prove that it or anything therein stated was true, or that it was read for any purpose other than to show what it was, that it was such a writing as in said reply alleged, is the merest sophistry.

To further understand the situation, when that written statement was read in evidence, and the objects and purposes for which the same was competent and could be then read in evidence without making the same or any of the contents thereof affirmative evidence of the truth thereof against plaintiff in error, the issues in the case and law as to, on which party lay the burden of proof, needs to be considered.

Defendant in error to maintain her suit, had to prove the facts alleged in her petition, including that the aforesaid dead body was that of Hillmon, all which she did, as shown by the references to evidence hereinbefore made, including what is said in the statement part of this brief, and she established that part of her case as shown by the referred to evidence, by an abundance of testimony, independent and irrespective of the testimony of John H. Brown, but all that of itself availed her nothing, and she still stood barred and precluded from recovering the amount due her on the policy sued on, unless she could and did defeat the release pleaded by plaintiff in error, by proving either that it was without consideration (see the hereinbefore copied Secs. 6, 7 and 8, of Kansas Statutes), or that it had been so fraudulently obtained as to therefore cause it to be void, both of which causes for defeating the said release she pleaded in her aforesaid reply (r. 20–22). *To prove either was sufficient*, and because of the evidence already in the case, including that of Reuben Brown, John H. Brown, James W. Green and defendant in error, herein elsewhere referred to, showing how and why said statement and release were respectively procured, and said written statement and the fact of its existence was used to procure and in procuring the release, all as alleged in said reply, as cause for defeating the release, it surely was competent and proper to read that written statement in evidence at the time it was read, in and as part of the cross-examination of William J. Buchan, a witness called by plaintiff in

error (r. 1227), after he had testified as shown at r. 1227 to 1284, to show by competent evidence (itself a writing) to the Court and jury what kind and sort of a writing it was, that Buchan had in his own language, as he himself testified, as shown at r. 1236–7, 1261, 1269, 1270, 1284, written and obtained from Brown as shown by his referred to testimony, and to induce him to obtain which, Buchan, whilst attorney of and acting as such for Brown (r. 1250), had accepted employment from plaintiff in error and the other interested insurance companies through Munn (r. 1254) and others, its and their agents and representatives, as shown at r. 1262, 1268, 1254 to 1268, and for procuring which the plaintiff in error and the other insurance companies paid him, as shown at r. 1247–8, 1250–1, 1288, 1262, and that it was such a statement in writing, as alleged in her said reply, without making the same evidence against defendant in error, that the same or anything therein stated was true.

And further, the fact of that written statement having been so written by Buchan, attorney for Brown, because plaintiff in error and others employed and paid him so to do, as shown by his own testimony, also tending to show that Buchan ought not to be trusted or relied on by the jury as to any matter wherein he differs from any other witness, and went to the question of his credibility as a witness.

The release constituted a bar to the action, no matter by how much proof defendant in error sustained the allegations in her petition, unless she could defeat such release.

Surely she had a right to defeat that release, either by proof of want of consideration therefor or that it was fraudulently obtained, etc. If she proved either, that would defeat the release, but proving either did not bar or preclude her from proving the other cause pleaded in her reply for defeating the release; the testimony in relation to said written statement helped to prove both want of consideration and the alleged fraud; it was an item of evidence in the whole chain which showed both the fraud and want of consideration, and it is clear that she had a legal right to prove both, or either, of the pleaded causes for defeating the release.

But she could not prove what kind or sort of a document, statement in writing, Buchan had, as employee of plaintiff in error, procured from Brown, or so much of either cause of reply for defeating the release as related to the matter of that written statement, and the fact of its existence, without proof that there was such a document as it was, she could not prove what it was; that is, that it was such a statement in writing as in said reply alleged, without its being in some way read to the Court and jury, it would not have been competent for her to prove its contents by oral testimony, and if she had, so doing would have had the same effect, so far as the questions raised by said 105th assignment of error is concerned, as is now thereby raised; and by making and urging the assignment No. 105, plaintiff in error, in effect and as to consequences, claims, and asks this Court to hold, that defendant in error could not prove that part of said reply which related to said written statement *without thereby admitting* such written statement to be true, at least, without making it competent evidence against herself that all the statements therein—including enough to defeat her in the case—were true, and that she must elect either to fail to prove all of the facts alleged in her said 3d cause of reply, and thus in effect abandon that cause of reply, or introduce evidence tending to prove that said 3d cause of reply *was false* and that Hillmon was not dead, surely it ought not to be held, and is not law; that plaintiff in error got any such cinch as that against defendant in error by procuring that written statement and the release in the manner the evidence proves, at least tends to prove it did.

And surely she might, and ought to be permitted to, prove all and any of the allegations in that reply without making such false written statement evidence against her that the statements therein made were true—and without making it evidence against her to the extent or according to the purport of that refused instruction No. 44. As to that written statement, she was under the issues in the case in substance and effect in the same position as litigants are in other cases when they seek to show how a wrong had been perpetrated on them by showing they had been libeled, or

that some deed or other instrument which had affected them injuriously had been fraudulently obtained, or made for the purpose of assisting to perpetrate a fraud on them, or showing that a certain deed or other instrument was a forgery. Of course in all such cases it is necessary to read the libelous article, and fraudulently obtained false or forged instrument, in evidence to help show how the fraud and wrong was perpetrated, and what the same was; and therefore, even if that statement had not been read during, and as part of the cross-examination of William J. Buchan, a witness called by the plaintiff in error, but at any other time it would not have been evidence against her that the facts therein stated were true. In this case plaintiff in error by that refused instruction No. 44 sought to make the very fraud that it by its representatives had perpetrated on defendant in error, and which it had ratified by paying for and using fruits arising therefrom, evidence against defendant in error *because* she proved *their fraud* and the *means* by which, as alleged in said third cause of reply, they obtained the release fraudulently and without consideration.

And we contend that any claim or argument that may be made that defendant in error represented said written statement to be credible testimony is the merest sophistry, and without any manner of foundation or reason to support it; defendant in error by reading the deposition of John H. Brown represented him to be a credible witness, but she did not thereby affirm that every statement he had ever made was true. Among other things, by that deposition it was proven, so far as by testimony of Brown it could be proven, that said written statement was utterly and entirely false, and was obtained from him for the purposes in her aforesaid reply alleged, and so far as any representation of hers went in relation to the matter of credibility of anything by Brown said or done, was to the effect that he was a credible witness to testify as he did in his said deposition, the exact contrary of what is, by sophistry, claimed in behalf of plaintiff in error. Further, by her reply, notice was given and allegation made to the effect that she claimed the written statement was false.

WRITTEN STATEMENT NOT EVIDENCE AGAINST DEFENDANT IN ERROR, EITHER OF A CONSPIRACY, OR OF ANYTHING THEREIN STATED.

If the aforesaid dead body was that of Hillmon, then it follows that all of the allegations about conspiracy in the aforesaid second defense were false, and that there was not any such conspiracy as claimed in the second defense.

And further, as plaintiff in error requested that the case be decided and that the jury be directed to find their verdict on the basis that the real question in the case was as to whether the aforesaid dead body, brought from Barbour County to Lawrence in April, 1879, was the dead body of Hillmon or not, and the Court at such request so instructed, in accordance with the issues on that subject.

And the jury found to the effect that said dead body was that of Hillmon.

It follows that plaintiff in error is not in position to claim that anything said by Brown on the 4th of September, 1879, long after said dead body was on the 6th of April, 1879, finally buried in the Lawrence cemetery (r. 1542), was as against defendant in error, or any person other than Brown, evidence of any conspiracy, or of anything whatever, and that statement itself only purports to be a *narrative* of *past transactions*, which, in addition to the fact that it was made long after *all* the transactions about the dead body were closed and ended, would be and is an additional reason why it was not, and would not have been, evidence against defendant in error, no matter why read to the jury, or what construction should be put on the second defense as pleaded, or what imaginary allegations plaintiff in error would like to have this Court consider as being therein; and that we are correct in this *merely* because of the *time when* that written statement *was made*, which shows it was merely *narrative*, irrespective of *any other reason* why it was not evidence against defendant in error, see the following authorities—

Logan vs. U. S., 144 U. S. 309. (See the words "*and in furtherance of its objects*," on *id.* 309.)

The State vs. Johnson, 40 Kansas, 268, and the cases there cited.

C. M. L. I. Co. vs. Hillmon, 107 Fed. 839, and cases there cited.

People vs. Collum, 54 Pac. 589, 590, and cases there referred to.

State vs. Hinkle, 54 Pac. 155, 156, and cases there cited.

Sparf and Hansen vs. U. S., 156 U. S. 56 to 58.

And further, that statement as against defendant in error was *mere* hearsay, and was *only* competent to *show* what *sort* of a *club* plaintiff in error used it for, to help wrong her with, the same and with like effect as though it had been a *bar of iron* USED to help get the release (r. 19) pleaded from her.

LEGAL MAXIMS AGAINST SAID INSTRUCTION No. 44.

From all which it is certain among other things that plaintiff in error by asking that refused instruction No. 44 asked the Court to violate an ancient and well established legal maxim, to the effect that "A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto," found in Broom's legal maxims, in the 6th Am. ed. of the 4th London, at page 128, etc.

And if the Court had given that instruction plaintiff in error would have had advantage from its own wrongs done and committed through agents whose wrongful acts it adopted and ratified and made its own by what if herein shown including payment to Buchan for getting the same, and it is a time-honored maxim that " No man should take advantage of his own wrong," as shown in the last mentioned book at page 212, etc., (and of course a corporation is in same position).

And, as defendant in error was greatly wronged by the procuration of that written statement, if the deposition of

John H. Brown was true, then if that refused instruction had been given, not only would the last mentioned maxim have been violated, but she would have been left without a *remedy* for the wrongs inflicted on her by its procuration in the manner it was by that deposition *prima facia* shown to be contrary to another maxim to the effect that "There is no wrong without a remedy," *id.* 147.

And another maxim to the effect "That a transaction between two parties ought not to operate to the disadvantage of a third," *id.* 704, would have been violated if that refused instruction had been given.

And as to the matter of any of our claims herein made in relation to the said written statement, it is not material or pertinent to refer to any testimony of Buchan to claim that he testified to the effect that Brown voluntarily made the same "because he just wanted to," for the reason that such testimony cannot be used as an estoppel, against inquiring into the truth, the testimony of each was before the jury for whatever it was worth, so far as the jury would in their province consider the testimony, &c., credible, &c.

MEANING AND PARTIAL INTERPRETATION OF, AND SOME OF THE ERRORS IN, THAT REFUSED INSTRUCTION No. 44.

The Court incorporated in its charge and gave to the jury so much of said instruction No. 44 as was to the effect that the written statement therein mentioned might be considered as affecting the credibility of John H. Brown as a witness, as shown at r. 1923.

We contend that the Court would have greatly very erroneously, to the injury of defendant in error, have misstated the law and facts and evidence, and the conclusions proper to be drawn from the evidence applicable to the matter of that instruction No. 44, and also have both usurped and invaded the province of the jury, and have itself taken from the consideration of the jury much of the evidence in the

case, if it had given any more of that instruction than it so gave to the jury.

The written statement in that instruction mentioned is set forth at r. 1284–6, and the deposition of John H. Brown in that instruction mentioned is set forth at r. 339 to 520, taken under the notice set forth at r. 341, and the agreement shown at r. 318, and an examination and comparison thereof will show that they could not both be true, and that they *irreconcilably conflict* with each other, and that if either is true as to any statement therein material to the case, the other is *utterly* and *entirely false* and *untrue* as to every statement therein material to the case; and to assist the Court in making such comparison (as well as for other purposes), we herein refer to some of the material parts of that deposition, as hereinbefore shown, and also in the statement part of this brief. And now here considering such comparison to have been made, and said *deposition* and *written statement* respectively, and the *conflicts* between the same, and the different circumstances under which they were respectively made, including that the deposition was taken openly, on notice to the other party, and that the written statement was secretly procured, fully understood and appreciated, we further argue as follows:

MATTERS UNDER OATH.

And further, said written statement was not *under oath* in any legal sense; that is, in such sense as the jury would have understood the Court to mean if it had given them that refused instruction, whilst the deposition was "under oath" within the meaning of the law on such subjects—this because the deposition of John H. Brown, in that refused instruction No. 44 mentioned, was taken at Wyandotte (now Kansas City), Kansas, about January, 1882, in pursuance of a notice to the opposite party (r. 341), (in one of the cases tried, and the agreement referred to at r. 318, that the same might be read in the other case, etc.), under the sanction and solemnity of an oath duly administered (r. 342, 520), a viola-

tion of which oath on the part of Brown would have subjected him, among other things, to the pains and penalties of perjury under Section 5392, page 1045, R. S. 1878; whilst said written statement (r. 1286) was a mere *ex parte statement*, and although in form of an *ex parte* affidavit, was not in law or legal effect sworn to in any legal proceeding, or under such circumstances as to be in legal meaning or sense, or as the jury would have understood the Court to mean if it had given them that instruction, or so under oath as to render Brown liable to the pains or penalties of perjury under said Section 5392, or William J. Buchan, who, according to his own testimony, wrote the same in his own language (r. 1236, 1269, 1270, 1283–4), and went to Parkville, where it was sworn to for the purpose of having that done (r. 1270), liable to the pains and penalties of subornation of perjury, under Section 5393, page 1045, R. S. 1878, even though both he and Brown at the time knew and believed (as elsewhere shown they did) such written statement to be false, as Buchan well understood when he procured that statement in the manner herein shown, and so in substance informed Brown when and before that statement was made, as shown at r. 473, A. 1295; 457–8, A. 1224.

And therefore that statement was not *under oath* in legal effect, nor within the meaning of the words "under oath" as used in that instruction, and by the use of those words "under oath" as used in that instruction, if it had been given the jury would have been thereby misled and misinformed, and told and instructed to the effect that as matter of law as well as of fact that said statement was *under oath* with like effect as the deposition when in truth and in fact it was not, and thus the distinction between testimony not so under oath as to make a person liable to perjury if false, or one who procured the same guilty of subornation of perjury if he knew it to be false, *and testimony under oath*, within the meaning of the aforesaid Sections 5392 and 5393, would have been wiped out and ignored.

And therefore we submit that because the words "under oath" were in that refused instruction No. 44, where and in the connection in which the same are therein, the Court

properly refused to instruct the jury to the effect that said written statement "may be considered in connection with the deposition of John H. Brown as evidence of the facts therein stated *under oath*, against the plaintiff (defendant in error meaning), *with like effect* as the deposition of John H. Brown"; that written statement surely was not "under oath" either *with like effect* as said deposition, or in any legal sense "under oath" at all; but whether it was or was not "under oath" in any legal sense at all, is probably not necessary to consider, because it is certain it was not "under oath" in the sense as used in that refused instruction, nor in the sense which the jury would have understood those quoted words if the Court had given that instruction; surely there cannot be any reasonable doubt but that if given them, the jury would have considered themselves as being told by the Court that said *ex parte pretended* affidavit *was* and *had been sworn to* in such proceeding and under *such circumstances* as to have made Brown guilty of perjury, and Buchan guilty of subornation of perjury if they knew or believed it was false when it was made, and the evidence herein referred to shows Brown knew it was false, and that Buchan then believed it was false, whereas the *pretended oath* attached to that statement, as shown at r. 1286, was simply in all and any legal sense *void*, at least, it was not of *like effect* as the oath under which Brown gave the testimony set forth in his said deposition, and if that instruction had been given, the jury would to that extent have been not only misled, but greatly misinformed as to both law and fact, to the injury of defendant in error.

LIKE EFFECT.

And further, *it was not possible* for the jury to consider said written statement *with like effect* as that deposition. If the jury gave effect to, that is, believed that deposition of John H. Brown, they would necessarily have to discard said written statement as being utterly and entirely false and untrue, whilst if they believed that written statement to be true as to any material part thereof, they must discard as

false and untrue nearly every material part of said deposition bearing upon any question in controversy, and they could not either believe that deposition to be untrue, or that written statement to be true, without also believing that all other testimony in the case which tended to show that the aforesaid dead body was the corpse of John W. Hillmon was also untrue, and thus we see plaintiff in error sought, among other things, to induce the Court to usurp and invade the province of and mislead the jury in many respects, in a very ingenuous manner.

And this conclusion was reached by the Court of Appeals, as appears from the opinion of Judge Thayer, wherein he says:

"There was evidence in the case which tendered to show that the *ex-parte* statement had been obtained from Brown on September 4, 1879, by much pursuasion and by covert threats; and by some unprofessional conduct on the part of the attorney who had obtained it; and that it had been used to induce the plaintiff to release her cause of action on the policies in suit without consideration; on the other hand, Brown's deposition had been taken at a later date in the usual way, and he had been cross-examined by the defendant company at great length. In his deposition he admitted having made the statement, and asserted that the statement therein contained, to the effect that Hillmon was not dead and that another man had been killed, were each false. He also explained the reasons and the influences which had been brought to bear upon him to induce him to make the false statement. It was the province of the jury to decide in view of the circumstances tending to show how the *ex-parte* statement had been obtained and the use that had been made of the same, and in view of the fact that it had been introduced into the case by the plaintiff, not as creditable testimony, but merely for the purpose of discrediting it, whether they would treat it with '*like effect*,' or consider it as entitled to the same credence as Brown's deposition."

Clearly if that instruction had been given, the trial court would have thereby erroneously invaded the province of the jury as to the effect to be given to said deposition and the written statement respectively.

The *chief* and *turning* point of *each* was as to whether said dead body was that of Hillmon or not—the jury had before them for consideration all of the evidence of a large number of witnesses on the question as to whether said dead body was the corpse of Hillmon or not. Defendant in error claimed it was the corpse of Hillmon; plaintiff in error claimed that it was not the corpse of Hillmon, but on the contrary that it was the corpse of one F. A. Walters; near the commencement of this brief we in the stating part thereof have referred to evidence showing that the dead body was that of Hillmon, also that it was not the corpse of F. A. Walters. If that refused instruction No. 44 had been given not only would the province of the jury have been thereby invaded in many respects, but the jury would have been thereby misled in many respects.

ASSIGNMENT OF ERROR No. 33. (R. 1948–9).

Relating to Excluded Testimony.

We submit the reason given by the Court on page 594 is sufficient answer thereto, and further there was not any foundation shown for such evidence as impeaching testimony.

But further, as Brown, as shown at pages 453 and 393 and 542, 304 and 454, testified at instance of plaintiff in error to the fact of a third party being with them at the Cowskin on the second journey, and as there was no contradictory evidence thereof, even if the ruling might or should have been different, it was immaterial whether the question was answered or not, and the evidence offered was mere hearsay, and therefore not competent.

ASSIGNMENT OF ERROR No. 34 and 35. (R. 1949.)

Relating to Excluded Testimony.

There was no foundation shown for making such proof as therein mentioned. If it was desired to try to impeach Brown, proper questions should have been asked him, and then before an offer of such proof could properly be considered, it should have been stated it was contradictory—the evidence offered was mere heresay and therefore incompetent.

ASSIGNMENT OF ERROR No. 36. (R. 1949.)

Matter of Refusal to Strike Out Certain Testimony.

The evidence referred, as shown at page 575, was received without objection, and for that reason should not have afterwards been struck out, the plaintiff in error took its chances as to what the answer of Mr. Green, one of its own attorneys might be, having done so; that we submit ended the matter, and further, Brown had sworn on the subject of identity at inquests before the time when Buchan procured from him, as above shown, the letter inquiring as to the whereabouts of John, or the aforesaid false statement of 4th of September, 1879, and we submit it was proper matter to inquire into; with reference to the matter of the releases pleaded, it threw light on why such letter and statement were wanted by the insurance companies, and was also proper matter to consider in relation to why Brown and Buchan, respectively, talked to each other and to defendant in error as they did, as shown by references to pages of record heretofore cited.

ASSIGNMENT OF ERROR No. 37. (R. 1949.)

Matter of Exception to Testimony.

We submit the question objected to was properly allowed within the rule of law relating to what person says or does, shown in the case of said plaintiff in error against said defendant in error, in 145 U. S. 285, etc., and was for many

other reasons a proper question, including the matter of showing by Davis in connection with other testimony, that Brown and Hillmon were in Medicine Lodge together twice, once in winter of 1878–9, again in March, 1879, pages 611, 612, 613, and the citations to the record heretofore made in relation to the whereabouts of Brown and Hillmon, for the purposes of identification of the corpse and to assist in determining whose dead body it was.

ASSIGNMENT OF ERROR No. 38. (R. 1949.)

Matter of Objection to Identifying Testimony.

We submit it was proper to prove that the man alluded to was with Hillmon in Medicine Lodge in the winter before the dead body, referred to on pages 611 to 613, was brought there in March 1879.

ASSIGNMENTS OF ERROR Nos. 39 and 40.

(R. 1949, 1950).

Matter of Objection to Certain Identifying Testimony.

The testimony at pages 661 to 663 of Eli Smith was competent, and with other evidence herein referred to proved John W. Hillmon and Brown were at different times in winter of 1878 and March 1879 together in Medicine Lodge. What Hillmon called himself is surely as competent as what Walters called him in the letters referred to in 145 U. S. 285, and we claim was competent for other reasons.

ASSIGNMENT OF ERROR No. 41. (R. 1950.)

Matter of Objection to Certain Identifying Testimony.

What the two called themselves comes within said case of 145 U. S. 285, if a letter from a stranger can be read referring to one as Hillmon—surely what two men called themselves is competent, but further by the chain of evidence in the case and above cited, the two men, John W. Hillmon and John H. Brown, are shown to have been together alive

twice in Medicine Lodge, and afterwards one alive and the other dead. The testimony of Derrick Updegraff, at pages 663 to 670, shows he knew the two men, had seen them at different times, and with other evidence cited herein shows the dead body was that of John W. Hillmon.

ASSIGNMENT OF ERROR No. 42. (R. 1950).

Matter of Objection to Identifying Testimony.

The answer clearly referred to the companion of Brown on their two former visits to Medicine Lodge, and surely it was competent to prove it was the dead body of Hillmon, and that dead body is above traced to the cemetery of Medicine Lodge and to Lawrence, Kansas, and at each place identified as the dead body of John W. Hillmon. (See evidence above cited in relation to identification thereof.)

ASSIGNMENT OF ERROR No. 43. (R. 1950.)

Matter of Objection to Certain Identifying Testimony.

The answer to the question objected to, showed the intention of the men competent within the law stated on the last four lines on page 299, and top line of page 300 of 145 U. S., by the Supreme Court, in the matter of this litigation, and was therefore competent.

ASSIGNMENT OF ERROR No. 44. (R. 1951.)

Matter of Identifying Testimony.

The testimony of Standiford is at pages 674 to 682 and shows he knew Hillmon, and identified the corpse as his; and the evidence cited shows that it was the dead body of Hillmon that he referred to. Surely the objected-to evidence was competent.

ASSIGNMENTS OF ERROR Nos. 45 and 46. (R. 1951.)

Matter of Objection to Certain Identifying Testimony.

See limitation put on the answer by the Court at page 676, and considering the testimony of Standiford at pages 674 to 682 and other evidence cited in this brief showing the dead body to have been that of John W. Hillmon, and that he traveled through Medicine Lodge twice when alive with Brown, we submit the evidence was competent.

ASSIGNMENT OF ERROR No. 47. (R. 1951.)

Matter of Intention.

Referring to the above relating to the 43rd, 44th, 45th and 46th assignments of error, we claim it was competent to prove the intentions of Hillmon, as expressed at pages 677 and 678; and the question was competent, as shown by 145 U. S. 285.

ASSIGNMENT OF ERROR No. 48. (R. 1951.)

Matter of Certain Excluded Testimony.

We submit it was entirely immaterial whether there was such excitement as asked about or not.

ASSIGNMENT OF ERROR No. 49. (R. 1951–2.)

Relating to Objection to Certain Testimony.

The evidence at r. 749, 750 shows that the letter referred to had been destroyed when a certain house burned, and we submit that the reason of the trial court, shown at r. 750–1, was sufficient to permit the evidence; if, however, we are wrong in that, still admitting it could not have done any harm to plaintiff in error, surely it did not and could not affect the case when it came time to instruct the jury.

ASSIGNMENT OF ERROR No. 50. (R. 1952.)

Relating to Certain Evidence

The Selig referred to in the objected-to question was at the trial a witness in the case called by the insurance companies, and his testimony is set forth at r. 1496 to 1526, and shows that he was agent for plaintiff in error in the whole matter of its insuring the life of Hillmon; and took the application and forwarded to plaintiff in error the application and M. D. certificate of Dr. J. H. Stuart, set forth at r. 180 to 185, on which the policy sued on was issued, and the evidence in the case showed that as such agent he delivered that policy to defendant in error, and although defendant in error offered to surrender, or rather to not accept it and take back the premium paid, he declined although he knew, as shown at r. 180 and elsewhere, that policy was for the last $5,000 on the life of Hillmon; all as shown by his aforesaid testimony and other evidence at r. 151–2–3–4–5 and 751–2; and we submit the objected-to question was competent for many reasons; but if we are wrong in that it could not harm plaintiff in error; and further, plaintiff in error did not object to the question asked, took its chances as to what the answer would be, and should, of course, abide thereby.

ASSIGNMENT OF ERROR No. 51. (R. 1952.)

We submit the objected-to evidence was proper and competent.

ASSIGNMENT OF ERROR No. 52. (R. 1952, 772.)

Relating to Certain Evidence.

The objected-to question was with reference to and explanatory of the circumstances under which Mr. Buchan obtained from defendant in error the before mentioned releases (see r. 772–3, etc.), and we submit it called for appropriate evidence; if not it was harmless.

ASSIGNMENT OF ERROR No. 53. (R. 1952–3, 761.)

Relating to Question to a Witness.

As we understand the record (r. 761), the trial court sustained the objection of the plaintiff in error to the question referred to in that assignment of error, surely the only exception in relation to the matter thereof was that of defendant in error (see r. 761), and further, we submit the evidence called for was competent as it related to the matter of the tintype of both Brown and Hillmon, referred to in our statement part of this brief, the loss of which, so that she could not produce the same in the trial court, was occasioned because of the investigation had at the Lawrence inquest, really for benefit of the insurance companies, but that is not here now material further than as it shows a disposition on the part of plaintiff in error to first cause loss of evidence to defendant in error, and then prevent her from giving secondary evidence of what it was the occasion of the loss of, but because of want of such exception on the part of plaintiff in error that matter is not now here important to further consider in this connection.

ASSIGNMENT OF ERROR No. 54. (R. 1953, 757.)

Relating to Certain Evidence.

The question in that assignment of error referred to was asked in reference to the matter of the bringing of the dead body of Hillmon from Barber County to Lawrence, and the disposition made of it there at Lawrence; to understand the matter it will be necessary to read the evidence of defendant in error at r. 757 to 759, as plaintiff in error did not object to the question, it could not complain of the answer; and further, surely the question and answer was competent.

ASSIGNMENTS OF ERROR Nos. 55, 56 and 57. (R. 1953–54.)

Relating to Some Excluded Testimony.

We submit the trial court properly excluded the evidence because of its being mere hearsay.

ASSIGNMENT OF ERROR No. 58. (R. 1955.)

Whilst we do not find such questions in the evidence of the witness referred to, yet if such question was asked her, it would have been appropriate and competent considering her testimony in the case, but in any event no harm was done any one by any question asked that witness.

(We have hereinbefore argued the matter of the 59th assignment of error in connection with the 31st, 105th, etc.)

ASSIGNMENT OF ERROR No 60. (R. 1958 to 1965.)

Relating to Judge's Remarks About Tampering with Jurors.

Somebody asked a juror to come to a certain place, "that there was something in it for him." (R. 802.) The juror deemed, as the Court did when the remark was related to him, that this was the inception of an attempt to bribe. There was then open to the Court two courses, to either permit the attempt to be carried further, or to make proclamation of the fact to the end that no further attempt should be made. The Court regarded the latter as the more dignified course, and announced from the bench the fact that improper remarks had been made by somebody to a juror, and that if it was persisted in the grand jury would be invoked. This ended the matter. Counsel for plaintiff in error complained of this utterance of the Court, saying in effect, that the insurance companies were the only persons who were in a position to do any bribing (r. 803), that that fact was known to the jury (r. 803), (and by way of argument we ask how known), and that hence the companies must be prejudiced.

That proposition was disposed of by the Court in the following apt language:

"Suppose that the juror who communicated this information to the Court had not done so until a verdict had been rendered in this case; nevertheless he possessed the information at all times after the invitation had been presented to him. Would the fact that the juror had been approached be sufficient to authorize the granting of a new trial, upon the claim made by counsel that he must have received certain impressions from the personnel of the parties to the case? I think not, so in principle there is no difference between a knowledge of the situation on the part of *one* juror and a knowledge on the part of the *entire* jury, and I cannot agree with counsel that this incident prejudices one side or the other." (R. 806.)

And that it was proper for the Court to say what it did in relation to the matter complained of, is shown by the case of State vs. Kyne, 62 Pac. 728.

And further, counsel for plaintiff in error alone addressed the Court on that occasion, and it is of course not for them now to complain of their own doings in that respect. There was nothing there disclosed that would give cause for the discharge of the jury or a reversal of the judgment. We would be pleased if the Court would take occasion to read all the record discloses of that incident at pages 800 to 807, which presents the best vindication of the trial court from the charge of impropriety of conduct or erroneous conclusions.

ASSIGNMENTS OF ERROR—Nos. 61, 62, and 63 (r. 1965-6-7), relating to certain excluded evidence; and

ASSIGNMENTS OF ERROR—Nos. 103 and 104 (r. 2005), relating to the refusal to give certain instructions Nos. 41 and 42, all in relation to the so-called McKamy matter.

We contend that plaintiff in error has not any available exception to the refusal of the Court to give either of those refused instructions Nos. 41 and 42, and there was not any

exception of any kind taken to the charge of the Court on the matter to which the instructions related.

Whilst the evidence, in relation to the sale of a train in Colorado, shows the train there sold was sold in 1877, and that it was owned individually by Hillmon, the evidence in relation to the mortgaged train was that it was sold to Hillmon and Brown by McKamy and Anderson in January, 1878, and the evidence shows that Hillmon had trains during different years, that is, that he had different trains; and the fact of his selling a train in 1877, in Colorado, according to the testimony of Brown is not any evidence whatever that he sold the train Hillmon and Brown purchased of McKamy and Anderson in January 1878, in Colorado; and the business that Hillmon was engaged in during 1876–7–8, freighting some, hunting and gathering buffalo hides, etc., and transporting same, required trains, and plaintiff in error to make excuse for its claim that Hillmon sold the mortgaged train, can only be supported by making Brown contrary to his testimony swear that the mortgaged train owned by himself and Hillmon was sold in Colorado, whereas the only testimony that Brown gave of any sale in Colorado was that of a train owned individually by Hillmon in 1877, and to do this plaintiff in error wants the Court to hold that when Brown said in his deposition "*1877*" he said "*1878*" we submit that that is asking and would be too much; no one asked Brown except the representatives of the insurance companies, plaintiff in error and others, anything about "trains;" they asked what questions they chose; Brown answered and they were apparently satisfied with his answers; the whole matter was between them and Brown so far as Brown's testimony is concerned, and we submit that plaintiff in error should not be accommodated so much at the expense of the character of Brown and Hillmon as to permit plaintiff in error to change "1877" to "1878," and then because of so making such change raise a presumption of a crime, but we will argue the matter on the theory of plaintiff in error, as well as show that there is no foundation or excuse for the theory or claim that there is any competent evidence that the train purchased of McKamy and Anderson in 1878 was sold in Kansas, or that it was sold at

all. At r. 379 Brown reiterates to the effect that the train sold in Colorado *was not* sold in 1878, and for all of anything shown in the evidence *either* the partner of McKamy may have taken it back, or it been left in Texas, until long after the death of Hillmon. We know nothing relating thereto further than as shown by answers to questions plaintiff in error asked Brown, and we see it did not choose to ask him about the train sold him and Hillmon.

Of course the hearsay evidence of McKamy *offered* cannot count or be of any force on this question, as that was, because of being hearsay, conclusions, etc., properly excluded; it is reasonable to suppose his informants, if he had any, were not either talking or knew accurately as to either *trains* or *years*, but as all that was mere hearsay, that suggestion is immaterial.

The assignments of error 61 and 62 are because of refusal to admit certain hearsay evidence and conclusions arrived at by McKamy (without cross-examination). We submit that the answers of McKamy in his deposition, reading of which was refused, were inadmissible because hearsay, and were conclusions of his from what he heard; and, therefore, that the Court properly refused to permit the answers of McKamy to be read; and each answer of witness was offered as a whole, and no offer was made to separate, or to offer separately, any part of either of said answers.

That the proper time to decide the objections to the incompetent and irrelevant part of the deposition of McKamy was when done at the trial. See—

Johnson vs. Mathews, 5 Kansas, 118, 124.
Tays vs. Carr, 37 Kansas, 142–4.

See also—

State vs. Lawrence, 41 Atlantic, 1027–8. (2d Syl. 1027.)

And see also the rules of law in relation to conclusions of witnesses and hearsay not being competent testimony.

Again, the special instructions numbered 41 and 42, are peculiarly obnoxious to the rule that the Court should not single out and emphasize a single subject or item of evidence.

The Court, in its general charge, did not overlook the evidence introduced by plaintiff in error, and upon which it sought to base these instructions, but the Court gave as parts of the general charge (r. 1920) a fair and accurate instruction to the jury, covering the whole subject, in the following language: "If it appears that a motive might exist for absence, and a continuance thereof, and to keep his whereabouts concealed, such motive is to be given due consideration in determining what weight is to be given to the continued absence as evidence tending to show death."

It is claimed by counsel for plaintiff in error that the Court arbitrarily excluded from knowledge of the jury the very evidence that would have furnished such adequate explanation of Hillmon's absence. A mere glance at the portions of the offered evidence so excluded will disclose that said testimony consisted of a mixture of *hearsay* and of the *conclusions* of the witness, and for that reason, among others, was not admissible as evidence for any purpose whatever, and in fact would not be legal evidence under any conceivable circumstances. If the matters which, apparently, the plaintiff in error desired to prove *existed* as facts, it was within the power of the plaintiff in error to have called the witnesses who had knowledge of such facts, and failing so to do, it certainly cannot be claimed that mere hearsay statements of third parties, and the conclusions drawn therefrom by the witness could be properly admitted in evidence over the objection of defendant in error.

In relation to the Texas statute that the plaintiff in error sought to introduce in evidence, it is sufficient to say that the Court took judicial notice of the same, and that therefore no proof thereof was necessary.

Noonan vs. Delaware, L. & W. R. Co., 68 Fed. 1.

If the plaintiff in error wanted to prove a violation of that statute it should have done so by witnesses who knew the facts that constituted such violation, and should not have attempted to prove it by mere hearsay, nor by statements which purported to be nothing more than *narratives* of what *other* persons had *told* the witness, with the *conclusions* of the

witness based upon such *hearsay*. All competent testimony that was offered in relation to the McKamy matter the Court permitted to be introduced in evidence, and we submit that there was not sufficient thereof to even *prima facie* show that any crime had been committed, and that therefore the Court might properly refuse those instructions.

And further, the evidence shows Hillmon had different trains at different times; and that in different years before 1878 he had trains; the buffalo hide business he was sometimes engaged in, in 1876 and 1877, required the use of trains. And further, there was not sufficient evidence furnished to maintain the claim of plaintiff in error that anything about the McKamy matter tended to explain Hillmon's absence. But the Court, in order to give the plaintiff in error the benefit of all of the evidence that was admitted in its general charge, as hereinbefore pointed out, submitted the whole matter to the jury.

By their special instructions, Nos. 41 and 42, counsel for plaintiff in error required the Court to submit to the jury the question as to whether John W. Hillmon had not been guilty of a felony in the State of Texas, for the collateral purpose of showing that he may have had a motive for disappearing and keeping himself concealed. We submit that before the Court could be required or would be justified in submitting such a collateral issue to the jury, there must have been preliminary proof sufficient in the judgment of the Court to make out at least a *prima facie* case of such guilt, and that the party alleging such crime should be held to a reasonable degree of strictness in making such a *prima facie* proof. The presumption of innocence in such case, no more than any other, should be lightly brushed aside. All of the essential ingredients of the crime charged should be first made out or supported by definite, sufficient and legal evidence. An analysis of the Texas statute and the application thereto of all that the evidence proves, or tends to prove, will show that such evidence falls far short of making a *prima facie* case. It seems that Hillmon and Brown bought an ox train of McKamy and Anderson, in Texas, in January, 1878 (r. 1890, 1896–7–8), and then gave a mortgage thereon and on other

property to secure the indebtedness. This indebtedness was in the aggregate only $3,623.90. It is without evidence claimed by plaintiff in error that Hillmon left Texas, taking the train, or a portion thereof, with him, but concede the other mortgaged property was left, and there is no evidence that it was not amply sufficient to pay the debt, nor indeed any evidence as to its value except evidence that it was with other considerations given in payment of the mortgage debt. (R. 374–375.) And the burden of proving that it was insufficient in value to pay the debt was on the plaintiff in error. Now, an ingredient of the Texas statute is that the removal or sale of the mortgaged property must have been with "intent to defraud" the mortgagee. If after the removal of a part of the mortgaged property, that which was left in Texas was amply sufficient to pay the mortgage debt, then the removal of that part could not in fact operate to defraud the mortgagee, and the felony defined by the Texas statute could not be predicated of such removal. As in cases of the alleged obtaining of money by false pretenses, where the person obtaining the money gave both personal and mortgage security, and it transpired that the mortgagor did not own the mortgaged property, as he had falsely represented he did, yet the personal security being ample, so that no loss could in any event occur to the lender of the money and holder of the mortgage, it was held that there could be no conviction, as the intent to defraud was not made out; in other words, the intent to defraud could not be predicated on an act that could not in any event operate to defraud in fact.

State vs. Clark, 46 Kansas, 65.

The evidence instead of making a *prima facie* case of intent to defraud on the part of Hillmon shows that all of his transactions were open and public, and marked by no concealment, and were not acts showing consciousness of any wrong doing; and in view of his long absence and the almost conclusive evidence of his death, the Court was justified before submitting the question of whether Hillmon was guilty of a felony, in requiring something more substantial in proof of his wrong doing than could be gathered from the weak

and unsatisfactory testimony of McKamy, whose deposition was taken without cross-examination, and who made no allusion to and did not explain what disposition he had made of the remainder of the mortgaged property.

A review of that part of the testimony of McKamy which was admitted, and upon which counsel for plaintiff in error principally bases their special instructions, Nos. 41 and 42, will show how unsatisfactory was the foundation laid. McKamy, after detailing the transaction of the sale of the ox-train to Hillmon, admits that the security included 2,500 buffalo pelts. He does not claim that the pelts were not in existence, does not state what was their value, or say what disposition of them was made. Common knowledge possessed by every man teaches that the cost of killing, skinning and delivering these hides to depots or places of storage must have been such that when stored they would have been worth from $3.00 to $5.00 each, and in the aggregate amounted to at least $7,500. Possibly McKamy disposed of those 2,500 pelts and wrongfully applied the proceeds upon the unsecured indebtedness mentioned in his deposition. He in effect says it was agreed that the money was to be paid from the proceeds of the buffalo pelts, and the proceeds of their hunting and freighting. (R. 1392.) While he says he was never paid a *cent* of the indebtedness, he does not say whether he obtained the buffalo hides and the proceeds of their hunting and freighting, or that his partner did not receive payments, and appropriated the pelts to the payment of the indebtedness.

So far as the evidence goes it shows a sale in January, 1878, from McKamy to Brown and Hillmon of a train (r. 1389, 1390), and the notes and mortgage of the two men show they were made January 10, 1878.

The time referred to by William Hillmon, at r. 1097, is 1878.

The reference to the evidence of John H. Brown (r. 372–6), and the train that he there refers to as being sold by Hillmon *was sold in August, 1877* (r. 376). At record 375 the evidence shows that the train mentioned as sold in August,

1877, in Colorado, was not the train obtained from McKamy and Anderson in January, 1878, by Hillmon and Brown. The evidence on pages 376 and 377 also shows that the train sold in Colorado was a train that belonged to Hillmon individually, and Hillmon paid Brown for his services, as there shown. From this we see that the train that Hillmon sold in Trinidad and Pueblo, Colorado, was not shown to be the train that McKamy and Anderson sold to Brown and Hillmon, and which Brown and Hillmon mortgaged back to them in January, 1878; so that the evidence, instead of showing that the mortgaged train was sold in Colorado, fails to make any such showing; but the only evidence of the sale of a train or any part thereof in Colorado, was of same being sold in August, 1877, long before the mortgage was made; hence, it must have been another train owned by Hillmon. In such evidence, which is all the evidence plaintiff in error refers to, we submit there was not so much as an excuse for asking either of the refused instructions mentioned in specification 9 or for offering the Texas statute. From this we see that all the evidence considered together leaves plaintiff in error without any competent testimony tending to show that any of the property mortgaged in January, 1878, was removed out of Texas or sold in Colorado, and we submit that if the Court had given either of the said refused instructions it would have been a matter of manifest error against defendant in error, for want of sufficient competent evidence to sustain the same or to make it proper to direct the attention of the jury to the Texas statute.

The Court properly regarded the proof insufficient to make a *prima facie* case of Hillmon having committed a crime against the Texas statutes, and we insist that there was no such *prima facie* showing made. But conceding for the sake of argument that the trial Court should have reached a different conclusion, still that Court cannot be put in the wrong unless appropriate instructions were asked, refused and specifically excepted to, which was not done in this case.

Undisputed facts shown by the witnesses of plaintiff in error are that Hillmon and Brown were in Texas on Pease

River and that Hillmon had a train there in 1876 and 1877, and they returned to Kansas in the fall of 1877.

The train Brown speaks of as having been sold in Colorado was the one brought from Texas in 1877, and not the mortgaged train. This we insist sufficiently appears from the testimony of their witness, W. W. Nichols, who met Hillmon in Texas in 1876, and saw him on his return in 1877 (r. pp. 1153, 1155, 1159), and the testimony of Brown brought out by plaintiff in error in his cross-examination (r. pp. 362 to 381).

Brown in 1876 and 1877 was working for Hillmon, and was "paid off" when the train was sold in 1877. (R. p. 363, ques. 204; p. 377, p. 246.

Hillmon and Brown again went to Texas in 1878 and then bought the train upon which the mortgage is claimed to have been given. This train, it is claimed, and the evidence shows, was sold to Hillmon and Brown jointly and by them jointly mortgaged, while the first train was owned by Hillmon individually and Brown was working for him. That Hillmon and Brown were hunting in Texas in 1876 and returned to Kansas in the fall of 1877; that they were again hunting in Texas in 1878 and returned to Kansas in the fall of 1878; that on both occasions they had a train, the first one belonging to Hillmon individually and the second one to Hillmon & Brown jointly, and that Brown was testifying as to the sale of the Hillmon train in 1877 certainly appears from the pages of the record referred to above. That the court below so understood it is beyond question.

All of the testimony of Brown on the subject was drawn out by plaintiff in error. It was outside of any possible legitimate cross-examination and was its testimony. If the matter was left in any doubt, it was so left by plaintiff in error, and just as it chose to leave it, and is the only testimony offered by it to convict Hillmon of felony.

The court below evidently held that it was not sufficient for that purpose in that it was not made to appear thereby that the train Brown testified to having been sold was the mortgaged one, and accordingly for that and the other rea-

sons stated refused to submit the matter to the jury except in so far as it touched the question of Hillmon's financial condition or ability.

And further, the matter of the mortgaged train was collateral to the issues.

IN RELATION TO THE MATTER OF CONSPIRACY AND FRAUD.

(Referred to at pages 8 to 16 of the petition for certiorari in subdivisions 3 and 4 thereof.)

ASSIGNMENTS OF ERROR—Nos. 64, 65, 66, 67, 68, 69, 70, 71 and 72 (r. 1978 to 1984), relating to certain questions asked witnesses Phillips, Blythe, Crew and Carr; and

ASSIGNMENTS OF ERROR—Nos. 87, 88, 89, 90, 91, 92 and 106 (r. 1997 to 2000 and 2006), relating to instructions refused or given and charge given on the conspiracy question.

In considering the matter of those several assignments of error it is necessary, first, to consider and determine what were the issues made by the pleadings in the case, and the law applicable thereto, which examination will show that there was not *either* such issues in the case, OR SUCH PARTIES THERETO or evidence *offered or given* as to require the trial court to do or rule otherwise than it did, or on or because of which plaintiff in error can here, or could in the trial court, make or raise any question whatever as to whether the policy sued on, or the contract of insurance, was or was not void in its inception, AND THEREFORE WE SUBMIT THAT ALL PLAINTIFF IN ERROR SAID IN ITS SAID PETITION FOR CERTIORARI OR BRIEF IN SUPPORT THEREOF, AS WELL AS WHATEVER IT MAY SAY IN ANY BRIEF IT MAY FILE HEREIN, IN RELATION TO WHAT AN INSURANCE COMPANY MAY PLEAD OR PROVE AS A DEFENSE TO

A POLICY IS ENTIRELY IRRELEVANT IN THIS CASE, BECAUSE SUCH DEFENSE WAS NOT PLEADED BY PLAINTIFF IN ERROR IN ITS ANSWER IN THE CASE.

The laws of the State of Kansas, by Section 914, R. S. 1878, page 174, made applicable to this case so far as the same are material to any question involved herein, and relate to the pleadings in the action, as found in the General Statutes of Kansas of 1868, at pages 647 to 650 and 652 thereof, and in all subsequent compilations of the laws of Kansas, are as follows, except that Sec. 86 is set forth as amended in 1870, as shown by the Kansas Session Laws of 1870, Ch. 87, page 171, Sec. 3. And also except that in subsequent compilations, published by private parties, the capitalization, punctuation, etc., are different:

"SEC. 84. The pleadings are the written statements, by the parties, of the facts constituting their respective claims and defenses.

"SEC. 85. The rules of pleading heretofore existing in civil actions are abolished; and hereafter, the forms of pleading in civil actions in courts of record, and the rules by which their sufficiency may be determined, are those prescribed by this code.

"SEC. 86. The only pleadings allowed are: First, The petition by the plaintiff. Second, The answer or demurrer by the defendant. Third, The demurrer or reply by the plaintiff. Fourth, The demurrer by the defendant to the reply of the plaintiff.

"THE PETITION.

"SEC. 87. The petition must contain: First, The name of the court, and the county in which the action is brought, and the names of the parties, plaintiff and defendant, followed by the word 'petition.' Second, A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition. Third, A demand of the relief to which the party supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated; and, if interest thereon be claimed, the time from which interest is to be computed shall be also stated.

"ANSWER.

"SEC. 94. The answer shall contain: First, A general or specific denial of each material allegation of the petition controverted by the defendant. Second, A statement of any new matter constituting a defense, counter-claim or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. Third, When relief is sought, the nature of the relief to which defendant supposes himself entitled. The defendant may set forth, in his answer, as many grounds of defense, counter-claim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both. Each must be separately stated and numbered, and they must refer, in an intelligible manner, to the causes of action which they are intended to answer.

"REPLY.

"SEC. 102. When the answer contains new matter, the plaintiff may reply to such new matter, denying, generally or specifically, each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter not inconsistent with the petition, constituting a defense to such new matter in the answer; or he may demur to the same for insufficiency, stating, in his demurrer, the grounds thereof; and he may demur to one or more of such defenses set up in the answer, and reply to the residue.

"SEC. 122. In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part; and if such allegations be controverted, the party pleading must establish, on the trial, the facts showing such performance."

1st. As to the pleadings in the case.

The petition was in ordinary form, on a policy of insurance wherein it was among other things in substance alleged, that plaintiff in error on March 4th, 1879, insured the life of John W. Hillmon, the husband of defendant in error, for the

term of his natural life, to the amount of $5,000 in her favor, and that he died an March 17th, 1879, and that both he and she duly performed all the conditions of the policy, on their or either of their part to be done or performed (r. 3 to 5).

The last answer to that petition is at r. 17 to 19.

The first defense was a general denial (r. 17).

By the 3rd defense, the supposed release hereinbefore more fully mentioned was pleaded; the only other defense pleaded was the 2nd set forth at r. 18, wherein, after making such general allegations of fraud and conspiracy, as however gratifying to the pleader or party to make, do not admit of proof in any court, as shown in by the herein cited decisions of this Court and of the Supreme Court of Kansas (where the contract was made, and all the transactions including the trial of the case in relation thereto occurred), it, plaintiff in error, as and for its allegations of what it hoped to prove such conspiracy and fraud, as it relied on, consisted of, alleged in substance and effect that said John W. Hillmon, Levi Baldwin and John H. Brown, with intent to cheat and defraud plaintiff in error, and for the purpose of securing payment of certain policies, including the one sued and recovered on as aforesaid, did in the lifetime of said Hillmon falsely and fraudulently pretend and represent unto plaintiff in error, that a certain dead body was the dead body of said Hillmon, and that said John W. Hillmon was still alive and not dead, and was keeping himself concealed under assumed names.

As said answer was filed on the 7th of June, 1881 (r. 19), more than two years after the death of Hillmon, on the 17th of March, 1879, notwithstanding the premium had been paid for a period beyond the time of the death of Hillmon, the policy would, because of such two years premium for the last of which years, that is for time after death of Hillmon had not been paid, have become lapsed and inoperative before the time when that answer was filed, if Hillmon was as therein alleged then still living, which explains what is meant in said answer about non-payment of premiums and the policy being void and inoperative.

That answer was met by such reply, as shown at r. 20 to 22, which so far as the matter of said 2nd defense is concerned consisted of a general denial, and of a statement in the 3rd cause of reply to the effect that said John W. Hillmon died in Barbour County, Kansas, on or about the 17th day of March, 1879, from a gun shot wound produced by the accidental discharge of a gun in the hands of John H. Brown.

That the words "unlawfully and fradulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant (plaintiff in error meaning)" contained in said 2d ground of defense were as to this case surplusage and mere epithets, at least that the meaning, scope, force or effect of that 2d ground of defense was not by insertion or use of those words therein, extended or enlarged or to be construed as containing allegations because of, or under which proof or testimony could be introduced, beyond, further or other than merely to permit plaintiff in error, if it could, to prove that said Hillmon was alive and not dead, or that the dead body herein mentioned was not the corpse of John W. Hillmon, and that such general allegations as those about conspiracy, fraud, &c., in that 2d defense are and will be limited to the particular and only issuable allegations therein made, that is, to those therein to the effect that Hillmon was alive and not dead, that is, as applied to the evidence at the trial making a question as to whether the herein mentioned dead body was that of Hillmon or not, is shown by the decisions and opinions of this Court in the following cases, to-wit:

Kent vs. Lake Superior Canal Co., 144 U. S. 91.
Fogg vs. Blair, 139 U. S. 118, 127.
Atlantic Delaine Co. vs. James, 94 U. S. 207, 208, 214.
Knox Co. vs. Harshman, 133 U. S. 155.
Ambler vs. Chouteau, 107 U. S. 586, 591 (last 15 lines of the opinion in this last case).
U. S. vs. Atherton, 102 U. S. 372.
Quincy vs. Conlon, 104 U. S. 426.

The Supreme Court of the State of Kansas, in its opinon in the case of—

The State *ex rel.* vs. Williams, 39 Kansas 520,

as shown by its opinion in that case delivered by Johnston, J., held as follows:

"Allegations of fraud and illegality, without a statement of the facts constituting the same, are mere legal conclusions and of no force in a pleading. No issue is presented by such averments, and no proof is admissible thereunder. (L. L. & G. Rld. Co. v. Comm'rs of Douglas Co. 18 Kas. 169; Clark v. Dayton, 6 Neb. 192; Pelton v. Bemis, 44 Ohio St. 51; Ockendon v. Barnes, 43 Iowa, 615; M. & C. Rld. Co. v. Neighbors, 51 Miss. 412; Smith v. Lockwood, 13 Barb. 209; Bliss, Code Pl. SS. 213, 334; Pom. Rem., § 530.)"

And the cases of—

Paving Co. vs. Botsford, 56 Kansas, 541.
Gleason vs. Wilson, 48 Kansas, 500, 502.
K. P. & W. Rld. Co., vs. Quinn, 45 Kansas, 478,

are to the same effect.

And those Kansas cases show the rule to be that in Kansas courts there could not have been any evidence given under the said second ground of defense further than as to whether the dead body herein mentioned was that of Hillmon or not.

In Van Horn vs. Van Horn, 28 Atlantic Reporter, page 669, the Court of Appeals of New Jersey says:

"The courts almost uniformly disregard the charge of conspiracy as an actionable element, and consider the malicious injury and resulting damage as the foundation and support of the action. Lavarty vs. Varnarsdale, 65 Pa. St. 507. Pol. Torts., p. 267, says: 'It seems to be the better opinion that the conspiracy is not in any case the gist of the action, but is only matter of inducement or evidence.' Mr. Bigelow, in a note to the leading Cases on the law of Torts., (p. 214) says 'that the effect of the principal case is that the fact of

conspiracy becomes actionable only when the act would be a ground of suit if done by a single person.' The Maryland Court of Appeals, in Kimball vs. Harman, 34 Md. 407, declared that an act which, if done by one alone, constitutes no ground of an action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several."

In Commercial Union Assur. Co., Limited, of London, et al. vs. Shoemaker, 88 N. W. Reporter, 156, the Supreme Court of Nebraska says:

"There is no doubt of the right of a plaintiff to maintain an action against two or more parties for conspiring to do and actually doing some unlawful act to his damage; but the Courts, so far as we are aware, are unanimous in holding that confederation and conspiracy are not actionable unless something in pursuance of the common plan is actually done, and the thing done results in injury to the plaintiff, and the facts constituting this injury, and the damage resulting therefrom must be alleged."

In Brackett vs. Griswold, 20 N. E. Reporter, 376, the Court of Appeals of New York says:

"The allegation that there was a conspiracy to commit the fraud does not affect the substantial ground of action. The *gravamen* is fraud and damage, and not the conspiracy. * * * But a mere conspiracy to commit a fraud is never of itself a cause of action, and an allegation of conspiracy may be wholly disregarded and a recovery had, irrespective of such allegation, in case the plaintiff is able otherwise to show the guilty participation of the defendant."

In Stevens vs. Rowe, 59 N. H. 578, the Supreme Court of New Hampshire says:

"The wrongs claimed to have been done to the plaintiff, and not the conspiring to do them, are the foundation of the action, and the damage resulting from the unlawful acts must be alleged."

And by the weight of modern authority—English and American—it is well settled that at law, as in equity, a mere allegation of fraud in general terms, without stating the facts on which the charge rests, is insufficient, is shown by the opinion of Gray, Justice, in the case of—

Hazard *et al.* vs. Griswold, 21 Fed. 179–180,

which opinion was delivered with reference to a plea in that case alleging that a certain writing obligatory "was obtained from the defendant by the plaintiff therein, and others in collusion with them, by fraud, covin and misrepresentation, and that the said writing was executed in confidence of such misrepresentations." And thus we see that was a case parallel to this, except that in the case at bar, the 2d defense adds, to the general allegations of conspiracy, fraud, etc., specific allegations to the effect as applicable to evidence introduced, that the aforesaid dead body was not the dead body of Hillmon, but was in his lifetime by himself, Brown and Baldwin procured and presented to plaintiff in error for the purpose of securing payment of the policies and obtaining the money thereon—thus limiting those general allegations substantially and in practical effect to the question whether said dead body was that of Hillmon or not.

And that last cited case, as well as the cases of—

Paving Co. vs. Botsford, 56 Kansas, 541;
Gleason vs. Wilson, 48 Kansas, 500, 502;
Kellar vs. Johnson *et al.*, 11 Indiana, 337,

wherein it was sought to defeat a recovery on contracts lawful on their face by reason of general allegations of fraud, are specially applicable to this case at bar, because the question as to the meaning, force and effect, or rather, want of force or effect, of such general allegations, arose in those cases on alleged defenses of defendants in the trial courts.

And further, that the words "unlawfully and fraudulently, confederating, conspiring, contriving and intending to cheat and defraud this defendant"—plaintiff in error meaning—as stated in said answer in said second ground of defense therein, were and are mere surplusage, and irrelevant and

immaterial to the case, and were not even privileged matter, but on the contrary, were libelous, is shown by the case of—

Union Mut. Life Ins. Co. vs. Thomas, 83 Fed. 803–4–5,

and the several cases there cited, including one in this Court on principle applicable.

And further, the following list of cases as well as those cited *ante* respectively show that general allegations of conspiracy, fraud, etc., in a pleading do not amount to anything more than mere idle wind, further or otherwise than as connected with limited and explained by and applicable to specific issuable allegations of fact which, if true, would show that the party pleading the same was actually injured, and thereby suffered and sustained actual damage because thereof, to-wit:

Adler vs. Fenton, 24 Howard, 407, 410.
Findley vs. McAlister, 113 U. S. 114.
Savile vs. Roberts, 1 Ld. Raymond, 374.
Cotterell vs. Jones, 11 C. B. 713.
Shaple vs. Page, 12 Vt. 519, 533–4.
Easton vs. Patracy, 1 Dev. and Bat. 44.
Kimball vs. Herman, 34 Md. 407.
Loverty vs. Van Arsdale, 65 Penn. St. 507.
Parke vs. Huntington, 2 Gray, 124, 127–8.
Herron vs. Hughes, 25 Cal. 556.
McHenry vs. Sneer, 56 Iowa, 649.
Page vs. Parker, 40 N. H. 47, and 43 N. H. 363.
Robinson vs. Parks, 24 Atlantic, 411; s. c., 76 Md. 118.
Maxwell L. G. Case, 121 U. S. 380, seven lines at bottom of page,

and by those seven lines, as well as by the other first herein before cited cases in relation to said second defense, this Court has decided, and it is shown (in conformity with the decisions of other courts above cited in relation to the matter of that defense) that unless there be such resulting injury, the alleged conspiracy, fraud, etc., is utterly immaterial; which as applicable to this case is equivalent to a decision, that if the aforesaid dead body was the corpse of Hillmon, that then all of

the allegations in said second defense about conspiracy, conspiring, contriving and intending to cheat and defraud plaintiff in error were immaterial, false and untrue, this because, as shown by above cited cases, the general allegations about fraud and conspiracy in that 2d defense were limited to the specific fraud charged, that is, to the presentation of a dead body other than that of Hillmon, claiming it was his dead body—and amounted to nothing further than as they were so limited, and referred to the specific fraud charged, which, in substance, was that the dead body claimed to be that of Hillmon was not his corpse.

And further, we submit that the only legitimate object or use of such general allegations of conspiracy, etc., in a pleading in a civil action or suit between private persons, as distinguished from criminal prosecutions on the part of the State, is, with the help of other allegations stating facts, showing the party, and how the party pleading had been injured and sustained damages because of the wrongful conspiracy and intent alleged, as against persons defendant in the action, who, but for such conspiracy, would not be liable for or because of the alleged facts which stated the injury received; and also, that a private party to a suit cannot be heard to complain of, or be permitted to prove, any alleged conspiracy unless by allegations first and by evidence at the trial such party proves it or he was injured by such alleged facts, and that such party cannot recover or obtain relief, remedy or damages further or other than as and to the extent it or he, by such allegations and proof, shows it was actually wronged, and sustained damages because of the alleged wrongful intent and execution thereof. And in such cases the combination or conspiracy is not the *gist* of the action, but is mere surplusage intended as a matter of aggravation, and cannot serve as a basis of *recovery* or *defense*, but is simply a *string* or *means* by which, if proven by proof of wrongful special acts alleged, to hold some one or more person party to the action liable to the injured party for the damage sustained because of wrongful acts done. (Porter vs. Mack, 40 S. E. 459, 463, and authorities there cited.) And that such general allegations of conspiracy, etc., are without

force or effect, as made in this case in a civil action on a lawful contract to defeat a recovery thereon, is, we submit, established by so many and such numerous authorities, including text-books and reports, that it is not necessary or appropriate to cite any to that point, other than such as we herein do with reference to the force and effect of the 2d plead defense, including those hereinbefore cited, and—

Porter vs. Mack, 40 S. E. 459, 463, and cases there cited; s. c. 50 W. Va., 581.

6 Am. & Eng. Ency. of Law, 873–4 (2d ed.)

4th Ency. of Pl. & Pr., 738–9, Sub. 4 and notes, and cases there cited.

For a late case on this subject, see also—

Commercial Union Assur. Co. vs. Shoemaker, 88 N. W. 156, 158, and the cases there cited.

And by examination of the aforesaid pleadings and the sections of statutes and decisions and authorities above cited, it is seen and made plain and certain that so far as matter of fraud, intent or conspiracy was or is concerned, the disputed facts were merely and only as to the question whether the herein mentioned dead body so as herein shown, brought from Barbour County to Lawrence, reaching Lawrence on the 3d of April, 1879, was the dead body of John W. Hillmon or not. And on the issues made the case was tried.

Such as alleged fraud, conspiracy, etc., could not have been practiced or consummated by John W. Hillmon and others, if the dead body herein mentioned was his corpse; and it is entirely certain that if said dead body was the corpse of Hillmon, that then and in such case the supposed acts and facts plead by plaintiff in error as the acts and facts DONE FOR THE PURPOSE OF CONSUMMATING SUCH AS ALLEGED CONSPIRACY, were and are utterly and entirely *false* and *untrue*.

And from the issues so made, as illustrated and explained by the above quoted sections of statute, and the cases and authorities cited, it is evident and certain, beyond cavil or room for dispute, that plaintiff in error did not, in or by its said answer, allege any fact or facts which, if true, would

have shown that the policy sued on was void when made, or at all, because of any intent at any time of or on the part of either John W. Hillmon or of any person or persons, as the allegations made only went to defeat a recovery on the policy, conceding it to be valid, and that the only evidence that was or would be competent on the issue made in part by that 2d plead defense, was as to whether said dead body was that of Hillmon or not, because if that dead body was the corpse of Hillmon, then that 2d defense was false, and if it was not his dead body, defendant in error could not recover, whether there was or was not any conspiracy.

And therefore it follows that notwithstanding however interesting it might be to investigate or determine as to what plaintiff in error might have plead in relation to the matter of any such supposed conspiracy, fraud or intent, yet as it *did not* plead facts, which, if true, would have rendered that policy void when made, it is not *now* relevant or material in this case to consider or determine any question raised by the aforesaid sixteen assignments of error, Nos. 64 to 72, 87 to 92 and 106, or any thereof, because there was not any issue in the case under or because of, or as to which any of the rejected testimony or refused instructions, or instructions given or mentioned in any of those several assignments of error, were admissible, competent, appropriate or applicable; and we submit the foregoing shows the rulings and action of the Court in relation to the matter of those assignments of error, was correct and not erroneous, irrespective of any other reason why its action and rulings in relation thereto were proper and in accordance with law, and therefore not erroneous.

In this connection and to show that defendant in error did not either lose or waive anything by not moving to strike out any of the words in said second defense, see—

Miller vs. Brumbaugh, 7 Kansas, 353-4.

1 Greenleaf on Ev., Sec. 51.

21 Ency. of Pl. and Pr., 257 etc., title, surplusage, subdivision (3) At Trial—General Rule—and note 2, and cases therein cited.

ALL CONSPIRACY QUESTIONS ELIMINATED FROM THE CASE BECAUSE OF WHAT PLAINTIFF IN ERROR DID AT THE TRIAL.

And further, after the evidence was all in, and it was time for parties to present to the trial court such instructions as they respectively desired to have given to the jury, plaintiff in error asked that Court to instruct the jury, as shown by its asked for instructions Nos. 1 and 28, referred to herein near the commencement of the stating part of this brief, and as shown at r. 1904, 1909, 1996, 2003, and thereby in effect requested the Court to ignore the conspiracy, fraud and intent question (as we see from the cases cited it ought to), and thereby, among other things, not necessary to consider in this connection (but as to which see what we hereinafter say in relation to assignments of error Nos. 85 and 99, respectively, where it is shown the parts of those instructions not given were not proper to be given to the jury), requested the Court to instruct the jury to the effect that the real question (meaning of course the matter in controversy in the case) was whether the aforesaid dead body so as aforesaid brought from Barbour County to Lawrence in April, 1879, was that of John W. Hillmon or not, and the Court *adopted such request* of plaintiff in error and instructed the jury *accordingly*, as shown at r. 1917–18–19, 1921; of course, *such* could not, and would not, have been the *real question* in the case as stated, in and according to the meaning of those two asked instructions, if the claimed question or legal points about conspiracy, plaintiff in error, in disregard of what it so did now urges herein, had not been by it abandoned, nor *unless* the jury ought *to find* for defendant in error if that dead body was the corpse of Hillmon, and for plaintiff in error if it was not.

And by requesting the trial court to so instruct the jury, plaintiff in error showed that it thereby conceded, and also then at the trial construed the issues made as aforesaid, and asked the trial court to consider and construe those issues to be in legal effect and substance such, and as we herein above

claim the same to be (in conformity with the rules of law shown by the hereinbefore referred to cases on that subject).

And from all this it follows that plaintiff in error at the trial admitted and asked the Court to act, rule and instruct the jury on a basis, theory and view of the facts and law applicable thereto and construction of the pleadings and issues, which shows and demonstrates that the excluded evidence referred to in the aforesaid assignments of error Nos. 64 to 72 was not appropriate, admissible or competent under or because of any issue in the case, and that plaintiff in error could not properly at the trial ask the Court to *construe* those issues *otherwise* or *differently*, or to give the jury any charge or instruction *contrary to what it so asked, and the Court* accepted and adopted; and that it should not, and could not, in that Court, and should not in any court of review, or now here, be heard to claim either that the issues tendered, raised or made by that 2d supposed ground of defense, or the reply, so far as applicable thereto, was other or different than as we herein claim, and as it (plaintiff in error) *thus* conceded the same and asked the Court to construe the same to be; or that the trial court erred in or by so charging the jury as to that question, as it so requested; or that the Court erred in or by refusing to give any charge or instruction conflicting therewith—and if we are right in that respect, then we contend it cannot be heard on its assignments of error Nos. 87 to 92 and 106, or as to whether any of the instructions therein mentioned should or should not have been given to the jury.

And further, that a party cannot complain of an action done at its request, see—

Hale vs. Wilder, 8 Kansas, 541, 545,

and the numerous authorities to the same effect, and therefore, as plaintiff in error requested the Court by said first and twenty-eighth instructions, to direct the jury to dispose of the case by determining the question as to whose the aforesaid dead body was, we submit that it should be held that plaintiff in error by so doing *consented* that the Court so do, and waived a consideration of any other question of fact; and thereby, in legal effect, withdrew its request to give any

instruction on the conspiracy question, operative as such withdrawal when the Court instructed the jury to find their verdict according as they should determine the question as to whose the dead body was.

And we submit that having so requested the trial court to so instruct the jury, plaintiff in error cannot, in this Court, be heard to say or claim that the trial court erred in so charging the jury; or that it should have given the jury any instruction which, if given, would have confused the jury on that point, or have, in any manner, conflicted with the said parts so adopted of those two instructions Nos. 1 and 28—this because a party *is bound by such theory* of the case as the Court *adopts* at *its request.*

New York, &c., Railroad Co. vs. Estill, 147 U. S. 592 (2nd Syl. on that page).

L. N. & S. Rly. Co. vs. Curtan, 51 Kansas, 432, 438.

21 Ency. of Pl. and Pr., 666, 667, 668, 669 and cases there cited.

Walton vs. Chicago, St. P., M. & O. Ry. Co., 56 Fed. 1006, 1008, and cases therein cited.

Badger vs. Johnson-Fife Hat Co., 85 Fed. 408.

Union Pac. Ry. Co. vs. Harris, 63 Fed. 801–4, and cases there cited.

Leonard vs. N. E. Mut. Life Ins. Co., 48 Atlantic, 808.

And those authorities are in line with an ancient maxim to the effect that "he is not to be heard who alleges or claims things contradictory to each other," found in Broom's legal maxims in the Sixth American Edition from the Fourth London, at page 130; and in relation to which matters contradictory we refer in this connection to the hereinafter cited case of

Losch vs. Pickett, 36 Kansas, 222,

and other cases therewith hereinafter cited which, as applicable to the question now under consideration, are to the effect that under the practice in Kansas (which, because of Section 914 R. S. of Congress, 1878, was applicable to the

proceedings in the trial court) plaintiff in error could not be heard or permitted to ask, claim or assert matters contradictory, or to have conflicting rules of law laid down to the jury for their guidance by asking the instructions it did about conspiracy; and as to what the real question in the case was, plaintiff in error asked the Court to contradict itself, but the Court refused so to do, but gave those of the instructions asked by plaintiff in error which, as we have before seen, conformed to the issues in the case, and were in accordance and practically universally recognized as shown, with the rules of law enunciated by the authorities above cited on the question in relation to conspiracy.

And further, Plaintiff in Error, by asking those Instructions Nos. 1 and 28 to be given to the jury, requested and consented that all issues and questions of fact be disregarded and eliminated from the case, except the single question as to whether the dead body was the corpse of Hillmon or not, and that the verdict be found according as the jury should determine that single question of fact.

And therefore, plaintiff in error cannot now in this Court be heard to complain of any part of the charge given by the Court to the jury, or of any refusal of the Court to give to the jury any refused instruction in relation to any other matter or question of fact in the case, no matter what other questions or issues there were in the case, or how made, or raised, or what testimony, or want of testimony, in relation thereto, there actually was, or was claimed to be, or as to the law applicable to any other question of fact in the case other than the single one, as to whether said dead body was that of Hillmon or not. As to this, in addition to the authorities above cited, see particularly—

21 Ency. of Pl. and Pr., 667–8, Sub. 5 and notes.

Arkansas City Canning Co. *et al.* vs. Dunston, 64 Pacific, 1025–6 (a Kansas Supreme Court case).

This because the whole case was thus narrowed and brought, at the request of plaintiff in error, to that one point and question, that is, as to whether said dead body was that of Hillmon or not; and as that was a question of fact for the jury to determine, we submit the case should be left as the jury determined that matter by finding the verdict it did, which was to the effect—as applicable to the case, evidence and said requested instructions Nos. 1 and 28—that said dead body was the corpse of Hillmon.

Present Claim of Double Defense Pleaded and Numbered Only as One.

As we understand plaintiff in error from what it said in its petition for a writ of certiorari and brief in support thereof, it intends to claim here and ask this Court to rule that in and by the aforesaid second ground of defense it had *deep buried*, and pleaded a second, other and further unnumbered ground of defense, to the effect that its aforesaid policy of insurance so sued and recovered on was always void, that is, was void from the time it was made, and was not ever a valid or existing contract, because it claims that in that second ground of defense it plead that John W. Hillmon, Levi Baldwin and John H. Brown conspired to procure, and procured, that policy with a fraudulent intent on their part to cheat and defraud plaintiff in error out of the amount thereof, and that it was not and is not material whether the aforesaid dead body so brought from Barbour County to Lawrence as aforesaid was that of Hillman or not, or whether he was alive or dead, or if dead when or how he came to his death, but that all such matter about his death, or whether he was dead or not, was entirely immaterial as to the matter of such now claimed defense.

In other words, we submit that plaintiff in error is now here seeking to obtain a decision of this Court to the effect that without having made appropriate allegations to entitle it thereto, it could and should have been permitted to introduce the excluded evidence, and also that without requisite and appropriate allegations or evidence it was entitled to

such refused instructions, as to all which we submit plaintiff in error is wrong.

That such intent, even if alleged and proven, would not constitute a defense to the action is shown by the numerous cases to the effect that an intent on the part of one party to a contract to not perform or abide by, or to act contrary to the express or implied provisions or conditions thereof, will not vitiate the contract unless followed by actual injury resulting and accruing to the other party thereto in pursuance and as a consequence of carrying into execution such intent.

And the cases and authorities hereinbefore cited in relation to the matter of said 2nd plead defense, show the same rule, and that to make any such supposed intent material, facts must be alleged and proven showing that injury resulted and accrued to plaintiff in error because of such supposed intent, and that mere general allegations of fraud and conspiracy, unless accompanied with allegations of facts sufficient to show the alleged fraud and conspiracy, and resulting injury to plaintiff in error, in pursuance and as a consequence of such intent and execution thereof amount to nothing.

SAID POLICY AND THE CONTRACT THEREBY SHOWN WAS A LAWFUL CONTRACT.

And it is not claimed by plaintiff in error that the policy was issued in consequence of any false representation, or that any statement in the application therefor was untrue, nor that Hillmon came to his death because of, or in pursuance, or as the consequence of carrying into execution any alleged or claimed intent or conspiracy, but, on the contrary, alleged he was living; and therefore we submit that the numerous cases referred to in the brief of plaintiff in error in support of its application for the writ of certiorari, and which we suppose it will cite in such brief as it may file herein, are not in any manner in point or applicable to this case in any view that can be taken of it, this because cases

showing that a policy can be defeated *if certain* statements made in the application for a policy are untrue, or *if* there is a breach of certain warranties, or *if* a policy is obtained with intent to *commit suicide* on the part of the insured, and that the insured in pursuance of *such intent* commits suicide, as was alleged in said suicide cases as we understand them, that then the policy can be avoided, are not in any manner applicable to this case. If plaintiff in error had for a fourth defense, or in said second defense in addition to the allegations therein, plead that John W. Hillmon came to his death by *suicide or otherwise in pursuance of* and *to execute and carry out an intent on his part* existing at the time the policy was applied for and issued, *the case would have been entirely different;* and if it had in such supposed fourth defense so plead that Hillmon so came to his death, *the issues* would have been *entirely different* from what they were and are, and it would then, notwithstanding its general denial in its said answer and such second defense as it actually plead, *have stood for t ue*, and been *admitted* in and by the pleadings that Hillmon *was dead*, and not alive, that is, such suggested and supposed fourth defense in that case would have been the reverse of the second defense it actually plead, and defendant in error would not have been required to have introduced any evidence to prove that Hillmon was dead.

We see by reference to the above mentioned Section 84 that parties are required to state the *facts* constituting their respective claims and defenses.

And if plaintiff in error had in its said answer in or by such suggested and supposed fourth defense, or by allegations further and other than any actually made in that answer, alleged that Hillmon came to his death in pursuance of and to execute and carry out any such intent, then such allegation of Hillmon having so come to his death by suicide, or intentional killing, accidentally or otherwise in pursuance of such intent, would have dispensed with proof of the death of Hillmon, and been an admission against the whole answer, leaving it for true that Hillmon was dead, because under the laws of Kansas in relation to the rules of

pleading a fact admitted, that is an admission in *any* part of an answer, is good against any other part thereof, that is, against any other part of such answer, which rules of pleading were and are applicable to the Federal Courts in Kansas, and that such is the rule of pleading and would be the effect of pleading such two irreconcilable propositions, as that Hillmon so came to his death, *and was also alive and not dead*, see the following cases decided by the Supreme Court of Kansas:

Wiley vs. Keokuk, 6 Kan. 94.
Butler vs. Kaulback, 8 Kan. 668.
Yandle vs. Crane, 13 Kan. 346.
B. of E. vs. Shaw, 15 Kan. 41.
Ballinger vs. Lantier, 15 Kan. 611.
Bierer vs. Fretz, 32 Kan. 337–38.
Meixell vs. Kirkpatrick, 33 Kan. 295.
Losch vs. Pickett, 36 Kan. 222.
Tweedell vs. Warner, 43 Kan. 603.

And of course those Kansas cases are conclusive in this Court and were conclusive in the trial court as to the rules of pleading and evidence. (Sec. 914, R. S. 1878.)

In the opinion of the Supreme Court of Kansas in the case of Losch vs. Pickett, 36 Kansas, 222, the following language is used:

"A thing cannot be true and untrue at the same time; and any pleading containing allegations made by the same party, both affirming and denying a particular thing, carries falsehood upon its face." (Butler vs. Kaulback, 8 Kas. 668, 671 to 673; Wright vs. Bacheller, 16 id. 259; Wiley vs. Keokuk, 6 id. 94, 105.)

In consideration of the above cited cases which show that general allegations of conspiracy and fraud *are without legal effect*, at least are *not allegations of any facts or statements under which proof or evidence can be given*, and are mere surplusage; and further, considering that plaintiff in error only plead in substance that Hillmon was alive and not dead, and that *he, a living man* with others *pretended* to plaintiff in error that the aforesaid *dead body* was his, as its claim of the

facts done, constituting conspiracy, fraud, etc.; and further, considering the aforesaid sections of statutes and the decisions of the Kansas Supreme Court in relation to contradictory allegations in the same answer, we submit that plaintiff in error did not (even if it could have) in its said second ground of defense plead a double defense, or two defenses, it certainly it did not therein plead any defense, to prove which would bar the action, if the aforesaid dead body was the corpse of Hillmon.

The fact that the policy sued on contained the clause or condition set out at r. 6, 7, has no bearing upon the question discussed, for the reason already several times pointed out, that the pleadings in the case do not allege any breach of said conditions or set up any facts showing that the plaintiff in error was entitled to avail itself of any breach of said conditions.

And further, if instead of pleading such supposed 4th defense, plaintiff in error in its 2d defense, in addition to what it did allege therein, had also alleged the matter of such supposed 4th defense, it is apparent that it would not, by so doing, have escaped any of the consequences of making such allegations in such supposed 4th defense, but would have only in closer connection have shown it was admitting its allegation that Hillmon was still alive, was untrue—all which we submit shows the absurdity of plaintiff in error's now claim, to the effect that it had any defense plead in that 2d numbered defense other than one to the effect that Hillmon was not dead.

And further, in this connection we request attention to the last clause in the aforesaid Section 94, which is to the effect that each defense must be separately stated and numbered; and as plaintiff in error stated all the allegations it made about fraud, conspiracy or intent in one ground of defense, under a single number, it surely ought not now to be heard to claim or urge that it in or by its 2d defense stated, or intended to state, anything in conflict with its allegations therein, or that it had two defenses therein alleged, one hidden—not even conceived—until recently, but to bring which forth it is now struggling, in the face and contrary to the

allegations therein and also contrary to the purport and effect of the cases and authorities hereinbefore cited in relation to the matter of that 2d defense.

And if plaintiff in error, when it filed that answer, had intended to plead two defenses in that 2d ground of defense, or supposed it had, it would certainly have stated and numbered them separately, surely it would not have left the two in a singly numbered defense, in which the *only issuable* and *provable* facts alleged were to the *effect* that Hillmon was *alive* and not dead, and to have met such issue as plaintiff in error would now like to have this Court interpolate into and construe said 2d defense to contain, would have required additional proof on the part of defendant in error to meet, if plaintiff in error could have made a *prima facie* case supporting such not plead defense.

And if there is any doubt about that matter of, or as to, the meaning and true construction of that 2d ground of defense, we refer to the rule of law that a pleading must, where there is doubt as to its meaning, be construed most strongly against the party whose pleading it is.

4 Ency. Pl. and Pr., 759, and notes.

IMAGINARY DEFENSE.

And further, we see from the authorities above cited, as well as by the plain language of the 2nd defense, as any one learned or unlearned in the law would understand it, plaintiff in error made and limited the issuable allegations therein to be, and to depend on, the question as to whether the herein mentioned dead body was the corpse of Hillmon or not, but notwithstanding it so did, *it now in substance* and *practical effect asks* this *Court* to *consider* and *construe* that 2nd ground of defense as though all and the only issuable allegations therein were struck out thereof, and only the surplusage and immaterial matter of aggravation about conspiracy, etc., left therein, and that although if that had been done in the trial court, and if this Court would now here consider those issuable allegations struck out thereof, we see

from the above cited cases and authorities, that then it could not introduce evidence under or because of what then, after such striking out, would be left therein, yet it asks this Court to ignore and disregard the above cited and referred to cases and authorities and rules of law, in relation to pleadings and evidence, and consider and decide this case and its aforesaid assignments of error, Nos. 64 to 72 and 87 to 92 and 106, and others of similar import, as though not only the *only issuable allegations* in that 2nd ground of defense were struck out thereof, but also as though there had been, when said answer was filed in 1881, and ever since in lieu of such so stricken out issuable allegations, such *other* and *different* issuable allegations inserted and made therein as this Court can imagine (if any such there be), as would have made a defense, if proven, all which accommodation it asks without withdrawing those issuable allegations, *really therein* to the effect that Hillmon was still alive and not dead, and notwithstanding it tried the case, and asked instructions on the theory that there was a question made by it as to whether the aforesaid dead body was that of Hillmon or not, and however much it might be appropriate to turn investigation of some cases into moot court proceedings after the pleadings are filed, we submit that it ought not to be done to such extent as asked for by plaintiff in error herein in relation to the matter of the excluded evidence and those refused instructions, and said as pleaded 2nd defense.

And Further, in Addition to What We Elsewhere Herein Say With Reference to the Excluded Questions and Testimony Referred to in Said Assignments of Error Nos. 64 to 72 Respectively, Relating to Witnesses Phillips, Blythe, Crew and Carr on the Conspiracy Question.

Defendant in error does not directly or indirectly, for any purpose or in any manner, claim through or under Levi Baldwin, the person that plaintiff in error sought by the excluded evidence to show made certain statements. She does not

claim through Levi Baldwin, under or by virtue of any act, or saying of his, she is not in any manner or matter in privity with him. Plaintiff in error did not allege that defendant in error and Levi Baldwin were co-conspirators, and therefore we submit that all the excluded evidence was incompetent as against defendant in error as mere hearsay.

And as she does not claim through or under Baldwin any transactions between him and any others whether acts or talk ought not to injure her as is shown by the maxim that "a transaction between two parties ought not to operate to the disadvantage of a third," found in Broom's legal maxims, 704 (6th Am. of 4th London ed.)

That said supposed statements of Baldwin were mere hearsay and not admissible, see—

2nd Law of Evidence (by Jones) 673 to 681, Secs. 299 to 302.
1 Greenleaf on Ev., Sec. 124.

And in this connection we also refer to the fact that defendant in error does not in any manner claim under, through or in privity with John H. Brown, or any act or transaction of his, and that therefore irrespective of any other reason his narrative, written statement (r. 1284-6) was not evidence against her of anything therein stated, but was mere hearsay.

The words, "AND DIVERS OTHER PERSONS TO THE DEFENDANT UNKNOWN" in said second ground of defense cannot be held to have applied to defendant in error because she certainly was known to it, it had issued said policy to her, she had sued it thereon before said answer was filed, and, therefore, it is conclusive that plaintiff in error did not by use of those quoted words in that pleading mean to allege that she was a party to any conspiracy or fraud.

It was not in said answer alleged that defendant in error was a party to any conspiracy. (R. 18.) In the opening statement to the jury it was not, by plaintiff in error, claimed she was party thereto. (R. 138.) At the trial plaintiff in error conceded it had not alleged she was, by asking leave to amend so as to allege she was, so as to introduce a new issue into a case long pending. (R. 1619.)

The opening statement at record 138, is, we submit, conclusive against plaintiff in error that it did not claim and went into the trial on the proposition and statement to effect it did not claim that defendant in error was party to any fraud or conspiracy.

Lindley vs. R. R. Co., 47 Kansas, 432.
Oscanyan vs. Arms Co., 103 U. S. 261.

And further during the trial plaintiff in error further conceded it had not alleged that defendant in error was party to any conspiracy or fraud, (to-wit: that of trying to palm off the dead body of another for that of her husband) by asking leave to amend its answer, so as to allege she was (r. 1619). And of course the Court at that late day, eighteen years after that defense and answer had been filed, and in view of said opening statement, properly refused to grant such leave backed as it was by the further fact that there was not any evidence showing she was ever a party to any conspiracy or fraud; and further as to that matter, we here refer to the hereinafter part of our brief which relates to assignment of error No. 73, relating to the matter of that refusal as though here repeated in appropriate form.

Therefore the law about what co-conspirators say whilst engaged in a conspiracy was not applicable in this case as to anything Baldwin could have said at any time or under any circumstances, and therefore, irrespective of any other reason, we submit the Court properly excluded the offered evidence.

And further, that the excluded statements of Levi Baldwin were not competent against defendant in error under any rule of law in relation to conspiracy (and the same objection is good against the written statement), see the cases of—

The State vs. Johnson, 40 Kansas, 268.
Logan vs. U. S., 144 U. S. 309.
Conn. M. Life Ins. Co. vs. Hillmon, 107 Fed. 839.

None of them were made, or claimed to have been made, in or about or to carry out anything which could have hurt plaintiff in error, but were merely *idle talk*, *hearsay*, etc.

The contract of insurance was a lawful contract. Plaintiff in error issued the policy sued on after and when it knew that thereby it insured the life of Hillmon for the last $5,000 of the total insurance on his life, as his application, set forth at r. 180, etc., showed; and after through what A. L. Selig, its agent to procure that last insurance and the premium paid therefor (r. 1496, 1524), knew and had notice plaintiff in error had been for months negotiating with Hillmon to procure premiums for such insurance as shown by that policy, and that it only got opportunity so to do (to get such premium) because Hillmon was not willing to accept a policy in an accident insurance company, which by its terms prohibited Hillmon from carrying fire-arms, and riding fast after stock, all as shown by the testimony of A. L. Selig at r. 1496 to 1526.

And we submit there is not any rule of law entitling plaintiff in error to any of the excluded evidence to prove any allegation by it made, or to disprove any allegation made by defendant in error, even if it had alleged she was a party to a conspiracy. What those allegations were, how the pleadings were to be construed, and the meaning and effect of the language used therein, is shown by hereinbefore cited cases, and we submit that the excluded evidence was utterly and entirely incompetent, hearsay, and not in any manner relevant to any issue in the case.

And further, there was not any competent evidence as against defendant in error, of any conspiracy, offered.

That the written statement (r. 1284–6) was not competent evidence against her to show a conspiracy, or for any purpose, we refer to what we herein say in relation to assignment of error No. 105, particularly to the subdivisions thereof, which show reasons why that written statement was not evidence competent to prove conspiracy or anything against defendant in error because of the wrongful acts of plaintiff in error and its assistants and agents, by which it procured the same for wrongful uses and purposes, as well as because of the time when it was procured—long after the dead body was buried—which shows that the written state-

ment, even if it had not been false, only pretended on its face to be a narrative of past transactions, and was merely hearsay.

In this connection we refer to what we hereinbefore say about that paper not being evidence against defendant in error, and the cases on that subject we cite in relation to the matter of assignment of error No. 105.

And further, the testimony offered and excluded, which is referred to in assignments of error, Nos. 64 to 72, was properly ruled out, because it consisted of hearsay and conclusions, and did not come within the rule, that declarations of alleged co-conspirators in futherance of the conspiracy, are admissible, as well as for the many reasons before urged, also because plaintiff in error had not alleged that defendant in error was a party to any conspiracy, or introduced evidence competent against either her or John W. Hillmon, showing that either had done any unlawful act, or any lawful act in an unlawful manner, or any act connected with insurance matters, other than to pay for and receive policies of insurance, which it was lawful to do, and the premium for which, as to the policy sued on, plaintiff in error still holds, and we submit that a mere glance at the testimony ruled out is sufficient to show that it was inadmissible for any purpose, in fact was not evidence at all, but mere rumor and hearsay.

In order to make the declarations of one alleged conspirator (not a party to the suit) admissible against his alleged co-conspirator, who *is* a party, the conspiracy must first be clearly shown *aliunde*. The rule is different perhaps where all of the alleged conspirators are parties, for in such case it has been held that the admission of each conspirator may be introduced to prove the conspiracy as to him (Baldwin was not party to the suit).

In this case it is not alleged that the defendant in error or any party to the suit was a conspirator, but it was attempted to introduce as against the defendant in error the declarations of third persons to prove that such third person and other third persons were co-conspirators. The declara-

tions of co-conspirators, to be admissible against other than the one making them, must of course be made in *furtherance* of, and not in frustration of the common object, and the existence of the conspiracy cannot be shown by the admission or declaration of one conspirator. (1 Jones on Evidence, Sec. 255.)

If such be the rule as applied to those alleged to be conspirators, upon what principle could the declaration of Levi Baldwin to Crew and others be introduced against defendant in error, who is not alleged to be a conspirator? It requires a very active imagination to see anything in the alleged conversations between Levi Baldwin, Crew, Dr. Phillips, Blythe or Carr, as set out in the brief of plaintiff in error, pp. 37 to 42, that can be characterized as "in furtherance" of a conspiracy. Certainly the statement by Baldwin to Crew that he had furnished money to insure Hillmon's life is mere narrative and hearsay, and not in furtherance of a conspiracy, even if it were conceded that a *prima facie* case of conspiracy had been proven, which we deny.

The rule as to such declarations seems to be well stated in the case of State vs. Johnson, 40 Kansas, 268, as follows:

"To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common criminal design. Mere admissions or narrations of what has taken place, which have no tendency to promote the common criminal intent, are inadmissible against anyone but him who made it.

"When the conspiracy has ended, or the crime involving conspiracy has been consummated, the admission of one in the absence of the other conspirators that he and others participated in the crime is a mere narrative of a past occurrence and can affect only the one who makes it," citing numerous authorities, and as such declarations would not be competent evidence as against one alleged to be a co-conspirator, for a much stronger reason such declarations would not be competent against a party not charged to be a member of the alleged conspiracy. We insist that all of the evidence excluded by the Court, the exclusion of which is complained of, was prop-

erly excluded for the reason that the same was hearsay and otherwise inadmissible against the defendant in error for the reasons above given.

We have before urged that the whole of the matter, pleadings, evidence and instructions, relating to any claimed conspiracy, was immaterial and not relevant to any material issue, and that the allegations in the answer of a conspiracy were immaterial matter. That we are correct as to this as applicable to Baldwin's idle talk, see the case of—

Union Mutual Life Ins. Co. vs. Thomas, 83 Fed. 803 804, 805,

and the other cases here before referred to in relation to the matter of the second defense pleaded in the answer.

If the dead body brought to Lawrence in April, 1879, was the corpse of John W. Hillmon, then the insurance companies were not harmed by any conspiracy, even if there had been one, and the jury by their verdict determined that it was.

And further, for reasons before shown, the law about what co-conspirators say whilst engaged in a conspiracy was not applicable in this case as to anything Baldwin could have said at any time or under any circumstances.

But further, as to the rejected evidence of Phillips, Blythe, Green and Carr, neither the time of the talk with either of them, nor the circumstances under which the same is claimed to have occurred, was such as to have made anything said by Baldwin in any such talk, competent or admissible against the defendant in error, even if requisite allegations to make proof of conspiracy admissible had been made in the answer, and particularly is this true in the light of the company's answers and its admissions made in its opening statement to the jury, which exonerate Mrs. Hillmon from being a participant in any conspiracy; and even if she had been alleged to have been one of the conspirators, this testimony was not competent or admissible as against her, because it did not pretend to be statements made in the furtherance of any conspiracy, or while it was being carried on, or in any wise connected with any, and, as already stated, the rule invariably is

that it isn't every remark or statement made by a conspirator that is competent as against his co-conspirators, but only such things as are said in the furtherance of the conspiracy, or in carrying it out, or that is in some way incident to it.

As to the excluded testimony of Crew, whom it is claimed would have told about some alleged debts that were owed by Baldwin, it may be also said that it was an attempt, on the part of the company, to prove the contents of papers, notes, mortgages and other written evidences of indebtedness by oral and incompetent testimony, incompetent because it was not the best evidence.

If the contention of plaintiff in error in this particular was correct, then Mrs. Hillmon must be held responsible for and her rights may be affected by, every word that Baldwin or any man plaintiff in error might have chose to allege was a conspirator, may have said to any person, and under any circumstances between the fall of '78 and the spring of '79. Such a contention, we respectfully submit, is erroneous, because if the sum total of many men's statements made in the course of six or eight months were gone over and every word culled out that might be distorted into evidence of a conspiracy, then almost any sort of a conspiracy could be proven from the utterances of almost any man. It would not require the ingenuity of learned counsel to make from the fragmentary remarks of almost anybody, during the course of many months, a Mosaic that would contain any design that the artist might require. And neither defendant in error or John W. Hillmon were any more responsible for the utterances of Levi Baldwin than of any other man, neither acted or claimed under, through or with him, in any matter or manner. It is not even pretended either was present when Baldwin is claimed to have made the excluded statements, nor was he then acting with or for either of them in any manner or matter—but the same were conversations merely between strangers to the suit, and also strangers to the contract sued on, none of them interested in any manner in the litigation or result of the suit; defendant in error does not in any manner claim under or through Baldwin or any act of his.

It is not even shown that the conversation was had whilst anything was being done by Hillmon or defendant in error about procuring the insurance, and it is impossible to imagine how anything Baldwin is claimed to have said to Dr. Phillips could have been in furtherance of or could have promoted any conspiracy.

As before shown, Hillmon was proposing to go into stock ranching business. Levi Baldwin, shortly after the death of Hillmon, went into similar business (r. 716 to 719); whether he alluded to such business in his talk with Carr, is perhaps not necessary to guess on.

And surely it was not competent to prove by conversation between Baldwin and Crew that Baldwin had previously paid part of the premiums; that would be narrative of past transactions.

40 Kansas, 268, and the other cases herein cited in relation to hearsay and narratives.

And also that it was not competent to prove by anything he said that he was or had been agent of defendant in error. Agency cannot be thus proven.

Donaldson vs. Everhart, 50 Kan. 718, 724.
Railway Co. vs. Kinman, 49 Kan. 631.

And, of course, it was not competent to prove by oral evidence that Baldwin had made such notes, mortgages or other papers as mentioned by Crew in his deposition.

PLAINTIFF IN ERROR HAD FULL OPPORTUNITY TO CROSS-EXAMINE BALDWIN AS A WITNESS, AS SHOWN BY THE RECORD, 684 TO 719; it was competent to have asked him by way of effort to impeach him as to anything he might have said to either Crew, Dr. Phillips, Blythe or Carr, unless his answers, whatever they might have been, would have been conclusive, because relating to a matter irrelevant and collateral and, therefore, conclusive.

1 G. on Ev., Sec. 449,

and then, if he had denied, etc., plaintiff in error could, if the same was material to the issues, have called Crew, Dr. Phil-

lips, Blythe and Carr to prove he said so-and-so, but plaintiff in error did not choose so to do, or to allege that defendant in error was a co-conspirator when it filed its answer.

And further, any claim plaintiff in error may make to to the effect that the Court *held* there was a *prima facie* case of conspiracy shown—as against defendant in error—is rebutted by what the Court charged the jury in that part of its instructions contained in the paragraph or subdivision thereof, partly on each of pages 1920–1921 of the record.

Plaintiff in error and its associate insurance companies having alleged conspiracy of Hillmon, Brown and Baldwin, the trial Court (erroneously, however, we claim) permitted in evidence every act and saying of John W. Hillmon, and of either John H. Brown or Levi Baldwin done or said in the presence of John W. Hillmon, thus giving the insurance companies the widest latitude on the conspiracy question it could, giving full force to any such claim made, because Hillmon had procured the insurance; but there was no competent evidence that Baldwin paid for or procured any of the insurance or helped so to do. And, also, admitted such other offered evidence as it deemed competent; merely stopped at such evidence as it thought not competent under the above mentioned issues, or because of some rule of law requiring exclusion.

And, further, there is not any evidence in the case that would be competent as against John W. Hillmon on any issue in any imaginable case that he was party to any such, as alleged, conspiracy; and for that reason, irrespective of any other, we submit all of the assignments of error relating to the conspiracy qnestion referred to in any specification of error, whether relating to evidence excluded or to instructions given or refused, are immaterial, and not matter of reversible error. Surely, unless there was evidence competent, as against Hillmon, of transactions occurring before the killing on 17th March, 1879, sufficient to prove he was a conspirator as alleged, we submit the whole alleged conspiracy matter is immaterial to the case as it now is here in this Court, and we submit the Court cannot find in the record competent

evidence sufficient to prove *prima facie* that Hillmon so conspired; and if we are right in that, it follows that all assignments of error which relate to any claimed conspiracy, should be disregarded or overruled.

LAWFUL CONTRACT.

The Court did not err in excluding any of the excluded evidence, even if we are wrong in claiming that because of many reasons herein urged it was incompetent and mere hearsay, and also not either competent, relevant or material under or as to the issues as made by the parties, because the contract of insurance was a lawful contract; it is not shown that defendant in error or that Hillmon ever did any improper act, or that either of them ever did anything in an improper or unjust or illegal manner; plaintiff in error received and retains the premium, and we submit there was not any error committed by the trial court other than such as it committed against defendant in error. The issue tendered by the second defense was fully tried, and found against plaintiff in error, on that plea as filed by it, construed by the Court as it asked the trial court to construe it, and we submit it is going beyond the limit of legitimate controversy and contention in and by now asking this Court to construe that second ground of defense as plead, to hold within its non-provable general statements consisting of surplusage and matter of aggravation, a defense that would entitle it to any of the excluded evidence, or to any of the refused instructions which relate to any supposed conspiracy question.

And that if plaintiff in error had wished to have raised in the trial court any issue that would have, if proven, vitiated the policy, either under the 1st condition in the policy (shown at r. 6–7) or for other reason, it should have plead the same, in due and proper form and taken the consequences, and not seek now to claim it had a defense in that subdivision of its answer *in conflict with what it alleged therein*, certainly not included within its allegations therein to the effect

that Hillmon was alive and not dead, and to which the general allegations of fraud, conspiracy and intent, were as shown by above cited cases limited.

INSTRUCTIONS REFUSED AND CHARGE GIVEN RELATING TO THE CONSPIRACY QUESTION.

As to refused instructions Nos. 36, 37, 38 and 47, mentioned in the aforesaid assignments of error Nos. 87, 88, 89 and 106 (r. 1997–8–9 and 2006), and as to so much of the instructions by the Court given to the jury as copied in assignments of error 91 and 92 (r. 1999, 2000), we submit that there was not any such exceptions taken as would entitle plaintiff in error to be heard here in relation to the matter thereof, as we have hereinbefore urged in our preliminary objections.

But if the Court shall overrule our objection as to that matter, then we submit that what we have hereinbefore said in relation to the issues in the case on the subject of conspiracy and fraud as to the meaning, force and effect of the second defense plead by plaintiff in error is a full and sufficient answer to those several assignments of error, but lest the Court should differ with us in that respect, then, if it does, we submit further in relation thereto that the Court did not err in refusing any of those instructions or in giving any mentioned instruction to the jury.

And as to each of those refused instructions we submit that as plaintiff in error by the herein before mentioned instructions Nos. 1 and 28 (r. 1904, 1909), ignored the conspiracy question, and thereby requested the Court to instruct the jury (among other things not necessary to consider in this connection, but fully argued and shown improper by what we say in relation to assignments of error No. 85 [r. 1996] and No. 99, [r. 2003], and which is here referred to so far as appropriate in this connection as though here repeated) to the effect that the real question was whether the aforesaid dead body was that of John W. Hillmon or not, and as the Court adopted that view and theory of the case, including construction of the pleadings, and as to what was in

issue in the case, as so requested by plaintiff in error, and as by those refused instructions Nos. 36, 37, 38, 46 and 47, a different and conflicting view and theory of the case, including construction of the pleadings of the parties, was asked by plaintiff in error, it cannot now be heard in relation thereto, because a party should not and has not a right to request a court to adopt at its request a view or theory of the case different and in conflict with such as it adopts at the request of such party, plaintiff in error in this case, and from that it follows that this case is now here to be considered the same as though those refused instructions Nos. 36, 37, 38 and 47 had not been asked for, or assignments of error Nos. 87 to 92 and 106 made or shown in the record at all—this because a plaintiff in error cannot be heard to urge a view or theory of the case which the case so as shown adopted as requested by it.

21 Ency. Pl. & Pr., 607–8–9, and cases there cited.

But in addition to the herein before urged objections to the matter of those refused instructions Nos. 36, 37, 38 and 47 respectively, we request the attention of this Court to further objections thereto, which of themselves, irrespective of anything before said, shows sufficient reason why it was proper and the duty of the Court to refuse to give the same to the jury.

ASSIGNMENT OF ERROR No. 87. (R. 1997.)

Relating to Refused Instruction No. 36. (R. 1911.)

An analysis of said instruction No. 36, and of the charge of the Court to the jury, will show that the plaintiff in error was not prejudiced by the refusal of the Court to give it, even if it had been sound, because the general charge of the Court, as shown at r. 1917–18, 1919, 1921, included so much thereof as could in any event be of use to plaintiff in error, and was much more favorable to it than the propositions embodied in the refused instruction, which was to the effect that if *all* of *four* principal propositions were true, viz: First, that if there was a conspiracy to *procure* and *present*

the dead body of a person *other* than that of Hillmon, and second, that if they did in fact produce a body *not that of Hillmon*, and falsely pretended that it was his body, and third, that *if the plaintiff knew* of the attempted deception and endeavored to further it, then fourth, that she thereby adopted such fraudulent acts and became a co-conspirator.

Now the Court eliminated the circumlocution, and instructed in its general charge that if only *one* of said propositions were true, viz: the second, that is, *if the body produced was not that of Hillmon*, then plaintiff could not recover, whether there was a conspiracy and whether she knew there was a conspiracy or not. (R. 1917–18, 1919, 1921.)

How can the plaintiff in error complain that the Court refused to give an instruction which directed the jury to find defendant in error adopted a conspiracy if all of three facts were proven, when the Court did instruct the jury to find for it if only *one* of such facts was proven.

And further, there was not in the aforesaid answer the pleading of plaintiff in error, on which the case was tried, any allegation that defendant in error *had been told* and *was informed*, and was *thereby notified* that Levi Baldwin, John H. Brown and John W. Hillmon had confederated or conspired together to procure from insurance companies policies sued on for the purpose and with intent to procure and fraudulently present to the insurance companies a dead body of another person than the insured as that of the insured, or that she knew of any such (pretended) attempted deception or fraud. And therefore there was no issue on such matter, as the Court was asked to instruct the jury concerning, by the instruction No. 36, and therefore it was proper for the Court to refuse that instruction, and also to instruct the jury as it did.

ASSIGNMENT OF ERROR No. 88. (R. 1997-8.)

Relating to Refused Instruction No. 37. (R. 1911-2).

That instruction No. 37 analyzed amounts to this: First, that if Hillmon, Brown and Baldwin formed a conspiracy to obtain a policy on Hillmon's life with the intent to produce the dead body of another, and second, that if "they procured and accepted said policy of insurance," then, third, that plaintiff could not recover "even though the dead body actually presented to the defendant was really that of said John W. Hillmon." Now this instruction in addition to other herein before urged objections thereto was faulty, and was properly refused for the reason alone that the second proposition had no basis or support in the evidence. There was no evidence tending to show that Hillmon, Brown and Baldwin "procured and accepted" the policy. Even if an inference could be drawn from any of the legal evidence (regarding it for that purpose as undisputed) that Hillmon obtained the policy with any such fraudulent design, which we deny, there certainly was no scintilla of competent evidence that the three jointly "procured and accepted" the policy. Such an instruction could not but be misleading, and suggest to the jury that they might draw upon their imagination rather than confine themselves to the testimony.

But the greatest vice in this instruction is that it is wholly outside of any issue tendered by the pleadings. To have given such instruction would have been to disregard the pleadings and submit to the jury a defense that had not been set up or presented by the answer, and as to that we refer to what we elsewhere herein say as to what the issues in the case were.

The answer of the defendant below sets up in defense a denial that Hillmon was dead, as claimed by the plaintiff, and charges that the body brought from Medicine Lodge and presented at Lawrence was a fraudulent substitution, and falsely pretended to be that of Hillmon.

The second paragraph of the answer of plaintiff in error analyzed and reduced to its lowest terms, amounts to this

and nothing more, viz: That which is simply equivalent to alleging that Hillmon was not in fact dead and nothing more. Does the second paragraph of the answer of the plaintiff in error (page 18) amount to anything more than a denial that Hillmon was dead? Does it perform any office that would not have been performed, or admit of any proof that would not have been admissible under an answer that simply denied the allegation in plaintiff's petition, that Hillmon was dead? We submit it does not.

During the twenty years of litigation never had it been claimed by plaintiff in error that the body was that of Hillmon, and that he had come to his death in an attempt to perpetrate a fraud upon it, but always that the body was not that of Hillmon, but was in fact that of one Walters, who had been murdered by Hillmon.

The verdict of the jury, in view of the instructions of the Court, necessarily implies that they believed and found that the body was that of Hillmon. How, then, can it have been material whether or not there was a conspiracy to produce a false body, in view of the allegation in the answer that the body produced was in fact a false body, and of the instructions of the Court that if it was a false body the plaintiff could not recover, whether there was a conspiracy or not.

The contention of plaintiff in error seems to be that where an act is claimed to have been done by a plaintiff which, if done by him, constitutes a defense to his action, that some additional force is given to an answer by not only alleging that the plaintiff performed the act, but that he conspired beforehand to do so.

We respectfully submit whether the allegation that Hillmon, Brown and Baldwin conspired to produce a false body, and did produce a false body, means anything more than that the body produced *was* a false body; and in this case whether it means anything more than that the body produced was not that of Hillmon or that Hillmon was not dead.

No notice had ever been given to defendant in error by the pleadings that the plaintiff in error would claim that the body produced, though that of Hillmon, came to its death

under circumstances that vitiated the policy, until after twenty years of litigation, in which every effort of the plaintiff in error had been directed to show that the body was that of Walters and not that of Hillmon. After this long period of litigation plaintiff in error seems to have lost confidence in its ability to ever convince any jury that the body was not that of Hillmon, and desired, without appropriate or necessary pleading or allegations in its answer, to inject an unplead defense by its instructions into the case, to the effect that if the aforesaid dead body was that of Hillmon, that he came to his death under such circumstances as to relieve the company from liability under its policy. As well might the Court have submitted to the jury a defense involving the theory that Hillmon committed suicide, or was killed in a duel, or in war, or insurrection, or in an affray provoked by himself, or in an attempt to commit burglary, murder or other felony, or that he was executed pursuant to a sentence of a court-martial, or that he came to his death by any other means or under any other circumstances that would avoid the policy, as to have submitted the defense embodied in plaintiff in error's special instruction No. 37. Not only was that defense not pleaded in the answer, but it was excluded by the answer, and wholly in contradiction thereof.

Nevada Co. vs. Farnsworth, 102 Fed. 573,

as shown by the cases hereinbefore referred to in relation to the matter of the meaning and proper interpretation of the 2d defense as pleaded.

If defendant had, in its answer, alleged that Hillmon came to his death while engaged in such scheme as mentioned in that 37th instruction, which would have been necessary before such instruction could be appropriate to any allegation or issue, the issues would have been entirely different. It would have then stood for true that Hillmon was dead.

And then, as herein before shown, because of the statutes, laws and rules in relation to pleadings, it would on the pleadings stand admitted by plaintiff in error that Hillmon was dead, notwithstanding its denials of the allegations in the

petition and reply or its affirmative allegations in the second defense that Hillmon was alive.

And further, in this connection, we request attention to what we have herein before said in relation to the 1st and 28th instructions asked by plaintiff in error, and the acceptance by the Court of the theory of the case which plaintiff in error requested it to adopt by giving so much of each of said instructions as was to the effect that the real question (then when the evidence was all in) was whether the aforesaid dead body was that of Hillmon or not.

Now to have instructed the jury as requested by said instruction No. 37 would have been giving conflicting instructions at request of plaintiff in error. Of course it would not have been proper for it to have so done.

And further, we claim the Court did not err against plaintiff in error in what it said about the conspiracy question; the conspiracy alleged was immaterial in any event. Certainly so if the dead body brought to Lawrence was the corpse of Hillmon.

ASSIGNMENT OF ERROR No. 89 (r. 1999)—Relating to Refused Instruction No. 38 (r. 1912); and

ASSIGNMENT OF ERROR No. 106 (r. 2006)—Relating to Refused Instruction No. 47 (r. 1915), further considered respectively and together.

The 38th special instruction, the rejection of which is complained of, should not have been given, because, among other reasons for rejecting it, the instruction erroneously assumes that there was evidence that tended to show that Hillmon, Brown and Baldwin, acting jointly, did "in fact procure, receive and accept said policies," when, as a matter of fact, there is not a scintilla of testimony competent against defendant in error to show that Brown and Baldwin, at least that John H. Brown, had any part in procuring or accepting the policies, and because of this assumption this instruction was misleading in the highest degree and had no proper

basis in the evidence. The only testimony in the case which by any possibility could be construed as giving any color for such an instruction, was the statement or admission of John H. Brown, which certainly was hearsay and incompetent, and made long after the dead body was buried, except as it was competent for the purpose of explaining the manner in which the release was procured, and incidentally for consideration by the jury upon the question of Brown's credibility, and to show what it was that had been procured and used as it was, as was well understood upon the trial of the case and was shown in the general charge (r. 1922–1923) of the Court, which is in the following language, and to which no exception *whatever* was taken by the plaintiff in error:

"The unsworn statements of any person which have been admitted in evidence are not evidence as to the truth of such statements. * * * The deposition of John H. Brown was read to you on behalf of the plaintiff. On behalf of the defendants evidence was introduced tending to show that he made oral declarations to W. J. Buchan, and showing that he also signed and swore to a statement contrary to his testimony given before you. The oral declarations of said Brown not under oath, and the statement signed and sworn to by him, are not affirmative evidence of the truth of any matter therein contained or mentioned, and they should not be considered by you, excepting as affecting the credibility of the evidence of said Brown, given in his deposition."

And further, all that is said in this brief in relation to the issues in the case, or relative to either of the refused instructions on the subject of conspiracy, is applicable as objection to each of those refused instructions Nos. 38 and 47.

And the 47th special instruction is indefinite and misleading to a further degree, in that it did not explain what was meant by the adverb "fraudulently," and did not define or advise the jury as to what would constitute the procuring the policy by fraud, but left the jury to attach such significance as they pleased to said word "fraudulently." In addition to this, these instructions were in conflict with other special instructions requested by the plaintiff in error,

wherein the Court was asked to instruct the jury "that the real question in the case is whether or not John W. Hillmon died at the time and in the manner in said petition alleged," and which instruction the Court gave in its general charge. (See instruction No. 1, page 1904, and special instruction No. 28, 1909, and the general charge of the Court, r. 1917–18, 1919 and 1921.)

In view of the special instructions just referred to, in which plaintiff in error invoked the Court to charge the jury that the real question involved was whether Hillmon was in fact dead or not, and the claim now made that such was not the real question, we feel justified in saying that the evident purpose of plaintiff in error, in asking its special instructions was to embody in them both the affirmative and negative of every proposition of law involved in the case, so that whichever of the instructions so asked the Court should adopt, the plaintiff in error would be able to except, because the Court must necessarily refuse to give the conflicting instruction.

Further, by the instruction No. 38 ~~in that 6th specification~~ mentioned, plaintiff in error sought to defeat the policy sued on if Baldwin, Brown and Hillmon confederated and conspired together to procure the policy for the purpose and with intent to procure and fraudulently present to the plaintiff in error, a dead body of another person than the insured as that of Hillmon and of thereby representing him to be dead.

In addition to what we have said, and the authorities we have cited in relation to ~~specification 3 and 5, as to~~ the allegations in the answer about conspiracies being immaterial, we further submit that said instructions Nos. 38 and 47 were not based on any issue in the case. By the answer (r. 18), the conspiracy charged was with reference to Hillmon being still alive. The substance of the fraud alleged in that answer was that a certain dead body was represented to be that of Hillmon whilst he was alive, making the question of defense to depend upon whether the dead body was that of Hillmon or not. The alleged substitution of the dead body of another as that of Hillmon was the only specific act of fraud alleged.

On those allegations issue was taken by filing the reply and the case was tried.

Therefore said instructions Nos. 38 and 47 were not based on any issue or evidence in the case. On that issue, to defeat plaintiff in error, what defendant in error had to do was to prove that the dead body was that of Hillmon. That was sufficiently proven, and proper instructions given on that basis. We submit it was not proper for plaintiff in error thus to attempt to change the issue, or to make any new issue, and that general allegations of conspiracy and to defraud amounted to nothing, or were limited to the specific fraud charged, to-wit: that of having actually presented another's dead body for that of Hillmon.

Such fraudulent intent as mentioned in said instruction No. 38 (or 47), as well as any fraudulent intent alleged in the answer, was immaterial and constituted no defense, as the insurance companies were not thereby injured, as is shown by authorities including decisions of this Court hereinbefore cited.

We refer to what we elsewhere say in this brief about there not being sufficient competent evidence against defendant in error or John W. Hillmon to prove a conspiracy, as sufficient reason for refusing instructions Nos. 38 and 47, referred to; and, in addition, we claim that if the dead body was that of John W. Hillmon, and that as plaintiff in error made the insurance and issued its said policy with notice that the $5,000 mentioned in the policy it issued made $25,000 insurance on the life of John W. Hillmon (r. 180 and 1523), it could not defeat a recovery on that policy without having previously, in due time, returned the premium.

> Jeffers vs. Forbes, 28 Kan. 174, 181, and cases there cited.

It never offered so to do, and further, it did not, as we have heretofore stated, in its answer plead that the policy was void because of any fraud, but only sought to prevent recovery because it claimed Hillmon was alive and not dead, in effect making and leaving the issue on all that matter merely as to whether Hillmon was dead or not practically

as applied to the evidence, whether the aforesaid dead body taken to Lawrence was the corpse of John W. Hillmon or not, as it is by the instructions of the Court given to the jury, shown the Court understood the issue made by the pleadings of the parties to be, and in fact admitted to be by plaintiff in error asking leave to amend its answer, as shown at record 1619. And by asking the Court to instruct the jury, as shown by the above referred to part of its first and twenty-eighth instructions (r. 1994 and 1909) given, as shown at r. 1917–1918 and 1921, which part of said asked instructions so given conflicts with said asked instructions Nos. 38 and 47.

And, by its opening statement to the jury, shown at record 138, plaintiff in error, in effect and substance, admitted it did not claim defendant in error was party to any fraud or conspiracy. All this in addition to the want of evidence sufficient to base such instructions on, that either defendant in error or John W. Hillmon was party to such conspiracy, or that Hillmon alone procured the same by fraud.

If it was the dead body of Hillmon that was brought to Lawrence, then in view of the pleadings and all the evidence in the case, we submit it is absurd to claim that the case should have been tried, evidence offered, or the jury instructed, on the theory that there was fraud, either alleged or proven, that could defeat a recovery on the policy.

The fact that the policy sued on contained the referred to first clause or condition set out at pages 6 and 7 of the record, has no bearing upon the question discussed, for the reason already several times pointed out, that the pleadings in the case do not allege any breach of said conditions or set up any facts showing that the plaintiff in error was entitled to avail itself of any breach of said conditions.

Certainly not if the aforesaid dead body was that of Hillmon, because, as hereinbefore shown, the aforesaid 2d defense limited the fraud alleged to the question as to whether said dead body was the corpse of Hillmon or not; and we submit that if we are wrong in that, it follows that if a party uses the word fraud in its allegations, it can ask a jury to infer it if they are possessed of imaginations that would let them

infer fraud from the amount of insurance or any other cause, without allegation, or proof of acts and doings, that would in law constitute fraud, as plaintiff in error tried to have done by seeking to get the jury to act on by such refused instruction No. 47, etc.

ASSIGNMENT OF ERROR No. 90. (R. 1998–9.)

Of course plaintiff in error cannot be heard to complain of the refusal of the Court to give instruction No. 46, therein mentioned — but the same is subject to all of the objections urged against refused instruction No. 47.

ASSIGNMENTS OF ERROR Nos. 91 and 92. (R. 1999, 2000.)

Relating to Only Portions of the Charge of the Court on the Subject of Conspiracy.

We contend that plaintiff in error has not any available exception to the part of the charge of the Court on the subject of conspiracy, set forth in either of those assignments of error Nos. 91 and 92, because there is not therein or in both together *all* that the Court said on the subject of conspiracy, and further some part of what the Court did say to the jury (we contend all thereof) on the subject of conspiracy was certainly correct, including what it said on that subject, as shown at r. 1916, 1917, 1920, certainly so much thereof as is shown at r. 1916–17, and as the exception shown at r. 1926 was *as to all* the Court said on the subject of conspiracy *as a unit*, therefore and for reasons herein before urged we submit plaintiff in error cannot be heard on the matter of those two assignments of error, Nos. 91 and 92, or either thereof, but if we are wrong in that then we contend the Court did not err in so charging the jury, and as to that we refer to what we have herein said and to the authorities we have cited in relation to the matter of conspiracy and the second defense pleaded by plaintiff in error, and claim that under the issues in the case and the evidence introduced it was proper for the Court to so charge the jury.

And still further, we submit that because plaintiff in error requested the Court to give the jury the before mentioned instructions Nos. 1 and 28 (r. 1904, 1909), and the Court accepted and adopted the theory of the case plaintiff in error so requested it to, to the effect that the real question in the case was whether the aforesaid dead body was that of Hillmon or not, that therefore plaintiff in error was not hurt by the Court charging the jury as it did, and if such was then the real question, and we not only contend it was in fact and in law, but that plaintiff in error cannot after asking those two instructions Nos. 1 and 28, be heard to claim the contrary, surely it is not in position to ask the Court to reverse the judgment because it charged the jury as it did, as complained of in those two assignments of error, particularly as it was not thereby really hurt.

THERE CAN BE NO CONSPIRACY TO DO THAT WHICH IS LAWFUL IN A LAWFUL MANNER.

Porter vs. Mack, 40 S. E. 459, and cases therein cited; s. c. 50 W. Va. 581.

And the same principle is established by other cases above cited.

And Hillmon is not shown to have done any unlawful act, nor any lawful act in an unlawful manner, nor is there any evidence competent against defendant in error that any person whomsoever did *any unlawful act* or any lawful act in an unlawful manner, in relation to the matter of procuring the insurance.

And the excluded evidence of Blythe, Carr, Crew and Phillips if it had been given would not have shown, or even tended to show, that either Hillmon did any unlawful act, or any lawful act in any unlawful manner, nor did it even tend to show that Baldwin ever did an unlawful act, or a lawful act in an unlawful manner, and still more certainly not if the aforesaid dead body was that of Hillmon, and we contend this case of Porter vs. Mack, 40 S. E. 459, shows of itself irre-

spective and independent of anything before said a full and unanswerable objection to every claim made by plaintiff in error for a reversal of the judgment complained of because of anything relating to any claimed conspiracy.

CONSPIRACY ABSURD.

And in this connection we request attention of the Court to the singularly absurd and unreasonable proposition plaintiff in error advances by claiming that Hillmon became party to any such conspiracy as claimed by it.

This because evidence in the case, when considered in the light of that common knowledge of which all men are possessed and which may be used in considering testimony.

U. S. vs. R. G. I. Co., 174 U. S. 697–8;
M. R. R. R. Co. vs. Richards, 8 Kansas, 101, 111,

not only tends to prove, but proves, not merely *prima facie*, but beyond any reasonable doubt, that on the 3d of October, 1878, defendant in error and John W. Hillmon, after having been affianced from some time in 1873, were married (r. 746, 748, 782), and that a family more or less numerous would naturally grow up around them, and not knowing how many he would leave to need maintenance if he met an untimely death in traveling in the then comparatively unsettled recently Indian raided parts of Kansas, Hillmon—beset by the agents of those who are ever ready to accept premiums—insured his life for the benefit of her he had for so long sought in marriage, taking with him his discharge as a soldier, to use as it might be to help in locating such land for use in starting the business of cattle ranching, as he should find appropriate—he a man ever active and doing something in an honest, proper and industrious manner, went on his last and ill-fated trip and came to an accidental death at the hand of his friend and companion, as many another has; and although there is not a scintilla of evidence competent against either defendant in error or the deceased John W. Hillmon that either of them ever either conspired to do, *or ever did any wrongful act*, or any lawful act *in an unlawful manner*,

yet plaintiff in error seeks to reverse the judgment against it whilst still holding tight its grasp on the premium, because it claims that a conspiracy was entered into which, to execute and make effectual, must have necessarily resulted in forever separating him from her he had so long contemplated being his companion for life, and from successful termination of which he could not hope to reap any benefit, or himself thereafter to be or to become other than a vagabond and outcast to his dying hour; and without daring to take the consequences of pleading that Hillmon *came to his death* in pursuance of a conspiracy, *that he should so die*, which would have been necessary to make any plea of conspiracy under the circumstances of the case, good as a defense, as is shown by numerous cases herein cited, it pleaded Hillmon was alive and not dead.

And having obtained the written statement, a thing *narrative* in form and of no force except as a weapon like unto a club, and release by such wrongful acts, including *threats* of polluting the administration of justice, as shown by the evidence hereinbefore referred to, plaintiff in error is now here on such altered pretended record as shown by the matter about its name on r. 1926, hoping this Court will find some such technical error in the record as will cause it to reverse the judgment, cast defendant in error into an enormous amount of costs, and give plaintiff in error opportunity to see if it cannot gather courage to allege Hillmon died in pursuance of a conspiracy that he should so die, with all its resultant effects, it being able to pay costs if it can only in effect make good its threat she could not recover (r. 771–2, 821–2), *which effect is nearly achieved*, if she has to pay the costs in this proceeding in error, which matter of costs will be proper subject of consideration if this Court shall ever consider the question as to whether it should differ with the trial court on the matter of its discretionary power, to have given or refused permission to plaintiff in error to introduce, by amendment of its answer, an undefined additional issue or pretended issue in the case, and it asks such reversal on a claim practically to the effect that this Court has a discretion to say the trial court ought to have permitted plaintiff in error to

so amend, although it did not specify any cause or reason for so doing, or present any such paper as it wished to file, if any, which would have put it in any better position than it was, as is apparent when all of the evidence and the law applicable thereto is considered and properly applied, and we contend that this Court has not right to exercise any such power over the discretion of the trial court, there not being *any abuse* of the discretion of that Court shown, and we submit the case is here, to this single, last mentioned point, for many reasons, including because of the matter of the whole case at near its close, having been requested by plaintiff in error to be treated and decided by a jury, and passed on, as they should find and determine whether the aforesaid dead body was that of Hillmon or not, on and as to which the jury found against it, and when it was defeated by the finding of the jury, we submit the whole conspiracy question was exploded, as any one should have expected such an absurd proposition as it is involved would be.

And we ask that all this matter about conspiracy be considered in connection with assignment of error No. 73, relating to leave to amend, which really is a part of the conspiracy question so involved and settled, because a party cannot divide a defense into different parts, try one, and retain another part for further use in any manner.

There was not any evidence whatever against any person whomsoever either given or offered of any conspiracy in the matter of either procuring the policy sued on or in relation to the dead body other than such conspiracy as was entered into by plaintiff in error and its assistants and agents to procure the written statement (r. 1284–6, and the release, r. 19), *and to defeat defendant in error.*

Except that as against Brown only, and that only, by and because of plaintiff in error and its assistants in the matter of trying to beat defendant in error out of her claim against it on the policy wrongfully, caused him to sign that written statement which as against all others, including defendant in error, is mere hearsay, and only a false narrative, procured by improper use of money, inducing an attorney to throw

his client, coupled with threats of improper use of money in judicial proceedings, in other words, there was *not any evidence whatever* either offered or given of *any unlawful act*, or of any lawful act done or attempted to be done *in an unlawful manner*, by either defendant in error, John W. Hillmon, Levi Baldwin or John H. Brown, other than said written statement, which was as to all persons *other* than Brown *mere hearsay* and *not competent* evidence of anything therein stated, and merely and only a false narrative, procured from him *under such circumstances* and *by* such *wrongful* means as to make and render it as *between* Brown and plaintiff in error *more its* act and document than his, and the act and document of plaintiff in error as between it and defendant in error.

And in support of this proposition we refer to the authorities cited and matters hereinbefore urged in relation to the several assignments of error on the conspiracy question as well as to those relating to assignments of error Nos. 105 and 27 to 32 and 59, all which we submit prove and clearly show our contention in this respect is incontrovertibly true.

ASSIGNMENT OF ERROR No. 73. (R. 1985, 1619.)

It was a matter entirely within the discretion of the trial court as to whether it would allow the amendment asked for. The answer was filed in June, 1881. (R. 19.) There had been five previous trials of the case, and at the commencement of the last or sixth trial in October, 1899, over eighteen years after the answer in that 73d assignment of error mentioned had been filed, the plaintiff in error by its counsel in his opening statement to the jury said to them as follows:

"The second defense is that John W. Hillmon, Levi Baldwin and John H. Brown entered into a conspiracy to defraud these insurance companies out of the money which was called for by these policies. It is said by the gentleman who addressed you that we have never claimed that Mrs. Hillmon is a party to this conspiracy; what the evidence will be deduced on that point is for you gentlemen to determine; what we say on paper is that John W. Hillmon, Levi Baldwin and

John H. Brown did conspire to defraud these insurance companies. * * * And by the way, these applications as is stated to you show that he was five feet eleven inches in height," as shown at r. 138 —and thereby in substance admitted that plaintiff in error and its attorneys appreciated and understood that it had not in its answer alleged that defendant in error was a conspirator with Baldwin, Hillmon and Brown, or with any person or persons, to cheat or defraud it; and that such admission is conclusive against plaintiff in error to the effect that it did not claim and had not plead that defendant in error was party to any fraud or conspiracy, see—

Oscanyan vs. Arms Co., 103 U. S. 261;
Lindley vs. R. R. Co., 47 Kansas, 432;

and then proceeded with the trial, and as it had not before the commencement of such last trial, nor until such trial was comparatively through with, ventured to commit itself to the statement that defendant in error had ever participated in any wrong act, and there was nothing developed at the trial indicating that plaintiff in error either after or before the making of that statement, or after the filing of that answer in 1881, discovered any fact it did not know of before that answer was filed, nor did plaintiff in error make any showing as cause for asking leave, as shown at r. 1619, to make any amendment to its answer; therefore its application was properly overruled, and further we submit there was not a scintilla of competent evidence given at the trial tending to show that defendant in error ever participated in any fraud or effort to cheat or defraud, or that she was ever a conspirator with any person or persons, for any purpose whatever, or ever did or was a party to any wrongful act or to doing any lawful act in an unlawful manner, or that the deceased Hillmon ever did either.

The leave to amend asked for was not with reference to the matter of an immaterial variance, but, as shown at r. 1619, was in substance and effect to insert the name of defendant in error in the aforesaid second defense with that of the others therein named. To have done so would have made a new issue in the case, other and different from any

therein, and was therefore properly refused at that stage of the trial.

But further, even if the Court had permitted the answer to have been so amended, we see from authorities cited in reference to the matter of the sixteen assignments of error, Nos. 64 to 72, 87 to 92, and 106, that there could not have been under said second defense even as so amended, any evidence introduced other or further than such as would be competent to prove that the aforesaid dead body was not that of Hillmon, and there was not any evidence competent to prove it was not, excluded; therefore, even if the Court had allowed such amendment, the position of plaintiff in error would not have been improved or changed in that respect, as the issue on that subject was as fully made by the petition, answer and reply filed, irrespective of what was said in that second defense, as it could be by any use of language — because, as between plaintiff and defendant, the general denial in the answer of the allegations in the petition put that as well as other questions in issue, and all evidence on that subject offered by plaintiff in error was received, no matter how remote.

And the jury were told to find for plaintiff in error if it was not the body of Hillmon, and therefore it is not important to consider whether such amendment should have been allowed or not, and as there is nothing in the record (r. 1619) indicating plaintiff in error desired to amend its answer otherwise than by the equivalent of so adding the name of defendant in error in said second defense with that of the three therein named. Of course it cannot now here be heard to claim it did.

And further, we refer to what we have hereinbefore urged in relation to the matter of claimed conspiracy, and assignment of error No. 105, to show that plaintiff in error could not properly have had stretched in its favor any rule in relation to amendments that would have let in any evidence, not submitted to the jury, which could have helped plaintiff in error, under the rules of law in relation to hearsay and narratives, and use that could properly or lawfully

be made, of either any excluded testimony or of the written statement, or other evidence in the case.

And further, in considering the matter of this 73d assignment of error, we request consideration of the fact that the trial court did not abuse any discretionary power in refusing to permit the answer to be amended, and, in so doing, to consider the last few preceding subdivisions of this brief, which relate to the conspiracy question.

WALTERS THEORY AND FIASCO.

ASSIGNMENT OF ERROR No. 74.

(R. 1985–6, 1688–9, 1690).

In Relation to the Matter of the Walters Theory of Plaintiff in Error.

Whilst in that 74th assignment of error, what the Court said to the jury, as shown at r. 1689, is not exactly correctly copied, we submit that what the Court actually said to the jury; as shown at r. 1689, was in substance and effect a mere reiteration of what this Court said relating to the same matter in its opinion in the case between the parties hereto, when it was previously here, as shown by

M. L. Ins. Co. vs. Hillmon, 145 U. S. 295–6.

And further, we submit that the trial Court did not err in that respect against plaintiff in error, but did err in what it said to the jury in that matter against defendant in error by stating to the effect that the Hillmon mentioned in the letter *was the Hillmon in this case*, because we claim that there is nothing in the case whatever to show, or sufficient to charge the jury on, that the Hillmon mentioned in the aforesaid policy, and whose dead body was brought to Lawrence as aforesaid, was the Hillmon mentioned in that letter, but on the contrary, there is much evidence to show it was not the same Hillmon, even if that letter was a genuine letter of Walters—which we deny.

In this connection we refer to the indisputable fact that there are many Hillmons in the country,—we suppose that this Court will, of course, take judicial notice that the name Hillmon, sometimes with the letter "a" in the place of "o" therein, is a common name in the country, perhaps not quite as common a name as Smith, or Jones, or Brown, but still a common name throughout the whole country, from ocean to ocean.

As we understand it, this Court, when this case was formerly here, held that the letter addressed to "Dearest Alvina," in that 74th assignment of error mentioned, was admissible in evidence on the supposition that the *writer* thereof was a *truthful person*, and would not either *himself*, or *advise another*, to tell an *untruth*, and therefore in this connection it is appropriate to examine the letter-writing record of whoever wrote the so-called Walters letters, directed, one to "Dearest Alvina" (r. 1689, 1900), another to "Henry Spreen" (r. 1713–14), the third to his brother, Charles R. Walters (r. 1742), and the fourth to "Dear Sister and all" (r. 1776). In the first cited letter, which for a person who had been absent so long —from the 24th of March, 1878 (r. 1687)—was *overdone* in the line of *gush*, instructions are given to Miss Kasten to * * * *tell an untruth* in this, whilst the letter is made to pretend he therein said to her he was going with a man by the name of Hillmon, and to tell her what he was *intending* to do, etc. (and thus got the letter in evidence under the decision of this Court, in 145 U. S. 285, 295–6), yet he is therein made to direct her, "If anyone asks you what I am doing, *tell them* that *you were not informed*," and thus by that letter, directing her to tell an untruth, and also indicating very clearly, if he actually wrote it, he did not wish others to know his doings; yet he is, by the Spreen letter, made to pretend to tell Spreen what he *intends to do*, and thus give the lodge information as to his supposed doings; and by the fourth he is made to inform his "sister and all" of supposed intentions as to his doings. Now, why pretend to wish kept secret and tell his still supposed sweetheart to tell an *untruth* on the matter of his *intended doings*, and then inform others, the lodge—"sister and all"—of his supposed intentions,

unless the real writer of those four letters was gifted with an inborn and *cultivated* inclination to * * * *tell the opposite of truth*—trying to act the part of a gusher. But however all that may be, or as to who wrote those letters, the one to Miss Kasten shows such *want* of *disposition* to be *truthful* as to utterly *impeach* any supposed veracity as to what is said in either letter about any Hillmon.

And we submit that because of the *untruthful disposition* of the writer of that letter, thus shown by it, that it is appropriate for us to now ask this Court to overrule its former decision in relation to the admissibility of that letter, and to hold that whilst the trial court gave full force to the referred to decision of this Court in relation to the letter, yet that the whole matter thereof was a mistake, we suppose arising because of this Court overlooking the *untruthful qualities* shown by that letter of the writer thereof.

And further, we contend that the evidence in the case shows conclusively, at least beyond any reasonable doubt, that the herein mentioned dead body was not that of Walters, and in support of such contention we here refer to the incontrovertible *misfit* of Walters as a *substitute* or candidate to supply the original, either of the corpse, owing among other things to certain marks on Walters, including those of the dog bite, bunion, crooked little finger, corns and straight nose, of and on Walters, and not on the corpse, and to the slight turning to one side of the nose of the corpse, corresponding to what is shown in some of the photos of Hillmon, and also to the breaking down of the tissues on one side thereof shown by photos, corresponding to what would naturally have been expected to occur in the nose of the corpse of Hillmon, and contrary to anything to be expected when Walters shall die, and to the closeness of the eyebrows of the corpse corresponding with those of Hillmon, shown by his photos, and contrary to what may, without disrespect, be appropriately termed the blaze face of Walters shown by his photos, all hereinbefore mentioned in the statement part of this brief, in connection with references to testimony in the record which proves those matters of identification, and the

misfit of Walters as a substitute for the original of the corpse.

When the written statement (r. 1284–6) was invented, there was not any such physical description of, or marks on, Burgess placed or mentioned therein, as would *therefrom* prevent him from being used as a substitute for Hillmon, but when the structure of reeds, in part composed of that written statement, collapsed and came to grief by the untimely reappearance and refusal to remain dead on the part of Burgess (r. 903–6–8, 1235–6), it became necessary, if further efforts should be made to defeat the policy, to secure another pretended victim to palm off as a substitute for Burgess, and none more promising than the tramp Walters being found, the Walters theory was developed, but that as we see, like the Burgess, also proved to be an abortion.

And further in this connection we suggest that if as the evidence shows Walters did not go on any trip with the insured Hillmon at all, it is not strange or singular that any pretended message intrusted to any Walters to deliver to any person at Medicine Lodge was not delivered (r. 1417–18, 1430.)

And in this same connection to show that Walters did not go on that trip with Hillmon, we refer to the testimony of Charles W. Schott, taken by the insurance company, under the agreement aforesaid, shown at r. 318, in May 1881, who, that is, said Schott, a witness for the insurance companies, testified that he saw Walters in Kansas City, Mo., in the spring of 1879 (r. 1666, 1670 to 1673), at a time when it was warm enough for him to be wearing clothes, there shown to be summer clothes, and the testimony of Arthur Simmons (r. 1856, 1858, 1860) to the effect that Walters worked for him in Leavenworth City, Kansas, in May 1879, two months after the death of Hillmon on Crooked Creek, and the testimony of Fannie Walters, a sister of Walters, (a witness called by plaintiff in error and the Mutual Life Insurance Company) who testified that Walters wrote to her whilst he was in Leavenworth, Kansas (r. 1795, 1808).

And further in this connection we refer to the fact that the sister, Fannie Walters, at the trial in 1899 sought to avoid

testifying to the dog bite mark on the supposed letter writer, as shown at r. 1803–4–5, after having previously sworn to having seen it (r. 1810–11–12).

And we also ask the Court to read that part of the evidence given by Charles R. Walters, a brother of the Walters plaintiff in error claims pictures of the corpse represent, set forth at r. 1753 to 1773, and to his testimony to the effect that he and others of the Walters family regarded the insurance companies' *side of the case* as *also their side* of the case, that is, as of his (and his sisters, Mrs. Rieffenach and Fannie Walters and Daniel Walters, the testimony of each of whom is set forth in the record) side of the case, in which he was testifying (r. 1765), and to his statement in a letter he had written on May 22, 1880, that he thought his brother had some *dentistry* performed on his teeth, a *few fillings perhaps* (r. 1770), and by his testimony set forth between pages 1757 to 1773, he, the brother of Walters, proves *by his own testimony*, that he was *not* above *falsehood, and that he had not hesitated to be guilty of falsehood* in connection with a *matter of efforts* made by different persons to ascertain *the truth* with regard to the *identification* of the corpse (see particularly r. 1761), and we submit that if he would state *such falsehoods* as he shows by his referred to testimony *he would* and *did*, that much of the identification of the corpse through means of the pictures by the family of the supposed to be missing Walters is *utterly unreliable and unworthy* of consideration, and considering what he so said about what he considered *our* (his family's) *side* (r. 1765), and the fact that the pictures were that of the 20 day corpse (1542, etc.) taken whilst the corpse was in the disfigured, decomposed condition shown thereby, and at r. 241–2, 225–6, and that the Walters theory in the case *was worked up through Theodore Wiseman*, as herein shown, in which he sent pictures of the corpse to some one at Fort Madison where the Walters family resided (r. 879, 880–1, etc.) *after abandonment* of the Burgess theory (r. 903-6 8) so as aforeshown by agents of plaintiff in error supposedly skillfully planted in the aforesaid written statement, shows that the Walters theory when considered with its connections and misfit of Walters as a substitute for the original of

the corpse herein mentioned, was an *invention* and *came* from a *factory* like that which with the inducements offered and given Buchan as shown at r. 1262, 1247–8, 1288, introduced and planted into the case, the written statement with its chief corner-stone the soon exploded Burgess theory.

And we request attention of the Court to the fact that the evidence showing that whenever Walters shall become a corpse, his dead body will not fit the description of the corpse brought to Lawrence in 1879, is shown almost entirely by the testimony of witnesses called by plaintiff in error.

And we submit that the letter addressed to "Dearest Alvina" shows beyond any reasonable question that it was not the outpourings of an honest, loving heart, but that on the contrary, it shows on its face that its writer, whilst *attempting* to *act* the part of a *gusher*, was so *taken* up with an *effort* to *act* the *unfelt* part of a *lover* as to use language unseemly coarse, and undoubtedly coarser and more of it than a man *really writing* to his *own* sweetheart would use, which, we submit, is of itself evidence enough to convince any human mind that the letter was an *invention* of an *architect* who overdid the part he attempted to act, and is enough to cause any anxious inquirer for truth to turn in disgust from the whole Walters theory as a fiction interjected into the case as a supplementary substitute for the Burgess *fiasco*, especially when we consider that Walters had, in March, 1878, bid his family *farewell*, about a year before the date of the pretended letter (r. 1795), and we cannot consent that Walters was coarse or imaginative enough to have either penned such a caricature on love and sentiment or written such a letter to one he is by that letter tried to be made to pretend he loved.

And of course, if that letter *is a fiction*, the same writer wrote all the others on the same subject.

And further, on this same line of inquiry as to *who wrote* those four letters, and as to the *object* of *writing the same*, (nothing ever done without an object and impelling motive) let us compare the letter to the brother, described at r. 1742, with the letters to the "sister and all," at r. 1776, and to "Dearest Alvina," at r. 1689, 1900, with reference to where

the writer of the letter pretended to say he was going, which in the two he represented as being *to parts unknown*, etc., whilst in the supposed letter to the brother he is made to know his route, and that he would soon be back to a point favorable to meet the brother and proceed with him to Leadville, Colo. And in one letter (r. 1742) the writer is made to say he is to help make a *cattle drive* from *the place of writing* the letter into Eastern Colorado; and in one to "Sister and all" (r. 1776) he is made to describe Hillmon as a *sheep trader*, and in the one to "Dearest Alvina" he is made to say Hillmon intends to start a sheep range, as a business he is to help in, something utterly inconsistent with helping to *drive cattle* into Eastern Colorado, and bringing him back to a point favorable to meet his brother to proceed from to Leadville (r. 1742), and when comparing those Munchausen letters, we submit that it is proper to inquire *if those letters really* existed before Munn, the author of the "Munn paper," copied and referred to at r. 580, etc., *interviewed* the Walters family, as shown at r. 1771, why were they not shown and blazoned forth *when* it is *pretended* the Walters family *were hunting* for F. A. Walters, instead of nothing being heard from them *until after* such *visit* of Munn, and after the sometime detective Wiseman *assisted* (see Burgess fiasco) to *develop* the Walters theory, as shown by the evidence.

And further, in this same connection, let us refer to r. 1561–2, 1564, 1575–6, where testimony of Michael Mesh and Bernard Helda is set forth, whereby plaintiff in error sought to make the jury believe that Hillmon and Brown tried to get those two men respectively to become *a victim*, one of them, Mesh, only five feet seven and one-half inches high (r. 1565), as late as from the 4th to the 10th of March, 1879, and the evening before Hillmon and Brown started and went alone on the trip which proved the last for Hillmon, and more fully as to the going alone referred to in the statement part of this brief, and we ask *why, if Walters* was *engaged* on or before March 1st, the date of the pretended letter to "Dearest Alvina" (r. 1689), to go with Hillmon *as a prospective victim*, was an effort to have Mesh, a man five feet seven and one-half inches high (r. 1565), desired to have along as a proposed

substitute victim for Walters, a man five feet eleven inches high, (r. 1653–4 and 6), or for Hillmon, a man about five feet eleven inches high, thus putting more of the tax on the *credulity* of the triers of the facts than was necessary, notwithstanding the capacity of the insurance companies to stand *expenses* they bragged of by their agent, Buchan (r. 771; 500, A. 36; 473–4, etc.), especially when this Walters theory, supplemental to the Burgess theory, is considered in connection with the visit of Walker, the companion of Wiseman at the cemetery at Medicine Lodge, when Hillmon was there exhumed, to Buchan at the court house in Wyandotte with the father of Brown (r. 1250), followed by the effort of Buchan and Walker to interview Brown (r. 1247,1281), followed by Buchan writing to Reuben Brown. (R. 545 to 548.) Buchan admitted writing to Reuben Brown (r. 1227), and getting Reuben to assist him in getting the different (r. 548–9, 550–1–2–3, etc.) statement, followed by procuration thereof, under the circumstances in the manner herein before shown soon after Brown made so-called proofs of death of Hillmon (r. 1258, 1262, 1268–9, etc.), and payment therefor by the insurance companies (r. 1247–8, 1262, 1288), and along side *all thereof* let us ask to have considered the matter of the name of plaintiff in error in the connection it appears at r. 1926.

AND WE ASK THAT THEN THE WRITTEN STATEMENT, ASSIGNMENT OF ERROR NO. 105, THE RELEASE AND THE CONSPIRACY, BURGESS AND WALTERS THEORY, AND CLAIMS OF PLAINTIFF IN ERROR, BE ALL BUNCHED AND THROWN INTO ONE OF THE SCALES OF COMMON SENSE; and after due consideration thereof, we submit that *all together* they will not move even an empty scale on the other end of the balancing lever, much less phase the evidence which shows the dead body was that of Hillmon.

And thus the so-called Walters letters and theory were dishonored and disgraced, not only in the house of its friend, the plaintiff in error, and by witnesses called by it, including his sister Fannie who received a letter from him sent from Leavenworth, Kansas, and Schott who saw Walters so late in the spring of 1879 at Kansas City, as well as by Simmons for whom he worked in May, 1879,—and by the testi-

mony of John H. Brown, whose referred-to deposition *conclusively*, so far as testimony of his could negative any claim that Walters went with him and Hillmon on their last trip, which *negative* is fully supported by the testimony of those who saw Hillmon and Brown on that trip referred to in the statement part of this brief, and also in connection with the matter of assignment of error No. 105, and surely for reasons and facts before mentioned, some thereof in relation to the matter of the 105th assignment of error, plaintiff in error is estopped from claiming Brown was not a truthful witness as to the matters he testified to, including those in relation to the man who rode a short distance with him and Hillmon, set forth at r. 502, A. 53 to 56, and 503–4, A. 70–1–2–3–4–5–6–7, and to the matter of his accidental killing of Hillmon shown at r. 345–6, 408, 411; 415, A. 762, 756; 420–1; 423, A. 855, *because if it is not so estopped* plaintiff in error will have advantage from and because of the wrongs by it perpetrated by its agents Buchan and others by means of the methods adopted, acts done, and promises and payments of money made and used in the matter of procuring from Brown, and to obtain and pay for the written statement (r. 1284–6) among other things, to injure his reputation for truth and veracity, and thus injure defendant in error; and that it cannot have such advantage is shown by the maxim to the effect "that none shall have advantage because of their own wrongful acts or conduct," on the matter of which maxim and estoppel and that the same is here applicable, we refer to the case of

Union Pac. Ry. vs. Harris, 63 Pac. 804,

and the authorities there cited, as well as to the rules of law in relation to the effect of destruction of testimony by a party to pending or expected litigation.

And we contend that justice and equity require that plaintiff in error, because of those wrongful acts, should stand, and be held *estopped* from denying that Brown was a credible, trustworthy and truthful witness as to the testimony by him given in his deposition, (at least that because of those wrongful acts and doings it was not entitled to have

said refused instruction No. 44 given to the jury, irrespective of any other reason for rejection thereof).

And from consideration of all the evidence, even of that produced by plaintiff in error, without resorting to any testimony given by any witness called by defendant in error, *much more with that*, it is evident and *prima facie* proven that the Walters letters and theory were introduced and interjected into the case by methods and means *equivalent* to the payment of the $500 and expenses to Buchan, referred to at r. 1262, 1247–8, 1288, to help make good the *threat* of plaintiff in error, made by *its agent* Buchan to defendant in error on the day it, by Buchan, obtained the release, *to the effect that she could never recover* on the policy *because* of the *millions* of the insurance companies (r. 771, and 500, A. 36), which threat we see was made in pursuance of the plan adopted to scare and bluff Brown into believing it was better for Brown to let Buchan prepare the written statement, which, being a lawyer, he could *so easily do*, than for Brown to risk application of the money power of plaintiff in error and its assistant insurance companies on proceedings in court, to convict him on a charge of murdering Hillmon (threat of use of money to change accidental to intentional killing), shown by the parts of the said deposition copied in the statement part of this brief, and by the testimony of Reuben Brown on the same subject, both corroborated by such of the testimony of Buchan as referred to his communications with Munn and others, and payment to him for what he did, promised, etc., as shown at r. 1262, etc., paid 1247–8, 1288.

And we submit it is not claiming too much to insist that whoever *would do* what plaintiff in error and its assistants *unquestionably did*, with and through the aid of Buchan, as shown by undisputed testimony, would consider it a *mere trifle* to attempt to establish the Walters theory, as a *substitute* for that of Burgess, *much needed by plaintiff in error* when Burgess failed to *remain* either *dead* or *among* the *missing;* and if possibly plaintiff in error should by its agents have seen the tramp Walters after development of the Walters theory, any one conversant with the situation after reading the history of said written statement and the Burgess fiasco, would

doubtless have wondered if Walters had not been given business opportunities sufficient to induce him to not assist in *protruding his continued existence* into the case by any *further* or subsequent voluntary act of his.

And because of all this, we submit the trial court *did not err*, as claimed in the 74th assignment of error, and that so far as that effusive letter to "Dearest Alvina," advising her to tell an untruth on occasion when we have seen she might as well have told the truth (even if a falsehood might ever be advisable, which we do not admit, but which, whoever wrote that letter, appears to have thought otherwise), is concerned—even if Walters wrote it—we submit it was proper for the trial court to *stop* when it had given to the jury the full force and effect thereof, *in conformity* with the referred to opinion of this Court, and from which it read when so doing.

WALTERS THEORY, ETC., CONTINUED.

ASSIGNMENTS OF ERROR.—Nos. 75, 76, 77 and 84 (r. 1987–8, 1995–6), relating to acts and doings of the Walters family after the death, and after the controversy arose, etc.

We refer to what we say herein in relation to assignments of error Nos. 74 and 105 as being applicable and proper to consider here, and to what we say about No. 74, as a reason why the Court did not err as claimed in assignments of error Nos. 75, 77 and 84.

And further, the witnesses, Mrs. Elizabeth Rieffenach and Fannie Walters, mentioned in those assignments of error Nos. 75, 76, 77 and 84, each testified to having seen and recognized the photographs of the corpse as a picture of their brother (r. 1778, 1798, 1799), at Fort Madison, Iowa, in January, 1880. The Court did not reject evidence of either of their recognition of the pictures—merely rejected evidence as to what their mother said or did in January, 1880, on the

occasion referred to in said assignment of error, at r. 1778, 1798, 1799, when she saw a certain picture of the corpse. This time, January, 1880, was long after controversy arose over the question of identity as to whose dead body, whether of Hillmon or some other person, arose, and also rejected evidence as to any tombstone or inscription mentioned in the 77th.

The transactions mentioned in this and the brief of plaintiff in error about inquests, releases, Brown's statement, etc., had all occurred. Of course the newspapers had, as part of the public history of this controversy, to entirely too much extent published some truthful and some erroneous accounts of the controversy. (R. 874.)

Theodore Wiseman, who had abandoned the theory that Nichols or Burgess had been a victim (r. 903, 906, 908), folfowed the Walters theory to Fort Madison, and sent pictures of the corpse to some one there about the middle of December, 1879. (R. 878, 879, 880, 881.)

Wiseman, in the matter of controversy and inquiry after missing men, went to Wichita and spent some weeks there in the spring and early summer of 1879, making inquiries, etc. (R. 887, 888.)

In the meantime, as a result of correspondence between persons in Fort Madison and Wichita, a picture of the corpse was received by Daniel Walters in January, 1880. (R. 1622, 1630, 1631.) Whether Mrs. Walters had or had not seen any of the three pictures of the corpse so sent to Fort Madison, or other pictures thereof before the time when she is claimed to have said and done as mentioned in said specification 12, is not shown by the evidence. But whether she had or not, we submit that it is evident that such controversy had arisen as would exclude testimony of what she so said and did in January, 1880, or as to whether a tombstone had been erected, or what inscription was thereon, or as to whether the insurance companies or the Walters family paid therefor.

1 Greenleaf on Ev., Sections 131 and 133.

The acts and remarks of the family of Walters after the death were mere hearsay and were not competent evidence,

this not being a case involving a question of pedigree, etc. See—

Conn. M. L. Ins. Co. (plaintiff in error) vs. Schwenk, 94 U. S. 593, 598–9.
Heyler vs. Faulkner, 153 U. S. 109–118.
M. B. L. Ins. Co. vs. Tisdale, 91 U. S. 238.

The parties to this litigation do not either of them claim under or through Walters or his family, and the fact that plaintiff in error tries to profit from a claimed misfortune of that family is no reason why what any of that family may have said or done should be given in evidence, or considered otherwise than as the acts and sayings of any member of any other family.

If what Mrs. Walters said or did in the presence or absence of the pictures is competent evidence, then anything that any person might have said about Hillmon or Walters after the 17th of March would be competent testimony. Witnesses could be produced without limit who could truthfully testify that they had seen third persons look at the pictures in question and say it was the picture of Hillmon, and *possibly* others that it was the picture of Walters, and others that it was the picture of neither, yet none of the testimony of such witnesses would be competent. In order to make the deeds and words of Mrs. Walters evidence, or anything in relation to the tombstone, you have got to obliterate the rules as to hearsay evidence, which applies to things done as well as things said. Relative to this rule Mr. Burr W. Jones, in his work on evidence, 2nd volume, pages 679, etc., Sec. 301, employed the following language:

"Hearsay may relate to what is done or written as well as to what is spoken. This proposition, as well as the strictness with which the courts adhere to the rule excluding hearsay, is well illustrated in a celebrated case, often cited, in which it was held that letters addressed to a deceased testator, indicating that the writers thought him sane, but which were not acted on by him, could not be admitted for the purpose of proving his sanity. By way of illustration,

Baron Parke stated, in his opinion in this case, that the conduct of the family or relatives of a testator in taking the same precautions in his absence as if he were a lunatic, his election in his absence to some high and responsible office, the conduct of a physician who permitted a will to be executed by a sick testator, the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of a vessel, embarked in it with his family, would all be mere instances of hearsay evidence—mere acts or statements not on oath—but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound."

In support of this proposition, Mr. Jones cites the following cases:

Sussex Peerage Case, 11 Clark and F. 85, 113.
Stapylton vs. Clough, 22 Eng. L. & Eq. 276; 2 El. & B. 933.
Schooler vs. State, 57 Ind. 127.
Ashcraft vs. De Armond, 44 Iowa, 229.
Hunter vs. Randall, 69 Me. 183.
Filley vs. Angell, 102 Mass. 67.
People vs. Cox, 21 Hun 47.
State vs. Haynes, 71 N. C. 79.
Campbell vs. State, 8 Tex. App. 84; 1 Greenl. Ev., Sec. 99; Tayl. Ev., Sec. 570.
Wright vs. Doe, *ex. dem.* Tatham, 7 Adol. & Ell. 313.

And see also—

People vs. Williams, 3 Abb. (N. Y.) App. 596.

If in May, 1881, when the deposition of Daniel Walters was taken (r. 1619), the insurance companies had seen fit to take such evidence as Mrs. Walters, who lived until 1888 (r. 1779), could have given in reference to recognizing or not said pictures as her son, she could have been cross-examined in relation thereto and on the matter of when she had first seen any of those different pictures, sent to Fort Madison, or talked of the matter in controversy with others.

And as to the identifying evidence by means of the pictures of the much decayed and shrunken corpse, because of

an *expression, general features*, etc., shown thereby that plaintiff in error may claim or refer to as the means of identification of the dead body as being that of Walters, we submit that a comparison of the pictures of the corpse with the pictures of the living Walters and Hillmon will show that the corpse was like Hillmon and not Walters, so far as pictures of a twenty-day-old corpse could be expected to, and that there is not any such likeness (none at all really) of either *expression* or *general features* of the corpse with the pictures of the living Walters as to call for the overruling of the authorities in relation to incompetent and hearsay evidence.

ASSIGNMENT OF ERROR No. 78. (R. 1988–9.)

Relating to Excluded Opinion of Wiseman.

We submit the Theodore Wiseman therein referred to was not shown to be such an expert as would have made an answer of his to the objected to question competent, even if the matter of that question was the subject of expert testimony—but we submit it was not, and that it was not competent or proper to ask such a question.

ASSIGNMENT OF ERROR No. 79. (R. 1989–90.)

Relating to Excluded Memoranda of Dr. Miller.

We submit that the rejected memorandum therein referred to was mere hearsay and not competent, and in support of this objection we refer to what we have said and to the authorities we have cited in relation to the matter of the 75th, 76th, 77th and 84th assignments of error.

And further, the Dr. V. G. Miller referred to was the same person who, as medical examiner for the Mutual Life Insurance Company of New York (the case against which was being tried at the same time as that against plaintiff in error), and in whose certificate as such he stated that Hillmon was 5 feet 11 inches high (r. 192–3), and *that* whilst Hillmon was alive and with him, but when Hillmon was dead he turns up

with the rejected hearsay memorandum—we submit it was not competent for that company or its agent (Miller) to make evidence by any such memorandum; there cannot be any presumption that he had performed his duty. If he did not know that Hillmon was 5 feet 11 inches high by actual measurement when he signed that certificate, set forth at r. 923, he was guilty of the most gross misconduct, not only towards his principal, but also towards Hillmon. The matter of the height of Hillmon was of importance as a matter of identification and description of the person, and he stated, as shown at r. 193, that he had made in private a physical examination of the person proposed for insurance, and made such further statement in that certificate as puts him in the position of a falsifier of facts when considered in connection with the rejected memorandum; the two statements put together show he was not a truthful man, for they differ as to the matter of the height of Hillmon. Of course, the medical examiners' certificates were competent evidence, and we submit his hearsay statement was not only not competent, but tended to show Miller to be utterly unworthy of credit in the matter of statement of his. There is no pretense Hillmon was present when Miller made that memorandum, or that Hillmon ever saw it. An examination of the several applications and medical examiners' certificates show that Hillmon was accepted by the companies as a man 5 feet 11 inches high (see r. 178, 184, 187, 192, 195, 198), and we submit the insurance companies ought to have been held estopped from any attempt to show that he was of any different height; but such rule of estoppel was not asked for by defendant in error or applied by the Court, but on the contrary, Miller and Stuart respectively testified to their content that they had made false certificates, and that their statements were not reliable; but we submit that the rule ought not to be extended to permit the insurance companies to show that Miller made such memorandum—his testimony to the effect that he had made a false certificate when Hillmon and he were together was admitted, and we submit that was going far enough in that direction.

ASSIGNMENT OF ERROR No. 80. (R. 1990–1, 1481.)

Relating to Opinion of Griffith.

The answer of the witness, Griffith, was stricken out because it was not responsive to the question asked him; he was not asked how defendant in error appeared, nor what she appeared to know, the question was as to what she did know, that is, as to whether she knew the color of her deceased husband's hair or not; the question did not ask Griffith as to whether she *appeared* to know, but called for the matter of her knowledge, and of course it was proper to strike out such answer, and if the witness did not know what the defendant knew, he *should* have contented himself with saying he did not know, but instead of that, he stated the conclusions he arrived at in his own mind on that subject, which of course was not *either competent* or responsive to the question asked him; and in this connection it should be borne in mind that this is the same Griffith, an agent of one of the insurance companies, to whom Wiseman, another agent thereof, on the way back from Medicine Lodge where the dead body had been exhumed to be transported to Lawrence, and while at Hutchinson on his way back to Lawrence wired to Griffith (r. 901–2), directing Griffith to see the defendant in error immediately and get from her a description of her husband (r. 1492), in pursuance of which telegram Griffith, on the 1st of April before the arrival of the dead body at Lawrence, requested her to call at his office (r. 1482–3) and make out an application, meaning evidently to help her prepare papers preliminary to make application for life insurance policies (r. 1503–4, 1482 to 1489, 1885–6–7, 1891–2–3). And he, (Griffith) having procured the attendance at his office of Selig, an agent of plaintiff in error (r. 1496, 1503–4), Griffith, with the assistance of Selig, proceeded to interrogate, make assertions to, and nag defendant in error evidently with the hope of getting a false and incorrect description of her deceased husband to be signed by her, as shown at r. 1482 to 1489, 1503–4, 1885–6–7, 1891–2–3, and having failed, as shown by the record at the pages cited, Griffith sought by so expressing

his opinion in answer to the last before mentioned question to *partly make up for his failure* to entrap defendant in error into making an incorrect description of her husband. If he had not failed, but had got her to sign any incorrect statement, it is of course clear beyond question it would have been produced at the trial, and we submit that it was incompetent for him or plaintiff in error to make up for their chagrin, because of such failure to so entrap her, by his giving to the jury the conclusions he pretended to arrive at in his own mind, as indicated by the stricken out answer, we submit that there was nothing in the evidence or the nature of the question excusing or sustaining the claim of plaintiff in error that Griffith was such an expert on the appearance of people as to make competent any opinion he may have formed as to her appearance or what it indicated.

ASSIGNMENT OF ERROR No. 81. (R. 1991, 1481–2).

Relating to Question not Ruled On.

One of the first principal and quite sufficient answers to that 81st assignment of error, is, that the Court did not rule or make any decision on or as to the question in that assignment of error mentioned, but on the contrary the insurance companies, including plaintiff in error, voluntarily withdrew that question (r. 1482), which of course disposes of that assignment of error.

ASSIGNMENT OF ERROR No. 82. (R. 1991–2, 1544.)

Relating to C. W. Smith, Etc.

For a sufficient answer to that 82d assignment of error we request attention to the fact that the Court did not in any manner rule on the question therein mentioned (r. 1544), nor have reasonable opportunity so to do because, when the objection was made to that question, there was nothing to indicate that Baldwin had any knowledge as to what was being

done in the matter of cutting pieces from or cutting up the dead body to any extent it was cut up until after it was done. Mr. Isham, one of the counsel for the insurance companies, taking offense, made several remarks, shown at r. 1544, and thereupon the Court directed the jury to pay no attention to certain outside comments of counsel, whereupon counsel for plaintiff in error, without waiting for or giving opportunity to the Court to rule upon the objection to that question, proceeded to further examine the witness, and thus abandoned that question. Of course, under such situation, there is no question here for consideration with reference to the matter of that question; but, if the matter of that question is open for consideration here, then we submit that question was entirely incompetent for many reasons, among others because it did not matter, and was entirely irrelevant and immaterial to the case, and incompetent to prove whether Levi Baldwin, or John Smith, or any other person on earth, other than defendant in error, made such objection as referred to in that question or not. When in the morning of the day the dead body arrived at Lawrence it was taken to the undertaking establishment of Bailey & Smith, undertakers at Lawrence (r. 1527, 690, 525, etc.), although defendant in error expected it to be brought to the place where she resided, and endeavored to have it taken there (r. 756–7–8, 765, 525) (which was the 3d of April), and on the morning of that day of the arrival of the corpse at Lawrence, doctors, including Dr. Stuart, medical examiner for plaintiff in error, took charge of it all the time until they finally let him (Smith) have it for the purpose of burial (r. 1540), which burial was on the 5th of April (r. 1542), and in the morning on which the body so arrived at Lawrence (the 3d of April), those doctors, physicians, in the morning of that day, cut up the body to some extent, and cut out part of the arm where a vaccine sore was, and had a post mortem examination of the body on that day, as shown at r. 1540–1–2 and elsewhere, and it was during the time of such post mortem examination and cutting out of that piece from the arm, that defendant in error with her mother and others, went to that undertaking establishment of Bailey &

Smith to see the body, but were refused and prevented from seeing it on excuse to the effect that it was not then in condition to see (r. 758, 796, 534. 335, 1542), and which matter of cutting out a piece of the arm of the corpse was followed by Drs. Stuart and Miller applying a hot iron to the piece of flesh so removed for the pretended purpose of preserving as evidence, etc., as by them stated at r. 969, 970–1, 988, to see the effect thereof, etc., which cutting and application of hot iron of course destroyed any further use of such piece of flesh for any such purpose—which piece of flesh, although Stuart pretended to remove the same to preserve it (r. 922–3), was followed by the fact that he, early in 1882, before the first trial of the case practically, purposely thew it away and it became lost (r. 923, 984, 987, 988); and after the dead body was buried on the 5th of April, 1879, as shown at r. 1542, 1888, and elsewhere, it was again exhumed on the 6th of April (r. 1542), at the instance of the representatives of the insurance companies, as shown at r. 766, 241, 929, 1542, and elsewhere, and at the instance of those companies, then when the body was twenty days old, and the hair badly mussed by handling and turning and bringing into position the corpse to take photographs of (r. 225–6), and Dr. Stuart had pulled out some of the hair from the head and the hair had become badly disarranged and full of dust, earth, clay, at the cemetery, and the face to some extent covered with dirt, and the eyes very much sunken, and rapid decomposition had taken place to such an extent that one would not have recognized the corpse with the dead body at the inquest had it not been for the teeth (r. 241–2)—the photographs through and by means of which the plaintiff in error seeks to establish their so-called Walters theory, were taken both of front and side view, as shown by the supposed copies thereof in court here—for all which we submit it was not competent, relevant or material whether Baldwin objected or not to what they had been doing.

ASSIGNMENT OF ERROR No. 83.

(R. 1992 to 1995, 1589 to 1592.)

Relating to Excluded Hearsay.

When the certified copy in that 83rd assignment of error mentioned was offered in evidence, the defendant in error, as shown at r. 1589, objected that any statement therein of description of John W. Hillmon was hearsay, and that it was not made by him, nor by his direction, nor with his knowledge, so far as it appears, objected to it as incompetent, irrelevant and immaterial and hearsay, and thereupon (as shown at r. 1589, 1590), the Court in substance inquired of counsel for plaintiff in error and the Mutual Life Insurance Company if the certificate of the recruiting officer was the part of the certified copy they claimed was material, to which counsel answered "Yes sir" (r. 1590), and thereupon the Court sustained the objection (r. 1590), and we submit that the offered copy was mere hearsay, and was not competent, material or relevant, and in support of our claim in that respect we refer to the cases decided by this Court, and to the authorities hereinbefore cited in relation to the matter of the 75th, 76th, 77th and 84th assignments of error, and that therefore the ruling of the Court was correct.

ASSIGNMENT OF ERROR No. 85. (R. 1996, 1904.)

Relating to the Matter of the Real Question to be Determined Being Whether the Dead Body was that of Hillmon or Not, also Relating to the Disputed Teeth Question.

We contend that for reasons shown *ante* plaintiff in error has not any available exception to the refusal of the Court to give instruction No. 1, mentioned in that assignment of error, and further, there was not any exception taken to that part of the charge of the Court which related to teeth, or to that matter of the identification of the body (r. 1924).

By asking the refused instruction No. 1, mentioned in

that 85th assignment of error, plaintiff in error conceded that the question remaining to be determined in the case after the evidence closed, was as to whether the dead body brought to Lawrence in April, 1879, was the body of John W. Hillmon or not, and asked the Court to instruct accordingly, which it did, as shown at r. 1917–18, 1919, 1921, in its general charge to the jury, and there was not any exception taken to that part of the charge, and of course plaintiff in error cannot be heard to complain of the Court adopting a theory of the case as requested by it.

But plaintiff in error, by asking that refused instruction, also asked the Court to select one of the many points, marks and reasons for identification and recognition, and make the case turn on that, contrary to the rule of law shown by the case of—

Grand Trunk Railway Co. vs. Ives, 144 U. S. 433;
Smith vs. Condry, 1 Howard, 28, 36;

whilst by reference to preceding parts of this brief, including that part in which we refer to evidence in relation to the identification of the corpse, it will be seen that there were many points of identification, each equally prominent as that in relation to teeth, and concerning which there was not any conflict of evidence, whilst as to the teeth matter there was a great conflict of evidence, yet plaintiff in error sought to make the case turn on the tooth question involved in the case as though it were the only matter of identity, thus asking the Court to require the jury to ignore all other evidence of identity. We submit it would not have been proper for the Court to have so done. We have in the statement contained in this brief referred to some of the evidence of identification, showing the dead body was the corpse of Hillmon (and, also, not the body of Walters), which we here refer to, but further, that refused instruction was, in its statement of facts, incorrect. The words, "Proof has been offered, which has not been disputed, that the corpse had a perfect set of teeth, without decay or imperfections," found in said assignment of error, were untrue; among other evidence Dr. Patterson, who, for the insurance companies, made the model mentioned

at r. 236, etc., testified to the effect that there was irregularity in the lower front teeth, and that the lateral incisor on left side of upper jaw was shorter than its mate; that it gave evidence of having been worn by a pipe or something of that nature considerably at that point—more than any other point on the front teeth, and showed how an opening would appear at that point as though a tooth was absent. (R. 237, 235 to 238.)

That Hillmon had good teeth, see r. 748, 525, 531, 532, 539, 720, 507. The defect spoken of by Patterson would not necessarily be noticed by all persons seeing him, whilst the conflict between the different witnesses who testified at the instance of plaintiff in error in relation to the teeth of Hillmon is, we submit, sufficient to destroy all their testimony and rebut their whole evidence among themselves, whilst the shortness of the one tooth so described by Dr. Patterson accounts for what some of the witnesses of plaintiff in error said about a tooth. See—

Henry Hillmon, r. 1094.
Theodore Wiseman, r. 860, 861, 882 to 901.
Claude Holliday, r. 994, 997.
Tinetta Corcadell, r. 1038; lower corner seemed worn off.

Whilst the testimony of William Hillmon (1097, 1107 to 1110), and Mrs. Nichols (1121, 1122, 1123), and others is in conflict, not capable of being reconciled with that of the other above named witnesses of plaintiff in error, or with several others of its witnesses in relation to the matter of Hillmon's teeth. This conflicting evidence of plaintiff in error was so destructive of itself as a whole as to render it proper for the jury to conclude that the conflict on the tooth question presented was well explained by Dr. Patterson, as shown at r. 237, where it is shown that he testified to the effect that one of the teeth in the mouth of the corpse, the left lateral incisor in the upper jaw, had been by a pipe stem or something of that order, worn considerably, so that when the lips were drawn around the upper teeth the major part of that tooth would not appear while the others would; and he explained that matter to the jury. Which explanation would

tally with other evidence in the case, shown at r. 748, 525, 531, 532, 539, 720, 507.

We also refer to the fact that neither Selig, agent of plaintiff in error, or said examining M. Ds., Stuart or Miller, testified to any of the teeth of Hillmon being decayed or missing. We submit the question of credibility of the witnesses, and the matter of preponderance of the evidence, etc., was properly left and submitted to the jury. (R. 1918, 1919.) There are many men named Hillmon. Howe (r. 1378) did not know whether he worked on John W. or some other Hillmon's teeth.

In this connection we refer to the testimony of Isaac Johnson, a witness called by plaintiff in error and the Mutual Life Insurance Co. (r. 1206), having testified to the effect as shown at r. 1209, 1210, that he knew a Hillmon who lived over or next to a store kept by one Hart on Massachusetts Street, between Pinkney and Winthrop, in Lawrence, Kansas, in 1878–9, and to the testimony of defendant in error at r. 1887–8 to the effect that there was another Hillmon Johnson may have meant, and that she and her husband did not ever live on Massachusetts Street, and to the fact shown by the common knowledge of which the Court takes notice, that there are many Hillmons, and that doubtless too many of them as well as too many of the people of any other name have a good many bad teeth, and that doubtless many of them would have liked to have had the dentist (Howe) work on their teeth if they resided near enough to him; and we submit that the identification of a person merely by that of his last name does not amount to anything worthy of consideration when it comes in conflict with any affirmative evidence, and but little at all.

The demeanor, conduct and appearance of the witnesses upon the stand was proper matter for the jury to consider.

And further, as part hereof, we refer to the foregoing part of this brief in relation to matters of identification.

Evidence identifying corpse as that of Hillmon, etc.: Vaccine sores; hair; identification of corpse as Hillmon; nose of both Hillmon and Walters; eye brows; dog bite; Walters'

crooked little finger—none on corpse; Walters' bunion; Walters' corns; Hillmon's ring mark; hands—driving marks; teeth; Hillmon's dark brown hair; Hillmon's height, length of corpse, etc.; scars; mole; photos of corpse; Hillmon and Walters compared; Walters seen alive after April, 1879. And where there were so many points of identification it would have been improper and misleading for the Court to point out a single one.

The testimony of some of the witnesses of plaintiff in error (as set forth at pages 1097, 1107, 1110, 1121, 1122, 1123) indicated he had a very bad mouth, whilst others left it in fairly good trim, differing among themselves, and showing that as a class of tooth witnesses, by their contradictory description of his teeth, that they could not be relied on to determine any question of fact. We submit there were many reasons for rejecting that instruction, and that the Court did not err in so doing.

And further, in this connection we refer to r. 87 and 1924, from which it appears that the trial court, at the request of plaintiff in error, in its general charge adopted and gave the substance of the 19th instruction, set forth at r. 87, which irreconcilably conflicts with the refused part of said instruction No. 1, set forth in said 85th assignment of error, and the Court having thus at the request of plaintiff in error, charged the jury in conflict with the refused part of said instruction No. 1. It follows that plaintiff in error cannot be here now heard to complain of the refusal of the Court to give the refused part of said No. 1, and if plaintiff in error shall claim that said No. 19 is not a part of the record in this case, then it follows that it, plaintiff in error, cannot be heard on or as to the matter of said 85th assignment of error, or any other, in relation to the matter of the trial court having refused to give any instruction it requested because unless so much of r. 84 to 94 as relates to instructions is part of the record, there is nothing to show plaintiff in error, either by itself or attorneys, signed any instruction by it requested or any request that the trial court give the same, and unless

such request was so signed plaintiff in error cannot assign error or be heard in relation to the matter thereof.

Morisette vs. Howard, 62 Kansas, 463, 468, and Sec. 914, R. S. of Congress, 1878.

ASSIGNMENT OF ERROR No. 86. (R. 1996.)

Relating to Refusal of Court to Strike Out Certain Testimony Introduced by Plaintiff in Error.

We contend that for reasons hereinbefore stated, plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 31 in that assignment of error mentioned for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken being to all as a unit, as shown at r. 1926.

There was not any evidence that Hillmon made any such statements as mentioned in that assignment of error other than as testified to on examination in chief of witnesses called by plaintiff in error and the Mutual Life Insurance Co. in answer to questions asked by their counsel, to, in and about the matter of their attempt to show Hillmon was not as tall, to-wit: 5 feet 11 inches, as stated in the medical examiner's certificate attached to Hillmon's applications for insurance, as shown at r. 178, 184, 187, 192, 195, 198, and also at r. 138, which several certificates show it was the duty of those medical examiners to have ascertained the actual height of Hillmon, and properly insert the same therein according to the actual truth, and of course it was important that such statement should be correct.

But as when the aforesaid dead body was at Lawrence being examined after death of Hillmon by said examiners, it was found that the corpse was of a length to correspond with such 5 feet 11 inches—a corpse of a man when lying down is usually a little longer than the standing living man (as is known by common knowledge)—therefore to help show the dead body was not the corpse of Hillmon (as the repre-

sentatives of the insurance companies as we have seen, bestirred themselves to do from the time Wiseman telegraphed Griffith as hereinbefore mentioned) an effort has been made among other things to prove Hillmon was not 5 feet 11 inches high, and of course it could not be by them hoped successfully so to do, unless so much of those certificates of the agents of the insurance companies, said medical examiners (whose duties as agents and representatives of the insurance companies it was to so correctly in such certificates state the height of Hillmon, as between the insurance company and the insured), as stated Hillmon was 5 feet 11 inches high, could be shown to be false, therefore those medical examiners after the death of Hillmon respectively testified to the effect that they so inserted that height because Hillmon told them such was his height—now sometime *they published an untruth*, either when they so stated in said certificates or when they testified he was not so high as they respectively did, and in doing so, further testified that Hillmon also told them he was not that high, we have in the statement part of this brief referred to the matter of the height of Hillmon, and if this Court shall think that the matter of that refused instruction ought to be investigated to see whether the Court erred in refusing to give refused instruction No. 86, then to do so intelligently it will be necessary for the Court to read all of the evidence referred to in the statement in relation to the matter of the height of Hillmon, and also the parts of the record referred to herein in relation to assignment of error No. 79; but we submit that considering that Hillmon is in said certificates stated to be 5 feet 11 inches high, and as the matter of his height was to be arrived at by some means, that if the insurance company by their agents saw fit to take statements of Hillmon as to his height and stated accordingly in their appropriate certificates, plaintiff in error was not entitled to the refused instruction, because if his statements were sufficient for them so to act and certify on, surely they were not entitled to that refused instruction; and further, the real object of asking that instruction was apparently to mislead the jury into supposing the Court meant thereby to convey the idea to them

that the fact that the plaintiff in error had by its agent, Dr. Stuart its medical examiner, in certificates by him made for it and as its agent certified Hillmon was 5 feet 11 inches high, still that such certificates were not evidence to be considered on the question whether such was his height, and of course such would have been the practical effect of such instruction if given.

And further, it was not proper for the Court to state to the jury either that as a fact Hillmon so stated, or if he did that such statement was not evidence of his height, he could not have so stated without being before the agents, and if they chose to accept and approve of any such statement of Hillmon, it was competent to be considered by the jury.

ASSIGNMENT OF ERROR No. 93. (R. 2000.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore stated plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 11, in that assignment of error mentioned, for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken being to all as a unit, as shown at r. 1926.

And further, we submit that said instruction No. 11 was erroneous and misleading in many respects and not proper matter of instruction, and was properly refused.

And further, we contend that said instruction was not applicable to the testimony of any witness in the case, because there was not, if we remember right, a witness who identified the body, that is, who saw the body and identified it as that of F. A. Walters. To pretend to recognize the photos of a twenty-day corpse as being that of a man a witness had known in life, is, we contend, not identifying the body as that of such person; and further, it was within the province of the jury only to determine what the testimony

of the witnesses who pretended to recognize photos of the corpse as being that of Walters amounted to within the meaning of that instruction.

ASSIGNMENTS OF ERROR Nos. 94, 95 and 1st 96.

(R. 2000–1.)

Relating to Refused Instructions.

We contend that for reasons hereinbefore stated plaintiff in error has not any available exception to the refusal of the Court to give either of the instructions Nos. 12, 13 or 14 in either of those assignments of error mentioned. And further, to have drawn the attention of the jury to, and so instructed them on the matter of those instructions, and thus to ignore the evidence in the case by which the circumstances under which the releases and order for policies were made would have been erroneous, and if the Court had given either thereof it would have in substance, as matter of law, struck out a large amount of evidence applicable to the matter of those instructions which it was proper for the jury to consider—and it was not proper to thus single out, as shown by those instructions respectively, the matter thereof in the manner requested thereby.

And further, we submit those instructions were properly refused because of what we hereinbefore say in relation to assignments of error Nos. 27, 28, 29, 30, 31, 32, 59 and 105, and of what the Court charged the jury in its instructions to them in relation to the same matter, as shown at r. 1917, 1921–2.

ASSIGNMENT OF ERROR No. 96 (2nd of that Number.)

(R. 2001.)

Relating to a Refused Instruction

We contend that for reasons hereinbefore stated, plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 18 in that assign-

ment of error mentioned for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken being to all as a unit, as shown at r. 1926.

And further, we submit that considering all of the evidence in the case in relation to the question of the identity of the dead body, and also considering testimony of Charles W. Schott, shown at r. 1666, 1670 to 1673, and to that of Arthur Simmons (r. 1856, 1858, 1860), to the effect that Walters was alive and seen in Kansas City and Leavenworth in the spring of 1879, after the matter of the death of Hillmon and as late as in May, 1879, two months after the death on Crooked Creek, and the testimony of Fannie Walters that F. A. Walters wrote her from Leavenworth (r. 1795, 1808), and also considering the other matters urged hereinbefore in relation to the matter of assignments of error Nos. 75, 76, 77 and 84.

And also considering the matters we have hereinbefore urged in relation to assignment of error No. 105, and to the charge of the Court on those subjects, we contend that if the Court had given the refused instruction No. 18, it would have greatly erred and would among other things have invaded the province of and misled the jury; and further we submit it was not proper to thus single out the matters mentioned in that instruction No. 18, and so charge with reference thereto in the manner as requested.

And further, we contend that it would not have been proper for the Court as matter of law to have charged the jury as requested by that instruction No. 18, and thus to have told the jury that the aforesaid written statement was a confession of John H. Brown that could be considered as such as matter of law as against defendant in error, she did not claim under or through him in any manner, and that paper was made long after anything said by John H. Brown could, because of being by him said, be introduced in evidence against her, or used in evidence against her, as requested by that instruction.

CLAIM OF FLIGHT WHICH NEVER OCCURRED.

ASSIGNMENT OF ERROR No. 97. (R. 2002.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore stated, plaintiff in error cannot be heard in relation to the matter of the refusal of the Court to give the instruction No. 22, in that assignment of error mentioned, for want of available exception thereto, some of the refused instructions being properly refused, the exception actually taken, being to all as a unit, as shown at r. 1926.

And further, we submit that considering all of the evidence in the case, it would have been improper and erroneous for the Court to have picked out the matter in that instruction mentioned, as one on which the case should be determined, without reference to the other evidence on the question of identity heretofore referred to in this brief.

> Grand Trunk Railway Co. vs. Ives, 144 U. S. 408, 433.
> Smith vs. Condry, 1 Howard, 28, 36.

By that instruction No. 22 plaintiff in error sought to have the Court, as matter of law, determine for the jury, as a fact, that Brown fled from the State of Kansas, whilst the evidence we submit was not sufficient to have even sustained any finding to the effect that Brown ever fled at all from any place to any place, but that on the contrary the evidence fully and definitely shows that Brown was always ready to put in his appearance at any time or place, when or where he had notice that any one wished to see him. More, the evidence showed fully that the insurance companies, by their various representatives, did their best to bluff and scare Brown to flee, but that they in that respect utterly failed; and we submit any claim or statement that may be made in any brief, or otherwise, in behalf of plaintiff in error, to the effect that Brown ever fled at all, is utterly and entirely unfounded, inexcusable and contrary to the evidence, and made

only to endeavor, by the weight of counsel and the hope of plaintiff in error to create prejudice against Brown, and to in so far as so doing might, trying to cover up the enormity of the offense committed by plaintiff in error in obtaining from Brown the written statement mentioned in assignment of error No. 105, under the circumstances, in the manner, and by the methods used to obtain the same. With reference in this connection to the subject matter of that refused instruction, we will refer to certain parts of the evidence, including the aforesaid deposition of John H. Brown, and the testimony of William Riggins, George W. Paddock, S. A. Ferguson, Charles Chadwick, Jacob Frazier, Harvey M. Davis, Clark Gilmore, E. M. Byerly, Eli Smith, Derrick Updegraff, W. W. Standiford, F. P. McAllister, A. J. Phillips, set forth in the record, as shown in the index thereto, that when John H. Brown, on the 17th of March, 1879, accidentally killed Hillmon, he immediately caused people residing in the neighborhood to assemble at the place where Hillmon's dead body lay, where an inquest was held, and remained there with them until some of them went with him and the dead body to Medicine Lodge, where a second inquest was held, and that after the burial he went with Paddock and remained with him several days, until Brown returned from the residence of Paddock (Paddock was J. P., who presided as coroner at the Barbour County inquests in place of the absent coroner) to Medicine Lodge, and from there returned to Lawrence with the dead body, as before shown; and that Brown, after having testified, as before shown, at the Lawrence inquest, and remained there until Mr. Barker, one of the employed attorneys of insurance companies, told him he was through with him (r. 431, 429, 434), and which, in substance, giving of leave to Brown to depart and go about his own private affairs, Barker did not deny, although he, at instance of plaintiff in error, testified as a witness, as shown at r. 1735, in relation to matters occurring concerning the Lawrence inquest, and then Brown went to his home, that is, his father's place, near Wyandotte, and from there to his brother's, near Parkville, Mo., and from there to different places, until he met Buchan at Lexington, as before shown; and Buchan

there learning that Brown thought of endeavoring to go back and work for his brother, Reuben Brown, in Platte County, Mo., near Kansas City, gave him some money, and tried to persuade Brown not to return to his brother's place but to go further away (r. 474, 550); and that whilst Brown was at Lawrence, attending the inquest there, Theodore Wiseman, one of the above mentioned agents of the insurance companies, tried to get A. J. Phillips, an acting officer there, to scare Brown into leaving (fleeing, as plaintiff in error likes to call it on Brown), but failed, as shown at r. 1851 to 1854, and at various times, as shown at r. 1066, 1070, 1071, 457, 458, 474, 477, 547, 549, 552, 553, 557, 559, 562, 563, 564, 565, 569, 570, 573, 574, 1281, and elsewhere, but still it is seen he was easy enough to find at any time Buchan, or any other person, sought to find him, and let him know they wanted him. He was a young man, and of course had to make his living. By reading the deposition of Brown, and looking at the map of the country, it will be seen that during the time which elapsed between the time when Brown so, with the assent of Barker, left Lawrence, until the releases were obtained from defendant in error, Brown was in one of the best populated, best cultivated, most thickly settled portions of this whole country, comparatively speaking, close to Kansas City all of the time; and notwithstanding all efforts made by plaintiff in error and the other insurance companies interested, through their various agents, to try to get Brown to run away—*flee*—or something of that sort, he was always, and has always been on hand, or where he could be easily found; now and for many years last past, as shown at r. 545, Brown has been resident at Jasper, Arkansas. There is not a scintilla of evidence in the case indicating that any person ever sought to find Brown, and failed so to do, unless excepting with reference to when there is enough in the evidence to show they did not use ordinary means to inform him they wanted to see him at a certain time or place. The failure of Buchan and Walker to find him is sufficiently explained at r. 438, A. 1076. When Barker, Green and Munn, representatives of the insurance companies, as shown by the before cited testimony of Buchan, ascertained that Brown, in addi-

tion to having before testified at the inquests that the dead body was that of Hillmon, had also made proofs of the death of Hillmon, they employed Buchan to obtain the written statement, as before shown, and as shown by the testimony of Buchan, one of the representatives and witness of the insurance companies; then when they employed him to obtain that statement, he took pen, ink and paper, and the bogus officer, and fast team of the sheriff before referred to, because he (Buchan), and evidently Barker, Green and Munn, knew where he was to go to find Brown, and there found him at work on the farm of his brother Reuben, within a few miles of Parkville, in one of the flower spots and among the best settled of the farming sections of the country—and then Buchan, as before shown, got the statement.

There is not any conflict of evidence as to the whereabouts of Brown, and not a particle, not a scintilla, of evidence showing that he was anywhere or did anything other or otherwise than as shown by his own deposition—except as Buchan, the attorney, who, by his own testimony, shows that for money, a few hundred dollars, he dumped his trusting client into the mire, and Buchan conflicts with Brown so far, and as to the point as to whether Brown and defendant in error were hunting him (Buchan) for a chance to make the statement, and defendant in error to give up the policies, which, we submit, in view of all the evidence, is absurd, that is, that the testimony of Buchan, in so far as it conflicts with that of Brown and defendant in error in relation to whether Brown wanted to make the statement, or defendant in error to give up the policies, is, we submit, absurd, not worthy of a moment's consideration, considering all the circumstances of the case, but whether so or not is perhaps immaterial on this question of charge of fleeing made in that refused instruction. If your honors shall ever think that possibly Brown fled, or thought of fleeing, from anywhere, we ask you to require plaintiff in error to point out the evidence which indicates it, or which gives it (plaintiff in error) any excuse for claiming that Brown ever fled. It is easy to charge with high-sounding language, and a bold front sometimes carries a man over a bottomless chasm, such as exists

between the charge of fleeing as to Brown, and proof that he ever did so, or even thought of doing so, or could, with all the ingenuity and efforts shown by the evidence on the part of the insurance companies' representatives, be induced or bluffed into so doing—that is, to flee.

As to payment of any money by defendant in error to Brown, surely it was no crime for her to owe him some for services he had rendered her husband, or to pay him therefor, as shown at r. 811 and 816.

ASSIGNMENT OF ERROR No. 98. (R. 2002–3.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore mentioned, plaintiff in error has not any available exception to the refusal of the Court to give the instruction No. 25 therein mentioned.

And further, we refer to what we have hereinbefore said in relation to the "Munn paper," copied at r. 580, including what we have before said in relation to assignments of error Nos. 27 to 32, 59 and 105, particularly Nos. 31 and 59, and to what we have said in the statement part of this brief in relation to that "Munn paper" as though here repeated in connection with the matter of that instruction No. 25.

And further, considering that plaintiff in error, by its agent, Munn (r. 1254), made that paper for the purposes shown at r. 580, 581, 592, for the purpose among others of procuring the release (r. 19), and further, considering that the only thing that saved the representatives of plaintiff in error from coming very near, if not quite attempting, to compound a felony is the fact that the aforesaid dead body was that of Hillmon.

We submit that plaintiff in error was not entitled to that instruction No. 25, and further, if given, it would have in many respects misled the jury, and caused them to think that in the opinion of the Court it was all right for the parties to do what they did in the way of getting from defendant in error the release, including all the transactions in relation to

that "Munn paper," and we contend it was not proper to single out that matter and instruct the jury as so requested; and in this connection we also refer to what we say herein in relation to the 102nd assignment of error, and submit that it was not proper for the Court to whitewash plaintiff in error and its representatives as requested by that instruction, and that the matter thereof should not have been singled out for the purposes shown by asking that instruction. By asking that instruction plaintiff in error is in the position of one who has attempted to commit a great wrong, but fearing it will fail asks the Court to give them a clean reputation because they feel they need such help. And further, if the Court had given that instruction No. 25, it would have greatly distracted the attention of the jury from the real points in controversy in the case, for all which and other apparent reasons we submit it was properly refused.

ASSIGNMENT OF ERROR No. 99. (R. 2003.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore stated plaintiff in error has not any available exception to the refusal of the Court to give so much of instruction No. 28, in that assignment of error mentioned, as it did not embody in its charge and given to the jury as hereinbefore shown.

As before shown the Court did embody in its charge and give to the jury all of said instruction No. 28, except part thereof which is to the effect that "the lapse of time since the alleged death of John W. Hillmon is an immaterial matter in this case," and no exception of any kind was taken to the general charge of the Court on this subject.

The refused instruction No. 28 was refused at a trial in 1899, twenty years after any evidence of Hillmon having been seen or heard of. His continued absence for twenty years was, we submit, proper matter for the consideration of the jury. Plaintiff in error did not except to the Court instructing the jury as shown (r. 1920), about absence.

That the Court would have erred if it had given that part of that instruction, which as quoted relates to lapse of time, and that the instruction or charge on the subject given, as shown at r. 1920, was correct is shown by the cases of—

Davie vs. Briggs, 97 U. S. 628, 634 to 636.
Whitely vs. E. L. S., 39 N. W. 369, and cases therein cited; and
1st Greenleaf on Ev., Sec. 41 and notes.

Yet, as that part of the charge which relates to absence was not excepted to, it is not material to consider whether the Court should or should not have so charged, the Court in saying what it did had reference only to the identity of that dead body.

2d. And the Court quite distinctly instructed the jury to the effect that the crucial question in the cases was whether John W. Hillmon died in March, 1879, and whether it was his body that was brought to Lawrence in April of that year. If it was not, to find for defendants, the insurance companies. (R. 1917–1918 and 1921.) And the substance of that 28th instruction was given, except that the Court did not say that the lapse of time was immaterial matter; and we submit the lapse of time was not entirely immaterial, but might be considered.

ASSIGNMENT OF ERROR No. 100. (R. 2003–4 and 151.)

Relating to Marriage of Defendant in Error.

We contend that for reasons hereinbefore mentioned plaintiff in error has not any available exception to the refusal of the Court to give instruction No. 33.

The policy sued on was payable to defendant in error under her name of Sallie E. Hillmon, as wife of John W. Hillmon, if she survived him (r. 6), and in that name she sued, but having after the commencement of the action married James C. Smith, as shown by evidence at r. 151, and being properly asked her name at the trial, she of course

properly said it was then (after that last marriage) Sallie E. Smith, and of course it was proper for her to state how she, who, when the policy was issued and also when the suit was commenced, was Sallie E. Hillmon, came to be Sallie E. Smith, all which evidence and statements were proper to inform the jury and the Court who she was. Her last marriage did not in any manner affect her status in the case. Sections 1, 2, 3 and 4 of Chapter 62 of the General Statutes of 1868 of Kansas, pages 562–3, are as follows:

"CHAPTER 62.

"MARRIED WOMEN.

"AN ACT respecting the rights of married women.

"*Be it enacted by the Legislature of the State of Kansas:*

"SECTION 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband, or liable for his debts.

"SEC. 2. A married woman, while the marriage relation subsists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

"SEC. 3. A woman may, while married, sue and be sued, in the same manner as if she were unmarried.

"SEC. 4. Any married woman may carry on any trade or business, and perform any labor or services, on her sole and separate account; and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used and invested by her in her own name."

And as James C. Smith is such husband as alluded to in said Sec. 1, it follows that she could continue to prosecute the action notwithstanding she had married him, and because of Sec. 140, at page 635, G. S. of Kansas 1868, which is as follows:

"SEC. 140. The Court, in every stage of action, must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

It is not material or important to consider whether her name should have been in the pleadings and record changed from Hillmon to Smith or not, but such question is not raised by that assignment of error, and further, the evidence referred to shows that there was proof of the marriage to Smith, and therefore, irrespective of any other reason, that instruction was properly refused.

And because of those statutes, defendant in error could continue to maintain her action notwithstanding her marriage to Smith after the action was commenced.

ASSIGNMENT OF ERROR No. 101. (R. 2004–5.)

Relating to a Refused Argumentative Instruction.

We contend that for reasons hereinbefore mentioned, plaintiff in error has not any available exception to the refusal of the Court to give the instruction No. 39 mentioned.

We submit that instruction No. 39 was erroneous in many respects and was designed as an argument and was properly refused, and we here refer to what we have before said in relation to assignment of error No. 85, and as we understand that instruction No. 39 it was desired as an argument among other things on the teeth question to help do away with the effect of the great discrepancy between the statement of

different witnesses plaintiff in error called to testify, some of whom described Hillmon's mouth as being exceedingly short for teeth, whilst others left him with a good enough mouth.

ASSIGNMENT OF ERROR No. 102. (R. 2005.)

Relating to a Refused Instruction.

We contend that for reasons hereinbefore mentioned, plaintiff in error has not any available exception to the refusal of the Court to give instruction No. 40 mentioned.

In this connection we refer to what we have hereinbefore said in relation to assignment of error No. 98 and instruction No. 25, as though here repeated, and we further submit that the only thing that saved the evidence from being sufficient to show *prima facie*, which would be enough for a civil case, that the only reason why the evidence did not show that plaintiff in error and its representatives attempted to compound a felony was the fact that the dead body was that of Hillmon, but we suppose it is not necessary to consider that question because the evidence tended that way; but even if it did not, there is nothing to show that anything was done in the case or that the case was in such shape as to require such instruction No. 40, or such instruction No. 25, as requested for any purpose other than to help whitewash plaintiff in error, Munn, Buchan, and others, and of course it would not have been proper for the Court to have distracted the attention of the jury from the issues in the case by trying to put white paint on plaintiff in error or its agents, and we submit the instruction was properly refused. It should be borne in mind in considering those two instructions Nos. 25 and 40 that the case on trial was not a criminal case, but a civil case, and that in such cases and in relation to such matters as referred to in those instructions, corporations are just as responsible to the opposite party for any wrong it may do through agents or otherwise as an individual is.

ASSIGNMENTS OF ERROR Nos. 107 and 108.

(R. 2006–7.)

We submit that plaintiff in error is not only without any available exception to the refusal of the Court to give either of those instructions, but that it is also without any available or reasonable excuse for making those assignments of error, or either thereof; the evidence was abundant to sustain the verdict as shown by the record, and of course it was proper to render judgment on the verdict.

And we submit that there is not any reversible error shown by the record, and we ask that the case be dismissed from this Court for want of jurisdiction in this Court, to review the record or determine whether the trial court erred or not, and if that is not done, then that the judgment of that Court and of the Court of Appeals in affirmance thereof, be affirmed by this Court, and that ten per cent. additional of the amount thereof be awarded her under rule 23.

And in support of the application for such ten per cent. damages for delay, and to prove that plaintiff in error has defended against the claim of defendant in error on which she recovered the judgment complained of for delay, we refer to the fact that there is not any competent evidence that either defendant in error or the insured (Hillmon) ever did an unlawful or improper act, or a lawful act in an unlawful or improper manner; whilst the record shows that plaintiff in error, by its assistants, representatives and agents, has from the time in 1879 when the dead body was on its way from Barbour County to Lawrence, to time of preparing papers for use in the Court for review of the judgment and proceedings by it complained of, done many wrongful acts, including among others,

1st. The effort by Wiseman, Griffith and Selig to entrap defendant in error into making a misdescription of her husband, and in same connection see the matter about height of Hillmon, including what is referred to in the stating part hereof and what is said in relation to assignments of error Nos. 79 and 86.

2nd. The cutting of a piece of flesh from the arm of the corpse, burning same with a hot iron by pretendedly learned medical gentlemen, and thus disfiguring the vaccine scar under the inexcusable pretence of seeing whether thereby effect could be produced equivalent to that scar, and carrying off the piece of flesh thus removed under pretence of preserving same for evidence at the trial, and practically throwing same away before the first trial of the case, and the treatment awarded defendant in error whilst engaged in the useless cutting, etc., of the corpse.

3rd. The sacrilege of pulling hair from the head of the corpse under pretence of wanting it for evidence at the trial, and not producing it at the trial.

4th. The pretended coroner's inquest at Lawrence, evidently for the private purposes of the insurance companies, and the treatment awarded defendant in error during that proceeding.

5th. The matter of the lost tintype on which Hillmon and Brown were shown side by side.

6th. The unsuccessful effort to scare Brown into fleeing, and then wrongfully seeking to create prejudice against him (a witness defendant in error needed) by claiming he fled, whereas on all appropriate occasions he was present and did not ever flee—done to injure defendant in error.

7th. The acts and threats which culminated in procuring from Brown the written statement, with intent to injure and wrong defendant in error and paying therefor.

8th. The motives and acts which culminated in the making of the "Munn paper" of 6th September, 1879.

9th. The swash-buckler style of threats of wrongful use of money, etc., and acts which culminated in procuring the release pleaded, and payment to Buchan for threatening both Brown and defendant in error, respectively, with a by plaintiff in error and its assistants misuse of money power on and as to judicial proceedings, including prevention of recovery on the policy sued on, and sending Brown to the penitentiary unless he would make the false written statement.

10th. The matter of the name of plaintiff in error on page 1926 of the record, all of which we contend, when considered with the other matters referred to herein, show beyond reasonable question that plaintiff in error, throughout the whole matter of the controversy and litigation, has sought to defraud defendant in error of a just claim against it, and has prosecuted its proceedings in error in hope of further and longer delaying defendant in error, without any cause or excuse whatever for hoping for more than delay, and therefore we submit she is entitled to such ten per cent. as provided for by rule 23 of this Court.

If the Court shall overrule our objections to the jurisdiction of this Court, and also to the hereinbefore mentioned 1798 pages of the so-called record, and also our argument as to the 110 several assignments of error, and determine to reverse the judgment of the trial Court, then we submit that the said 1798 pages is composed principally of matter which does not help or throw any light on and is not pertinent to any assignment of error which petitioner, plaintiff in error, had reasonable ground for hoping would be by any court of review considered stating cause for reversal, and that as shown by the exceptions set forth at pages 125 to 128 of the record, respondent did all she could to reduce the size and cause to be stricken out all unnecessary and improper parts of such bill of exceptions as was presented by petitioner, plaintiff in error, and objected thereto; that there ought not in any event to be taxed against her any more costs than such as would have necessarily been incurred to present such assignments of error, as in view of the case as tried it was reasonable to hope would be considered by a reviewing court as appropriate and proper to have made, considering the issues and the adopted part of said instructions Nos. 1 and 28. And in this connection we refer to subdivision 3 of rule 24 of this Court. And further, we submit that because of the first 2007 pages of the volume called the record, herein having come on file as it has, that there ought not in any event to be any cost taxed against respondent for or in relation to any matter of printing or preparing the same for printing, or indexing the same, in or for use of or in this

Court; and that because of the matters hereinbefore referred to in relation to said 1798 pages, part of that volume, there ought not in any event to be any costs taxed against her for any printing or for any copy or copies of said 1798 pages.

In this connection we request attention of the Court to the exhibit No. 1, filed herein by respondent on the 18th of November, 1901, which includes certain journal entries in case No. 3149, in which she recovered the judgment complained of, which exhibit is a duly certified transcript showing certain matters about impaneling and discharge of juries, setting aside of the judgment of 1888 in pursuance of the decision of this Court, shown in 145 U. S. 285, etc., which we refer to because of the rule of this Court about manifest error, etc., which transcript is mentioned at page 12 of her brief, filed herein in November, 1901, and was therein requested to be made part of the record herein, *really to prevent* any *adverse* ruling for want of a showing that such orders, etc., were made as shown by that transcript, dated 27th October, 1900.

Still we do not understand plaintiff in error claims that the judgment so as aforesaid rendered against it on the 18th of November, 1899, should be reversed because of anything occurring before or after the trial of 1899.

And as the case was, on the 13th of June, 1899, by consent of parties set for trial on 16th of October, 1899 (r. 67), we do not suppose any question will be made because of the matter of those omitted journal entries, etc., but if there should be, then said transcript of date October 27th, 1900, as so left with the clerk, shows such question should not be considered. Why those journal entries were omitted from the transcript sent with, and in answer to the writ of error, as returned to the Court of Appeals from the trial court, we do not comprehend, particularly as the said printed volume contains much that is not material to any assignment of error, and ought not to have been printed, and there is also involved the question that the cost of printing of immaterial matter ought to be taxed against plaintiff in error, whether the aforesaid judgment is reversed or not, to-wit:

1st. All between the copy of file marks on page 11 to the commencement of the last aforesaid answer, page 17.

2d. All between the copy of the filing of the said last reply on page 22 to end of page 64, except orders on pages 25 and 40, 41, 43, 44, 51 and 52, empaneling of juries in 1882, 1885, 1888, 1895 and 1896.

3d. All between the figures 142 on margin of page 84 and the figures 173 on page 107, about instructions.

4th. All between said figures 173 and the figures 185 on page 117, as the same is set forth at pages 1915 to 1925.

5th. And if the Court does not for other reasons tax all of the costs of procuring copy of and of printing the bill of exceptions, entitled, etc., in case No. 3147 (said 1798 pages), to plaintiff in error, then at least the costs of printing all thereof other than such, if any thereof, as this Court shall hold proper to have been printed with reference to assignments of error.

If the two cases mentioned in the aforesaid order of June 7, 1901 (r. 2012, 2013), had both been heard in the Court of Appeals, and were both here in substantially the same shape as this pending case, so far as applicable, the costs of procuring, printing, etc., of the before objected to 1798 pages of course could not any thereof be taxed in this now herein pending case, from which we contend it follows that not only our aforesaid objections thereto ought to be sustained, but even if they are overruled, that costs in relation thereto cannot properly be taxed herein, or in any court, against respondent.

As there would not have been time between the six days mentioned in the 1st subdivision and the three days mentioned in the 3d subdivision of rule 21 of this Court, to have prepared such brief for the respondent as, considering the matter of the petition for certiorari herein and the length of the record and number of assignments of error and the right of petitioner, if the jurisdiction shall be maintained herein, to argue in this Court, any question made by those assignments of error, we have prepared the foregoing without having had opportunity to see or know the contents of any such brief as plaintiff in error may file herein, and without knowing what specifications of error it will make or

rely upon, or which it intends to urge; and we have therefore made what we deem sufficient answer to each of the several 110 assignments of error made by the petitioner, with intention on our part of preparing and filing herewith an ADDENDA hereto after petitioner shall have filed its brief with such specifications of error, etc.

October 31, 1902.

C. F. HUTCHINGS,
JOHN H. ATWOOD,
L. B. WHEAT,

Attorneys and Counsel for Respondent and Defendant in Error.

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IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1902.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY,
Petitioner and Plaintiff in Error,

vs.

SALLIE E. HILLMON,
Respondent and Defendant in Error.

Term No. 94.

PETITION FOR REHEARING.

To the Supreme Court of the United States and the Honorable the Justices thereof:

And now comes said Sallie E. Hillmon, respondent and defendant in error herein, and petitions said Supreme Court and the Justices thereof for a rehearing of this the above entitled case, and for orders and judgments of said Court to set aside and vacate the judgment heretofore, and at this said October term of that Court rendered in this said case and also to affirm the several orders and judgments of the Circuit Court of Appeals, and also of the Circuit Court of the United States for the District of Kansas, reversed by the aforesaid judgment of this said Supreme Court for the following reasons, namely:

We contend this Court ought not to reverse the judgments of the Circuit Court of Appeals, or of the trial Court for any of the reasons assigned therefor, in the opinion heretofore filed in this case.

In relation to the matter of the written statement dated of the 4th day of September, 1879, we contend the facts in relation to the production in the trial Court, and proving the *contents* of said written statement are as follows, to-wit: That the same was not shown to the witness John H. Brown, when his deposition was taken (r. 339 to 520), and that it, said written statement *was not* at the trial *produced* in, or shown to the trial Court, or its *contents* proven at the trial, either by *any part* of the deposition of John H. Brown read in evidence or otherwise at all, until the same was, as shown at r. 1283 by plaintiff in error, by Mr. Green, one of the attorneys for the Insurance Company, produced in open court and handed to Mr. Atwood, one of the attorneys of defendant in error, who was at the time cross-examining Mr. William J. Buchan, and then offered in evidence and read from a copy certified to by said Buchan and Green as shown at r. 1283–6.

That the record does not show that the *contents* of said written statement, or any part thereof, *had been proven* before it was offered and read as shown at r. 1283–6, or that any part of the deposition of John H. Brown descriptive of such *contents* was read before then — but that on the contrary that the record shows those *contents* had not, or any part thereof before then, been shown or proven to the jury by any testimony, and that such descriptive part of said deposition had not before then been read, given or received in evidence at the trial, is made clear and certain by the record, particularly by reference to r. 339, 340, and to questions and answers in said deposition numbered on those pages 339 and 340 of the record, and examination of that deposition and examination of assignments of error numbers 22 to 26, r. 1936 to 1943, 339, 340.

That the objections to certain of those questions and answers shown at r. 339, 340, said written statement not having been produced and shown to the witness, Brown, when his deposition was being taken, were properly provisionally

sustained, is shown at pages 96 to 99 of the brief and argument for defendant in error heretofore filed in this case, (and in this connection we also refer to pages 156 to 160 of said brief as though here repeated).

The parts of Brown's deposition consisting of questions and answers 406 to 409, 630, 777, 1059, 1060, 1068–9, 1112 to 1146, 1175, 1176, 1184–5–6, 1294 to 1299, 1332, 1346 to 1350, and 130, set forth at r. 383, 404–5, 418, 436–7, 441 to 450, 452–3, 472–3–4, 477–8, and 519, do not show what the *contents* of the written statements actually were, but those questions and answers would not have answered or filled the office they did (argued at pages 143 and elsewhere in the brief) if said written statement had not been offered and read as shown at r. 1283–6. Therefore any argument that the said written statement and its contents, or any parts thereof, were *false*, would if it had not been so offered and read in evidence, of no force or effect—and until it was read as shown at r. 1284, etc., the jury did not know its *contents*, it might for all the evidence had before then shown, been a very different document than what it was. But, and further, even if we are wrong in claiming such *contents* had not been proven before said written statement was offered and read, as shown at r. 1283–6, and if said opinion is correct in that respect, then so offering and reading the same was in substance and effect a mere re-reading and showing of what plaintiff in error had already proven, and surely *so doing*, should not subject defendant in error to the penalty asked by the refused 44th instruction by plaintiff in error and inflicted by this Court on her, and it was necessary and proper as part of the cross-examination of Buchan to read said written statement to show what sort of a paper, as paid employee of plaintiff in error, r. 1247–8, 1262 and 1288, etc., *he took pen, ink* and *paper* with him to write the same with when he went with the officer, Ward, to get that written statement, see r. 1269, and other evidence on that subject referred to in the brief, and which written statement he testified he wrote himself, in his own language, r. 1236–7, 1261, 1269, 1270, but as to whether he or Brown furnished the ideas therein expressed is matter of dispute, between Buchan on one side and Reuben and John

H. Brown on the other, as shown by the conflicting evidence herein referred to—and penalty being inflicted by holding that it was error in the trial Court to refuse said 44th instruction, is in effect a penalty inflicted for trying to prove her third cause of reply to be true.

And further, we request attention of the Court to the parts of our brief in relation to said release and written statement and to said reply. And we contend that a decision to the effect that the Court erred in refusing to give that instruction among other things in effect inflicts a penalty on defendant in error *for trying to prove her third cause of reply*,—the part of that cause of reply in relation to said written statement could not be proven by competent evidence without showing what the *contents* of that written statement was, a description in part of which and her belief of the claimed effect of which on the matter of proving her case against the plaintiff in error Brown and Buchan made her believe as shown at r. 770, 771, etc., helped when she came into the sick condition mentioned in said brief at page 113, etc., thereof to cause her to sign the release as shown at r. 771–2–3, 822–3, 830–1, 1241, 1243.

And further, even if defendant in error had, when said written statement was read, as shown at r. 1283–6, stated it was read for any particular purpose *then specified* that she *could not* by so doing, have changed or lessened any otherwise legal effect of so doing, is shown by the case of—

Sill v. Reese, 47 California, 294, 340.

And it is a well settled rule that it is for the Court to determine the legal effect of legal instruments read in evidence, which is of course to be dependent on the nature of the issues in the case, as shown by the legal maxims referred to in said brief at page 162, etc., and cases in relation to libel, forged and other instruments obtained by either forgery, fraud or other undue means,—and said written statement was —in and by said reply alleged to have been wrongfully and fraudulently procured as therein alleged for the wrongful purpose therein alleged.

And further, we submit that by said reply the most FORMAL NOTICE was given, to both plaintiff in error and to the Court, that said written instrument *would be proven* for the purpose of sustaining that cause of reply, and it *could not* be proven by competent evidence *without* reading it in evidence, nor could its *contents* be otherwise lawfully shown, and surely *plaintiff in error could not, by anything it ever did or could do* either at the trial or by cross-examination of Brown *take from* or *deprive* defendant in error of her *lawful right to prove that third cause of reply by competent evidence, or compel her to abandon that cause of reply under penalty of said written statement being taken as true, or competent affirmative evidence against her* that its *contents were true*, because of its being so read in evidence.

And further, referring to the words *under oath* in said opinion as well as in said refused instruction, we refer to what is said on that subject in said brief at pages 164 to 166 thereof, and we contend *it was not under oath* within the meaning of that instruction, nor as those words would have been understood by the jury if that instruction had been given.

And further, it was not *under oath* with *like effect* as the deposition, and on that matter we refer to what is said in said brief at pages 138–9 and 164 to 168 thereof. And we contend that the words *under oath* in said refused instruction *ought not to be disregarded*, and that said written statement was not *under oath* in any legal sense or in any such sense as the jury would have understood the same if that instruction had been given. AND PLAINTIFF IN ERROR HAVING *those words therein we contend the* MEANING THEREOF *may not be ignored or taken away now at its request.*

And we contend that one of the clear and certain meanings of that instruction is that the written statement was *under oath with like effect* as the deposition, and we submit it is clear and certain it was not so *under oath.* False swearing in the deposition would have been perjury, but not so as to the written statement, as Buchan convinced Brown, as shown at r. 473, A. 1295, and 457, A. 1224.

And in relation to the words, "*it was competent for the defendant to waive this objection* and to treat it as other testimony

in the case offered by the plaintiff," even if the idea expressed by those words would in any imaginable case have become appropriate, we submit they are not as to any application to said refused instruction, because it by said instruction *asked the court to say to the jury* to the effect that the written statement was *under oath*, not merely that it was *under a void pretended oath* but *under oath* with like effect as the deposition, which it surely was not. Plaintiff in error could not so waive as to itself, and also so use or have used by the Court those words *under oath* as to or against defendant in error.

The matter of plaintiff in error having by its agents procured that written statement was important in the case, and it, and the manner in which it and said release when coupled with the testimony of John H. Brown, Reuben Brown, James W. Green, William J. Buchan and defendant in error referred to in the brief for defendant in error in relation to the matter of that release, and said written statement, was important to show both the want of consideration for and how the release was obtained. (See particularly record 770, 771, etc.) And for some purposes reading of that written statement to the jury *when read* was proper to show that Buchan, a lawyer, who would write such a paper and use it as he testified he did, was not a credible witness, too bad a man to believe, as well as for other purposes urged in said brief.

By procuring that written statement of Brown in the manner and by the means shown by the evidence referred to in said brief, and in paying Buchan for obtaining the same as well as the release, as shown at r. 1247–8, 1262, 1288, etc., as shown by its own witness, (Buchan stated as shown at r. 1247–8 in answer to questions asked by its own attorneys on his examination in chief as its witness), plaintiff in error became responsible for that written statement as much as though it had been a living person and wrote and signed the name of Brown thereto itself, and thereby that written statement became the act and deed of plaintiff in error as between it and defendant in error. *Yet that part of the matter is ignored in the second subdivision of the opinion of this Court in*

this case as well as in the 44th instruction set forth in the 105th assignment of error; and that part of the matter was reason sufficient independent of any other for refusing the instruction.

But, and if plaintiff in error was entitled to that refused instruction as written, then the evidence referred to in said brief, to the effect that plaintiff in error (and the other Insurance Companies) procured the same in the manner and by the use of the means shown and for the purpose of suppressing and destroying testimony favorable to defendant in error, including destroying the character of Brown, and to help to obtain the release or surrender of the policies as the fact of its existence was used *is all ignored,* and the rule established that an insurance company can employ and pay agents to do all that Buchan did, as shown by the testimony of John H. Brown, Reuben Brown, James W. Green and defendant in error, and still have benefits from such wrongful acts as against the party thus injured if and because of its wrongful acts done by its employed and paid agents are proven as alleged against it. And we ask your Honors to reconsider the matter and decide to the effect so to do or to have given that instruction would on the part of the trial Court have been the acme of injustice.

And on that matter we submit that to rule that said instruction as worded should have been given to the jury includes a ruling to the effect that plaintiff in error was entitled as matter of law to have all of the testimony of Reuben Brown, and so much of the testimony of John H. Brown as related to the manner and means by which said written statement was procured *utterly ignored* and *treated as false by the Court.* We contend such is not the law.

And further in this connection, and with special reference to the matter of that part of the opinion of the Court which is in relation to the testimony of Buchan, we contend that *because of the rules of law in relation to conflicting evidence* on any matter to the effect that the Court *may not lawfully disregard conflicting testimony,* and instruct the jury on matter of law as though only such of the conflicting evidence as is favorable

for one party is true, or the only testimony on the subject, as the Court would have done if it had given that refused instruction to the jury, *because* both Reuben Brown, as shown at r. 545 to 575, and John H. Brown, as shown by the copied part of his deposition, set forth in said brief at pages 40 to 44 thereof, and elsewhere, as shown by his deposition, testified to the contrary of the so referred to testimony of Buchan, so far as the same is material to any question involved—and further *prima facie* by the referred to testimony of Reuben and John H. Brown, and the admission or statement of Buchan as a witness, as shown at r. 1227, to the effect that he wrote for Reuben, as Reuben testified, as shown at r. 545–6–8, which was after Walker, an employee of the Insurance Company, r. 1066–7, went to see the father of Brown, r. 1167, and with the father went to Buchan, as shown at r. 1250, when Buchan commenced to act in behalf, and in the interest of, the Insurance Company, and continued so to do until he had procured said written statement and the release, as shown by the testimony referred to at pages 28, 29, 30, 31, 32, 35 to 44, 48 to 52, 146, 147 and 148 of said brief, plaintiff in error is shown to have, with its associates and its and their agents, commenced the matter of procuring such written statement, and of making itself responsible therefor as its act and deed.

And by the referred to testimony it was *prima facie* shown that plaintiff in error, by its agents, wrongfully procured and caused said written statement to be made, and that the so referred to in said opinion, part of the testimony of Buchan was so far as material to any question involved utterly false. Yet if said refused instruction had been given *such referred to testimony conflicting with that of Buchan would have been disregarded and utterly ignored*, while if Buchan's referred to testimony was false one and a necessary reason to sustain any claim to the effect that said refused instruction should have been given, would fail, and as the trial Court ought not to have disregarded such conflicting testimony, of course we contend the judgment ought not to be reversed because it did not. If said instruction had had a clause therein practically to the effect that if the jury believed Buchan and dis-

believed the two Browns, the question and case as to this conflicting evidence point would be different than it now is, with the instruction worded as it is (and if Buchan did not get said written statement for the purpose in said reply alleged, why did he tear and throw it into a stove, used as waste basket, when he had gotten the release, as shown r. 1246, 1276, 502, 520, 457–8),—and we submit that if the reversal is to stand, it follows that so far as the matter of that written statement is cause of reversal that it follows that the plaintiff in error obtains its victory among other things because as matter of law its witness, Buchan, is to be believed as against the conflicting evidence referred to, and we contend such is not the law as applicable to the matter and question involved, and that if defendant in error proved the part of her third cause of reply in relation to the written statement to be true that therefore the statement should be considered as true, at least as competent evidence against her,—*surely such is not the law.*

And further, we contend that defendant in error, because of the issues, had right to help her defeat the release (r. 19) to have introduced the written statement in evidence at any time during the trial to help sustain her third cause of reply as well as with help thereof to help sustain her second cause of reply (we here refer to pages 156 to 160 of said brief as though here repeated).

IN RELATION TO THE MATTER OF CONSPIRACY.

1st. We have hitherto supposed that we and defendant in error had always denied that any competent (or even incompetent, other than the Brown statement, wrongfully obtained by plaintiff in error and others, as shown by evidence referred to in said brief, and said written statement was not competent against either Hillmon, for reasons stated in said brief, at pages 161, 162 thereof, and elsewhere therein) evidence had been introduced of any conspiracy to which John W. Hillmon was a party, or that he was a party to any con-

spiracy whatever, or that he ever did, or committed any wrongful or illegal act, or any lawful act in a wrongful or illegal manner; and we and defendant in error contend that it cannot be demonstrated that it would have been necessary to do or say more than as done in said brief to prevent being held by this Court or represented in or by its opinion in the case, as having failed to deny that considerable or any evidence had been introduced of or as tending to show Hillmon was a party to, or the existence of, a conspiracy between the three — John W. Hillmon, Brown and Baldwin; and we contend that contrary to the showing and denials on behalf of defendant in error, great wrong is done her and her cause by the statements in that respect in the opinion; and we contend *the claim* that there was competent, or any evidence (said Brown statement not being such against defendant in error), showing the alleged conspiracy as against John W. Hillmon or defendant in error, is not sustained by evidence sufficient to sustain such claim, as to such denials, see pages 19, 20, 21, 216–17, 211, 230 to 234 of said brief.

And we contend that a reading of the record and of our brief will show there is nothing to sustain any claim we have not always denied there *was any competent evidence against John W. Hillmon of any conspiracy, or that he was ever a party to any conspiracy*, and if our claim is correct that the Brown statement was not affirmative evidence, competent against defendant in error or John W. Hillmon to prove existence of conspiracy, *then we contend that all of the evidence*, competent and incompetent combined, in the case, or any part thereof, is not sufficient to sustain any claim John W. Hillmon was ever party to any conspiracy, or was ever party to or committed, or did either any illegal act or any lawful act in an illegal manner, see particularly the part of said brief in italics on page 233 thereof.

2nd. We contend that for reasons stated in said brief the excluded evidence was not competent in the case.

John W. Hillmon did not, nor does defendant in error claim, under or through Levi Baldwin, and Levi Baldwin was not a party to the suit.

In the case of—

The State v. Johnson, 40 Kansas, 266, 267, etc.,

the following language is used in the opinion of the Supreme Court of Kansas, at said page 267, to-wit:

"He claimed also to have had conversations with Kreinhop and Johnson on the same day, and the statement of each detailing his connection with the crime was testified to by the witness. The admissions and declarations so admitted were made by each defendant in the absence of the others, and were allowed to go to the jury over the objections of the defendants not making the admissions as though they were applicable to all. These admissions were competent testimony against the defendant making them, but certainly they were not against the others. While the existence of a conspiracy to commit a crime may be shown by the confessions of the *several* individuals engaged in it, it is well settled that one person cannot be convicted of a conspiracy by the declarations of another,"—and all the transactions between the parties relating to the controversy were in Kansas; and we contend that because of Sec. 914, R. S. 1878, as well as on general principles, that part of said Kansas Supreme Court opinion is conclusive that the excluded statements of Levi Baldwin were not competent evidence to prove any alleged conspiracy as against defendant in error either because of anything done by John W. Hillmon or of anything he did in or about procuring the policy sued on, or otherwise.

3rd. And we contend that the well settled law on such subjects is to the effect that said excluded testimony was not competent to prove the existence of any conspiracy, Baldwin not being a party to the suit.

4th. And that any statement Baldwin could have made in the absence of both defendant in error and John W. Hillmon to any person, would not be competent evidence in the case to prove the existence of any alleged conspiracy, Baldwin not being party to the suit.

5th. And further, those excluded statements of Baldwin were not "in furtherance of the object of any alleged conspiracy," and therefore the same were properly excluded,

irrespective of any other reason. Only such statements of any co-conspirator are in any case, under any circumstances, admissible as are made *in furtherance* of the object of the alleged conspiracy; it is not *every* statement of even a proven co-conspirator that is admissible against even a proven to-be co-conspirator, *but only such as are in furtherance of the alleged common object;* and we contend that even imagination cannot show *how*, or in *what manner*, the *excluded* evidence or statements of Baldwin was in furtherance of any alleged common object or design, and therefore the same were not admissible.

Logan v. U. S., 144 U. S. 309.
The State v. Johnson, 40 Kansas, 268.
107 Fed. 839.
1 Greenleaf on Ev., Sec. 111.

This as to each of those statements respectively, and from those last cited authorities, particularly 1 G. on Ev. Sec. 111, it appears care must be taken that the admitted be such only as are in furtherance of the objects of the alleged conspiracy, the statements of Baldwin respectively were not *res gestae* of any act carrying out any object or common design, and we contend the opinion of this Court as published confounds this matter and disregards such distinction, and in effect holds that Baldwin's statements might be admitted to prove that John W. Hillmon was a party to the alleged conspiracy, and the existence thereof as against both Hillmons, whilst the law we contend as shown by said 40th Kansas, 267–8 and other authorities is to the contrary.

And further, in reference to the denial of there being any competent evidence as against defendant in error as standing in place of John W. Hillmon that he was party to any conspiracy, *we contend he is not shown to have done any act that tended to show such conspiracy as alleged*, (this treating the Brown statement as not being so competent).

Among the reasons why the excluded testimony was not competent and was properly excluded, is that there is not any competent evidence that any *wrongful* or *unlawful act* was done, or any lawful act done in an unlawful manner, *there is not any ground for pretense* that any wrongful act was

done if the dead body produced was the corpse of John W. Hillmon, *and the jury found to the effect that it was his dead body*, as to which matter we refer to pages 197 to 200 of said brief, and the authorities there cited. And as shown by the authorities cited in said brief at pages 185 to 234, particularly at pages 189 to 195 thereof, the only evidence that could have lawfully been introduced to support the second defense (r. 18) was as to whether said dead body was that of Hillmon or not.

And that question was duly submitted to the jury (r. 1917–8–9, 1921, to determine whether it, said body, was the corpse of Hillmon, in substance as requested by plaintiff in error as shown by the first and twenty-eighth instructions asked (r. 1904, 1909, 1996, 2003), in pursuance of its theory and construction of the issues in the case shown by asking those instructions, and the jury found to the effect that said corpse was the dead body of Hillmon, as to which matter we refer to pages 197 to 201 of said brief.

6th. And if this Court is right and sustained by evidence in the case, in and as to that part of the first paragraph in the third main subdivision of its opinion heretofore delivered herein which is as follows, "AFTER EVIDENCE HAD BEEN INTRODUCED ESTABLISHING SUCH CONSPIRACY," then we contend it follows clearly and certainly as day and light follows the darkness of any night, that by asking those instructions plaintiff in error *eliminated* from the case and *waived consideration* by the jury of any question, material or relevant to consider relating to any alleged or claimed conspiracy, as claimed in said brief at said pages 197 to 201, and having so *eliminated* and *waived* any such question (if before then such question was in the case) the authorities cited at page 199 of said brief show *it is not entitled* to be *heard* thereon in this or in any court of review, or on, as to, or *in relation to any question conflicting* with the fact that the *real question* in the case was as to whether said corpse was the dead body of Hillmon or not, this because if the Court is right as to the said quoted part of its opinion there was established by evidence a question of conspiracy in the case, (even if we are wrong in

our claim urged at pages 188 to 196 and 207 to 217 of said brief and elsewhere therein to the effect that the second defense pleaded (r. 18) in substance and effect only raised an issuable question as to whether said dead body was the corpse of Hillmon or not), *and if the fact is as so stated* in the opinion, then plaintiff in error by asking said 1st and 28th instructions waived consideration thereof by the jury, and having so done we contend that ended the conspiracy matter, and if that quoted part of the opinion is wrong then it follows that it was proper to reject the excluded evidence, because as elsewhere herein shown an alleged conspiracy could not be proven against John W. Hillmon (or defendant in error) by statements or acts of Baldwin in the absence of each, and therefore the judgments ought not to be reversed because of rejection of the excluded testimony.

7th. And if we are right in claiming as we do that there was not evidence in the case sufficient to establish any alleged conspiracy as against John W. Hillmon, or that he was party to any alleged conspiracy, in view of the authorities cited, including 40 Kansas 267–8, it therefore, irrespective of any other reason or cause of rejection of such excluded testimony, follows equally clearly and certainly that the excluded evidence mentioned in the opinion, exclusion of which is stated therein as cause for reversal of the judgments, was not competent or admissible against defendant in error, or to show or prove anything as against John W. Hillmon, or the existence of any alleged conspiracy or that he was party to any such alleged conspiracy, Baldwin not being party to the case.

And further that agency cannot be proven by declarations of the claimed agent, see—

Donaldson v. Everhart, 50 Kansas, 718, 724.
Railway Co. v. Kinman, 49 Kansas, 631.
1 Greenleaf on Ev. Sec. 112, note (*b*).

And the law in relation to admission of statements of an alleged co-conspirator under any circumstances is based on the law of agency or a rule of same import.

8th. And further, as John W. Hillmon is not shown by the evidence to have done any unlawful act, or any lawful

act in an unlawful manner, we contend that the whole conspiracy question is immaterial. This is shown by the case of

Porter v. Mack, 50 W. Va. 581; s. c. 40 S. E. 459, 463, and cases there cited,

and the authorities referred to on pages 195, 189 to 193 of said brief, certainly because thereof, that is, of the want of any such evidence, the excluded testimony was not admissible in evidence.

9th. As plaintiff in error could not have been injured by any alleged conspiracy if the said dead body was the corpse of Hillmon, and as the only issuable allegations in said second defense were as shown by the authorities last above referred to to the effect that said dead body was not that of Hillmon, but that he was still alive (and that question was in the manner shown by the record duly submitted to the jury, which found to the effect that it was the corpse of Hillmon), it follows that the said excluded testimony could not have had any effect or performed any office or part other or further than to help (even if it would have so done) to prove by and because of what Baldwin had said and done, that Hillmon was party to the alleged conspiracy, and we see from authorities before referred to that the excluded evidence was not competent for such purpose.

And further, as those referred to authorities establish the law incontrovertibly to be as claimed by us at pages 189 to 201, to the effect, as applicable to this case, that the allegations about conspiracy were immaterial. Baldwin not being a party to the case, the same were not required to hold him to any liability, and in the nature of the case it not being material what statements he had made or acts he had done in the absence of said Hillmon, or what his condition was, it follows that the excluded evidence, if admitted, could not have had lawful effect on any material issue in the case, and could not have had effect other than to help plaintiff in error to try the issues on the incompetent and hearsay statements of Levi Baldwin. And we contend that it is not according to law to hold that it could do so, whether the Court of Appeals or trial Court, either of them, *either erroneously or*

otherwise at all, did or did not consider or hold the evidence in the case sufficient to establish a conspiracy as against John W. Hillmon. But if those courts so held, *we contend they respectively erred in so doing*, and we contend that it is not according to law for this Court to act on the basis those courts so held, but it would be for this Court to determine such question for itself (if the jury had not substantially so found under such instructions as given to the contrary, irrespective of anything said by either of those courts) *from the evidence* if and so far as this Court holds any conspiracy question material. And if this Court reverses the judgments of those courts because of the rejection of the excluded testimony, then if this Court is correct as to the before quoted part of its opinion, we contend it will so reverse those judgments *merely because cumulative testimony*, claimed by plaintiff in error to be of such nature as to help establish the alleged conspiracy was not admitted to further establish such alleged conspiracy as against Hillmon by the statements and acts of Baldwin in his absence (incompetent we claim as before for reasons stated), notwithstanding plaintiff in error, by asking its 1st and 28th instructions, abandoned and eliminated the conspiracy question from the case, and also this in a case where, as we contend, the conspiracy question always was and is immaterial, and in this case where the only office and effect the allegations about conspiracy could perform, if proven, would be to show that Brown and Baldwin were equally responsible with Hillmon, if Hillmon really was party to the alleged conspiracy, and this is a case to which neither Brown or Baldwin was party, and this also in a case in which plaintiff in error was not injured if the dead body mentioned was as in effect found by the jury to be the corpse of Hillmon; and this also in a case in which the alleged conspiracy could not in any event have harmed plaintiff in error, because recovery could not be had on the policy unless the dead body was the corpse of Hillmon.

10th. And irrespective of anything before urged we contend it was not competent for plaintiff in error to prove by statements or acts of Baldwin with what intent Hillmon did, what he did, whatever that was, in or about procuring

the policy sued on, said policy being a lawful contract, and therefore that it was not error to refuse the excluded testimony.

11th. That because the second defense did not allege any injury to plaintiff in error resulting because of the alleged conspiracy, and it could not have so alleged without alleging Hillmon came to his death in pursuance of the conspiracy, the whole alleged conspiracy was immaterial, and evidence could not lawfully be admitted to prove any allegation in the second defense other than evidence as to whether the dead body was the corpse of Hillmon or not, (a mere matter of identity,) is shown by the cases decided by this Court, the Kansas Supreme Court and other Courts, referred to at pages 189 to 196 of said brief, and therefore the refused evidence was properly excluded. That it would not be of any use to prove Hillmon conspired unless plaintiff in error was injured in pursuance of such conspiracy has in effect, we contend, been by the authorities referred to established by this and other Courts too firmly to admit of question, and plaintiff in error did not dare to allege in its answer Hillmon so came to his death, (because of resulting consequences if it had, as shown at pages 202 to 207 of said brief,) but wants to try the case on incompetent, hearsay and immaterial statements of Baldwin as shown by those authorities, and we contend it ought not to be upheld in such effort.

12th. And we contend that the part of said opinion of this Court in relation to the matter of alleged conspiracy is in conflict with the decision of this Court and other Courts referred to at pages 189 to 217 of said brief, particularly those cited at pages 189 to 196 and 199 thereof, because those authorities establish the proposition *that allegations of conspiracy without allegations of resulting damages accruing because of consummation of the conspiracy are immaterial, and do not admit of proof*, and that as applicable to this case, and said second defense, proof or evidence should be *limited to testimony* as to whether said dead body was the corpse of Hillmon or not (a question fully tried and duly submitted to the jury as requested by plaintiff in error, and by the jury in effect by its

verdict found that it was his corpse) that question being the only *issuable matter* alleged or presented by that second defense, Baldwin and Brown *not either being party to the case* it was not material or proper to permit evidence of any *alleged conspiracy* to be introduced because the only office or use of allegations of conspiracy in any case in a civil action between parties is to lay *foundations to hold parties liable* for wrongful acts done because of which *actual injury* is by alleged *issuable facts* shown to have been sustained because of carrying out the alleged conspiracy, who but for the alleged conspiracy would not have been liable. That is, to hold parties who did not commit the wrongful acts *otherwise than by those who by and because of the conspiracy became their agents* And even in such cases the only statements of the alleged co-conspirators admissible is such as done *in furtherance* of and at time of doing those things done to carry out the conspiracy, *admissible only as a string or means to hold* and recover against *some parties who but* for the conspiracy *would not* be liable on, or because of the *special* issuable alleged facts because of which *alleged damage* was sustained, (see same brief pages 189 to 196, particularly 194) and *never admissible to establish* the conspiracy as against one (John W. Hillmon) who did not make the statements to establish the alleged conspiracy as against him. And as defendant in error could not recover unless said dead body was the corpse of Hillmon, and as Brown and Baldwin were not either a party to the suit, it follows that the excluded evidence was incompetent, irrelevant and immaterial and was properly excluded.

And that proof of a conspiracy in this case could not have been made material without a defense alleging that in pursuance thereof Hillmon came to his death.

13th. And further, even if we are wrong as to all other claims in relation to the alleged conspiracy, plaintiff in error cannot properly ask to have a policy held void *ab-initio* because it did not return the premium it received, it was paid for the policy sued on, r. 145, 151–2–3, 752, 1496, 1524, (and see herein brief of plaintiff in error, pages 48, 145, 148–9 thereof, conceding premium was received to a time beyond that of the

claimed death of Hillmon). And that it is a settled rule of law and equity that a party cannot set aside or avoid a contract because of fraud without first returning all by it received thereunder, is shown by the case of—

Jeffers vs. Forbes, 28 Kansas, 174, 181, and cases there cited.

And the clause in *italics* referred to at bottom of page 92 of the brief of plaintiff in error does not help plaintiff in eror on this matter, because if the contract between the parties *is void* or can be shown to have been void *ab-initio*, that clause goes with the remainder and *all other parts* of the contract, and *that* a contract *cannot* for such as by plaintiff in error claimed fraud be set aside *in part* and *remain in force as to another*, to-wit: as to a clause which would if remaining in force permit it to *retain* or neglect to return the *premium* before attempting to set aside or have cancelled the contract, the policy, is we contend, too well settled to need reference to authorities. And therefore, irrespective of any question as to the matter of construction of said second defense, we contend any request of plaintiff in error for a ruling direct or indirect that will permit it to try to avoid the policy because of any pretended conspiracy or fraud should be overruled. That a court *may not help* a party to do *indirectly* that which cannot be done *directly* is too well established and plain to need to be sustained by citation of authorities. And this matter of the non-return of the premium before filing of said second defense is very different from what it would be if plaintiff in error *had alleged* and *proven* Hillmon *came to his death in pursuance of a conspiracy to the effect he should so come to his death*, and is very different from cases where recovery is defeated for breach of warranty, false representation or other similar cause, and such cases are not in point as to the matter of this case, that is, of the effort of plaintiff in error to have its second defense changed by construction so as to let it defeat a recovery because of the claimed conspiracy whether said dead body was the corpse of Hillmon or not.

14th. And we contend that there is nothing shown by evidence in the record (unless by the incompetent written

statement) in relation to the transactions between Baldwin and John W. Hillmon competent against defendant in error that in any manner tends to prove conspiracy, or that John W. Hillmon was party to any conspiracy. Those transactions were only such as is usual between parties located and situated as they respectively were, and to claim any of those transactions are evidence of a conspiracy we contend is equivalent to saying *that the ordinary transactions* between people may be construed to establish a conspiracy *if an enemy chooses so to allege.* And we contend there is not sufficient evidence to sustain a claim that Hillmon was a man of no property, and Hillmon and his wife living for a short time as they did, is no evidence of a want of property. It was not permanent nor intended to be a permanent way of living. Hillmon died while on such expedition as shown by testimony referred to at page 139 of the brief of defendant in error. And it would have been contrary to custom for people similarly situated, recently married, intending to go into ranching business, to have gone to housekeeping or living in the manner wealthy city people sometimes do, or that plaintiff in error claims and the Court *seems by its opinion to hold* they should have done if Hillmon was not in a conspiracy.

Plaintiff in error presumably knew, at least should have known, when it insured Hillmon, who and what he was. There is nothing shown by evidence it did not, and when it was taking the premium paid it, Hillmon was good enough man to insure the last $5,000.00 of $25,000.00 under the circumstances referred to at pages 20, 21, 210, 231–2, of the brief (and argument) herein of defendant in error, on his life as it knew after months of negotiation it was doing, as shown by the amounts of previous insurance stated in the application shown at r. 180 on which the policy sued on was issued, and we contend that the rules of law and equity should be held to estop plaintiff in error from making any objection, or having for its benefit referred to, any matter it either knew or could with diligence have ascertained in relation to, in the absence of both allegation and proof, that it was by affirmative action prevented from so doing, and there is nothing in the evidence giving it any excuse for claiming

it was prevented from ascertaining the antecedents and situation of Hillmon when it contracted as shown by the policy, and we contend that as Hillmon and wife were good enough to take premium from at that time, the contract ought now to be complied with on its part and that any objection urged in behalf of plaintiff in error against Hillmon or his financial condition whether he was poor or well-to-do is inequitable, and contrary to law and the principles of justice, particularly if said dead body was (as is practically by the verdict found to be) the corpse of Hillmon.

And we contend that every act and remark of John W. Hillmon, as well as of Levi Baldwin, done or said in the presence of Hillmon was and is under the circumstances shown by the evidence, referred to at pages 20, 21, 210, 231 and 232 of said brief of defendant in error, not only *consistent* with the fact of his *not being party* to any conspiracy but is also *inconsistent* with the claim he was party to any conspiracy, and that there was not admitted sufficient evidence *to establish any claim* that he was party to any conspiracy, and that under the issues the rejected testimony can be of no force or effect (if of any at all) further than possibly because of statements of Baldwin to cause some juryman to think *possibly* Baldwin conspired, but without that excluded evidence we contend the alleged conspiracy was not and cannot be established sufficiently for any purpose whatever, even if it can be with it. And Baldwin's statements were not admissible to establish conspiracy against Hillmon. And we contend plaintiff in error requires that the written statement of the 4th of September, 1879, procured and written by plaintiff in error and others by its and their agent Buchan by the means and methods shown by the evidence in the case to be considered affirmative evidence against the defendant in error of the alleged conspiracy and also the excluded statements, etc., of Baldwin to establish a case of conspiracy as against Hillmon, and *then* it would *only be of an immaterial conspiracy if said dead body* was the *corpse* of Hillmon, as the jury by their verdict in effect found it was in pursuance of instructions given by the Court on that subject *on the theory* shown and claimed by plaintiff in error by asking its 1st and 28th requested instruc-

tions so worded that by asking them to be given to the jury it *eliminated* from the case and *abandoned any claim of conspiracy* even if evidence received established the existence of a conspiracy as against Hillmon.

And as an unobjectionable jury so found—*unobjectionable* because as shown at r. 136, 137, *after all of the twelve men who composed the jury that so found were in the jury box* plaintiff in error *waived* its right to peremptorily challenge either of them whilst it might have peremptorily challenged either of them if it had seen fit or had any objection to either of those men, jurors, and that jury being such as mentioned in the opinion of this Court in the case of

Railroad Company v. Stout, 17 Wallace, 664,

were as there shown more likely to pass and *determine correctly on the facts than any court*, at any rate the jury were the triers of the facts in the case, and they so found as before stated, and to the effect that said dead body was the corpse of Hillmon, under instructions r. 1917–18, 1919, 1921, *given in accordance with the theory and construction* of the issues accepted by plaintiff in error by asking said 1st and 28th instructions asked by it, r. 1904, 1909, 1996, 2003 as heretofore argued, as shown at pages 197 to 207 of the brief of defendant in error, and if on reconsideration this Court shall hold that the trial Court did not err by refusing to give the 44th instruction *either because* the parts of the deposition of Brown descriptive of the written instrument dated of the 4th of September, 1879, were not as shown at r. 339, 340 read to the jury, at any rate not before the said written statement was read as shown at r. 1283–6 *or because plaintiff in error could not after having procured such written instrument to be made* by the means and methods and as shown by the evidence heretofore and in said brief referred to, *prevent defendant in error from proving it so did as alleged in her reply* (r. 21, 22,) *without making it competent affirmative evidence* AGAINST HERSELF that the STATEMENTS THEREIN were true, that much of the conspiracy matter will be eliminated from the case.

And the evidence of Buchan set forth at r. 1247–8, 1262, 1269 and 1288 about his employment, payment for his services, taking pen, ink and paper with him to write the same

under the circumstances shown by the evidence referred to in the stating part of said brief, and in the part thereof in relation to assignment of error No. 105 (concerning said 44th instruction), we contend conclusively establishes our claim that plaintiff in error as between it and defendant in error is responsible to her as maker of that written instrument, if not then when his testimony is considered in connection with that of Reuben and John H. Brown, defendant in error and James W. Green, and with Buchan's evidence in relation to the tearing of that written instrument and his remarks made at the time set forth at r. 1246 *it is conclusively* shown that plaintiff in error by Buchan, its pa. agent, procured that written instrument for the purposes in said reply alleged, and we contend it would have been competent and proper for defendant in error to have read that written statement in evidence at any stage of the case to help prove her said reply to be true without becoming liable to the penalty of making that written statement affirmative evidence against her of truth of anything therein stated, either within or according to the tenor or meaning of that rejected 44th instruction, and if we are wrong in that, then plaintiff in error has advantage of its own wrongful acts done by its agent.

And in this connection with reference to some of the excluded statements of Baldwin we refer to Hillmon's applications for insurance wherein as shown at r. 167, 171, 174, 180 and 186, he informed the insurance companies to the effect that he was a dealer in live stock, and the same thing is shown at r. 1496 and 1505, and by the fact that he was hunting a location for a stock ranch when he was killed, r. 381, A. 398 to 401, and r. 349, A. 80, and r. 334, A. 33, referred to at pages 11, 139 and 20 of said brief, and the evidence also showed that Baldwin was a stock man, r. 684, 716, 717, and further Hillmon held Baldwin's note and due bill for considerable amounts as shown at r. 1889, on which payments were made as shown at r. 1894–5–6, which were once in the hands of Buchan as shown at r. 1251, 1888, 1889, all of which we contend conclusively shows that it is not proper to use anything said by Baldwin about payments of premium, scheme

or brogue *to help establish a conspiracy as against Hillmon*, this *in addition* to our contention that none of the offered statements of Baldwin were in any manner *in furtherance of any conspiracy*, Baldwin had already gotten much of Hillmon's money as shown by the note and due bill, and we contend the law is that statements may not be construed to mean more than their import or inconsistently with indisputable facts, whilst to construe anything said by Baldwin to help establish a conspiracy against Hillmon or as being in furtherance of any conspiracy is, we contend violent and extreme, and inconsistent with and not warranted by the circumstances of the case, shown by the evidence considered as an entirety, including the evidence and circumstances referred to at pages 231–2 and 19, 20 and 21 of said brief.

15th. And further we contend that a reversal of the judgments because of a rejection of the excluded evidence is erroneous, because that excluded evidence was immaterial if the before mentioned dead body was the corpse of John W. Hillmon; and unless it was his body the defendant in error could not recover, and the trial Court so instructed the jury (r. 1921, 1919, 1917–8), and if it, said dead body, was the corpse of Hillmon, then the case of

Adler v. Fenton, 24 Howard, 407, 410,

and other cases therewith cited in said brief of defendant in error, as well as the other cases referred to at pages 189 to 196 of said brief, we contend, *show conclusively* that plaintiff in error had not a defense *equivalent to a cause of action to cancel the policy sued on because it was not injured by any alleged conspiracy* (whether established by evidence or not) if that dead body was the corpse of Hillmon, and as to *that question those cases* show the allegations about conspiracy were *limited* to *that question*, but whether so limited or not, those cases show that the *alleged conspiracy was immaterial if that dead body was the corpse of Hillmon*, and as we do not suppose the Court in this case means to overrule its former decisions referred to on those pages, or to decide contrary to the decisions of other courts cited on those pages, we contend the part of its opinion in this case in the words following, "While we are not

called upon to express an opinion upon the question whether the mere proof of a conspiracy to defraud the defendant by the procurement of an insurance upon Hillmon's life with the view of ultimately collecting the amount of the policies by a false pretense of his death would be sufficient to avoid the policies as having been obtained by fraud, without proof that such conspiracy had been consummated by compassing the death of another party and passing off the body of the deceased as that of Hillmon," *is contrary to all of those referred to cases*, and if we are right in that respect, we contend it follows that the part of said opinion which is between those quoted words and the last paragraph therein as well as all therein relating to the alleged conspiracy, which precedes those quoted words, *is irrelevant to the case:* of course, if this Court intends to be understood as overruling or deciding contrary to those referred to cases, then this, the foregoing part of this No. 15, is not matter now for consideration; but we contend it is conclusive to the effect that the said judgments ought not to be reversed because of anything in relation to any conspiracy question—CERTAINLY NOT UNLESS PLAINTIFF IN ERROR CAN DEFEAT A RECOVERY on the policy, *even* if said dead body *was the corpse of Hillmon*, and without alleging or proving it *has been injured* by any alleged conspiracy, and can also try to get a jury to believe there was such alleged conspiracy on statements, and proof of financial condition of an outside party (Baldwin) in no way connected with the policy, without proving Hillmon did or helped do any unlawful act, or any lawful act in an unlawful manner. And further, unless it, plaintiff in error, can so defeat recovery, notwithstanding it *eliminated from the case and abandoned* any claim to defeat recovery on the policy because of any *alleged conspiracy by asking* the Court to give the 1st and 28th instructions, as urged at pages 197 to 200 of said brief, nor unless the authorities cited at page 199 of said brief in relation to that matter are overruled or disregarded. Whilst we contend they are conclusive against plaintiff in error and are to the effect it ought not in this Court be heard as to the matter of said alleged conspiracy.

And further we contend that the case of

Smith v. N. B. Soc'y, 123 N. Y. 85,

referred to in said opinion, is not in point against defendant in error, because, as therein shown, the *insured came to his death in pursuance* of the *alleged fraud* and *thus* it was in that case *shown* that the insurance company, defendant in that case, *was injured because of the alleged fraud*, that is, became liable to pay the amount of the insurance unless it could defend because of the *consummation* of the fraud, and in this case all competent evidence as to the identity of the dead body was admitted, whilst said SECOND DEFENSE in this case is *to the effect* that plaintiff in error *was not injured at all* IF THE STATEMENTS THEREIN ARE TRUE, this because it was not injured by *any alleged conspiracy if said dead body was the corpse of Hillmon*, as in effect found by the jury to be,—and (as the Court instructed the jury) defendant in error could not recover if the corpse was not the dead body of Hillmon.

AND IF IT, SAID DEAD BODY, WAS NOT THE CORPSE OF HILLMON, AS SO BY IT ALLEGED, THEN PLAINTIFF IN ERROR WAS NOT INJURED. SO THAT IN EITHER CASE, AND NO MATTER WHOSE CORPSE THAT DEAD BODY WAS, PLAINTIFF IN ERROR WAS NOT INJURED BY ANY ALLEGED CONSPIRACY, AND PLAINTIFF IN ERROR MADE THAT CERTAIN BY ITS ALLEGATIONS IN SAID 2ND DEFENSE,—and thus we see that the real question was actually as to whether said corpse was the dead body of Hillmon, as stated in the said 1st and 28th instructions, and as in effect stated by the Court in its charge to the jury. (In this connection see particularly the hereinafter quoted part of the opinion of this Court, in Adler v. Fenton, 24 Howard, 410, and the cases therewith referred to at page 193 of said brief.) And surely anything said or done by Baldwin could not be made evidence against defendant in error as to whether said dead body was the corpse of Hillmon or not, further or otherwise than as Levi Baldwin who, as a witness, identified the dead body as the corpse of Hillmon (r. 686 to 690). And plaintiff in error, to try to impeach him as to such matter of identification, might have asked him questions relating to the matter of the excluded testimony

if it had seen fit, and if he denied, &c., have called the witnesses Blythe, Crew, Carr and Phillips to testify so far as admissible to what he said, &c. And that, we contend, was the only way, and a sufficient way, for plaintiff in error to have got the excluded testimony before the jury, so far as pertinent for any legitimate purpose whatever, as argued at page 215, 216, etc., of said brief. But it did not choose so to do, but wishes to defeat the contract shown by the policy because of statements, &c., of a stranger to the contract thereby shown,—and we contend it is error to help it do so.

With reference to the last quoted part of said opinion in this case, it should be borne in mind that it is not stated in said 2nd defense that the alleged "conspiracy had been consummated by compassing the death of another party," but only in effect—that the aforesaid dead body was not that of Hillmon—whatever the difference in that respect be between said quoted part of the opinion and said 2nd defense we suppose is not important, so far as any question involved is concerned, we make our contention with reference to the 2nd defense as pleaded, and to the contention of the parties respectively in the trial Court, and on the supposition that this Court in its opinion intended to refer to the matter of the 2nd defense as pleaded, and to the controversy relating thereto.

16th. And we contend that plaintiff in error, by asking the Court to give those 1st and 28th instructions, *asked the Court to adopt*, AND DIRECT THE JURY TO FIND THEIR VERDICT ON, a *theory* (and construction of the issues in the case) *of the case and evidence inconsistent* with BOTH so much of said opinion of this Court as relates to any *conspiracy* question, and also with any claim that the *alleged conspiracy* was material matter for consideration by either the jury or the trial Court, or any court of review; and that, therefore, as the trial Court, by what it said about *conspiracy* in its charge to the jury, adopted and charged according to such theory, that is, as so requested by plaintiff in error; therefore, it, plaintiff in error, should not here be heard to complain of anything said in its charge by the trial Court in *relation to the matter of conspiracy*

or of any ruling of the trial Court in conformity with such theory so claimed by it, and the fact of any such ruling having been made by excluding evidence of statements of Baldwin and of his supposed financial condition before the asking of those instructions, makes no difference *if the evidence previously given established the alleged conspiracy as stated in said opinion*, AND IF IT DID NOT (as we claim), then of course it was proper to so exclude the rejected testimony. And that we are correct as to this claim about the effect of asking those instructions, see—

N. Y. &c., R. R. Co. vs. Estill, 147 U. S. 592 (2nd Syl. on that page and corresponding part of the opinion in that case).

L. N. & S. R. Co. vs. Curtan, 51 Kansas, 432, 438.

Broom's Legal Maxims, 130 (6 Am. Ed. from 4th London Ed.).

And this more particularly, because we contend so to do and rule would be in accordance with the rules of law in relation to allegations of conspiracy shown by the case cited at pages 189 to 195 and 205 of said brief, decided by this Court, and other courts; and we contend the opinion of this Court, as written in this case, so far as the same relates to the matter of conspiracy, not only ignores, but is also in conflict with those cases.

17th. And we contend that the last above quoted part of said opinion *as coupled with what precedes and follows it is practically to the effect* that defendant in error cannot recover on the policy if the alleged conspiracy was entered into EVEN THOUGH THE PLAINTIFF IN ERROR WAS NOT THEREBY INJURED, *and such ruling is*, we contend, contrary not only to the case in 123 N. Y. 85, referred to, but is also in the face of and contrary to the cases in this and other courts last above referred to, inclusive of the said case of Adler *et al.* v. Fenton *et al.*, where at page 410 of 24th Howard it is in the opinion of this Court said: "An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it." And it was legal for Hillmon and his wife to procure the policy sued on, and there is not any evidence

either ever did an unlawful act or a lawful act in an unlawful manner, and therefore and as is also shown by before referred to cases including that of—

Porter v. Mack, 50 W. Va. 581; (s. c. 40, S. E. 459, 463 and cases therein cited),

the allegations about conspiracy are immaterial, and is not, that is, said quoted part of the opinion in this case is not (we contend) sustained by any heretofore established rule of law, (or shown case decided by any court), *but is contrary to settled rules of law relating to such subject*, and we further contend that deciding *that the excluded evidence should have been admitted is as applicable to this case and the evidence given in it and the finding of the jury to the effect that said dead body was the corpse of Hillmon*, AMOUNTS TO A HOLDING AND DECISION by this Court that such alleged *conspiracy can be established against John W Hillmon and defendant in error*, and recovery on the policy prevented, because of and by the *statements of Baldwin made in the absence of each*, and by testimony of Baldwin's supposed financial condition (including incompetent evidence to show such financial condition, that is, by permitting Crew to testify as to *his conclusions of fact* arrived at by claimed examination of writings and other things). And therefore we contend that the decision shown by the opinion in this case is erroneous and contrary to heretofore well established law.

18th. And further, irrespective of the foregoing, as the jurors by their verdict found to the effect that said dead body was the corpse of John W. Hillmon, it follows as a matter, certain beyond question, that he was not a party to any alleged conspiracy relating to said dead body, (his own), and that he did not and could not have made any alleged claim, pretence or representation or been party to any claim, pretence or representation relating thereto, either to plaintiff in error or to any person or persons, and the allegations in the 2nd defense are limited to that specific dead body as heretofore shown, so found by the triers of the facts to have been the corpse of Hillmon, and from this several matters follow, including that the jury necessarily in their verdict include a finding to the effect that there was not evidence sufficient to establish the alleged conspiracy as against Hillmon, that dead

body being his corpse, and therefore it follows that the alleged conspiracy did not exist, and also that the only issuable allegations in the 2nd defense were not only absurd but could not have been true, that dead body being as found by the jury the corpse of Hillmon, and the jury were the triers of every fact in the case pertinent or in any manner relevant to the conspiracy question, and their finding is, we contend, conclusive against plaintiff in error to the effect that there was not any such, as alleged, conspiracy.

Therefore, and because of the matters before mentioned, defendant in error claims this Court erred in its rulings and decisions in relation to the matter of the written statement dated of the 4th of September, 1879, and alleged conspiracy referred to in its opinion in this case, and therefore petitions for a rehearing of the case, and that the orders and judgments of this Court made herein at this October term, A. D. 1902, be set aside and vacated, and that the judgments of the United States Circuit Court of Appeals and of the Circuit Court of the United States for the District of Kansas complained of, be affirmed, and ask that a mandate be not issued on the said orders and judgments of this Court until final determination hereof, and if one has been issued, that the same be recalled, etc.

L. B. WHEAT,
C. F. HUTCHINGS,
JOHN H. ATWOOD,
Attorneys and Counsel for Respondent, Defendant in Error.

We certify that in our opinion the foregoing petition for rehearing is well founded and ought to be sustained, and a rehearing of the case granted.

L. B. WHEAT,
C. F. HUTCHINGS,
JOHN H. ATWOOD,
Attorneys and Counsel for Respondent, Defendant in Error.

Supreme Court of the United States.

No. 94.—October Term, 1902.

The Connecticut Mutual Life Insurance Company, Petitioner, *vs.* Sallie E. Hillmon.	On writ of certiorari to the United States Circuit Court Appeals for the Eighth Circuit.

[February 2, 1903.]

This was an action begun July 13, 1880, by Sallie E. Hillmon, in the Circuit Court of the United States for the District of Kansas, to recover the amount of a policy of insurance, ($5,000,) issued by the company March 4, 1879, upon the life of John W. Hillmon, her husband, in which the plaintiff was named as beneficiary. Plaintiff made the usual allegations of compliance with the terms of the policy, and averred that the assured had died March 17, 1879, thirteen days after the policy was issued, and that due proofs had been forwarded to the company. Other actions were also brought against the New York Life Insurance Company and the Mutual Life Insurance Company of New York, upon policies of insurance issued by them upon the same life, which actions were subsequently compromised.

Defendant interposed a general denial, and for a special defense set up in substance that on or before November 30, 1878, John W. Hillmon, John H. Brown, Levi Baldwin and divers other persons to defendant unknown, fraudulently conspiring to cheat and defraud defendant, procured a large amount of insurance on the life of Hillmon, to wit: $10,000 in the New York Life, by policy dated November 30, 1878; $10,000 in the Mutual Life, by policy dated December 10, 1878; and $5,000 in the Connecticut Mutual Life, by the policy in suit, dated March 4, 1879; that thereafter, in pursuance of such conspiracy, Hillmon, Brown and Baldwin falsely represented to defendant and others that said Hillmon had died, and that a certain dead body which they had procured was that of Hillmon, whereas in truth Hillmon "was not and is not dead," but has kept himself concealed under assumed names for the purpose of consummating the conspiracy.

As a third defense the company set up a release by plaintiff of all her claims against it under the policies.

Actions having been begun upon all three of these policies, an order was entered July 14, 1882, consolidating them for trial. Two trials of the three consolidated cases resulted in disagreements of the jury. On Feb-

ruary 29, 1888, judgments in each were rendered for the plaintiff, which, upon writs of error, were reversed by this court and the cases remanded for a new trial. (145 U. S. 285.) The material facts of the case are fully set forth in that report, and will not be here repeated, except so far as they are pertinent to the questions before this court for consideration. After two more trials of the consolidated cases, which resulted in disagreements of the jury, a compromise was effected between the plaintiff and the New York Life, which was followed by dismissal of the action against that company. Thereafter, and on January 9, 1895, an order previously entered consolidating the two remaining actions for trial was continued in force against the objection of each defendant, and the consolidated cases again came on for trial, resulting in separate judgments November 18, 1899, against both companies. To reverse this defendant sued out a writ of error from the Circuit Court of Appeals, and upon hearing in that court the judgment was affirmed with one dissent. (107 Fed. Rep. 834.) The Mutual Life sued out a similar writ of error, but compromised the case before it was heard in the Circuit Court of Appeals.

Mr. Justice BROWN delivered the opinion of the Court.

We shall have occasion to notice but few of the 108 assignments of errors in this case.

1. Several of these relate to an order of consolidation, and to the ruling of the court giving to the plaintiff six peremptory challenges to the jury, while each defendant had but three.

On June 14, 1882, the three original cases were first consolidated for trial, and so remained through all the trials which took place prior to the settlement with the New York Life. The propriety of this consolidation was affirmed by this court upon its first appearance here in 145 U. S. 285. A stipulation appears to have been entered into October 16, 1899, between the attorneys for the plaintiff and the attorneys for the three defendants, to set aside the order of consolidation, and a motion was made for an order to that effect, which was overruled, and the order of consolidation was continued in force as to the two remaining defendants. It would seem that the court refused to be controlled by the stipulation. We see no reason to doubt the propriety of this order, nor does it appear to have been seriously contested. But its effect upon the number of peremptory challenges to which the defendant was entitled is made the subject of dispute. Upon the former hearing of this case it was held that the consolidation of the three cases there considered did not impair the right of each of the three defendants to three peremptory challenges under R. S. sec. 819. But the question was left undecided whether the right of the plaintiff was multiplied, so that she became entitled on the last trial to six peremptory challenges, or only to three.

The Circuit Court was of opinion that, as under our ruling, the two defendants were under R. S. sec. 819, each entitled to three peremptory challenges, or six in the aggregate, the plaintiff was also entitled to six. This is the converse of the proposition established by this court when the case was first here. The argument of the defendant in this connection is that under the ruling of the court each defendant was treated as one party and the plaintiff as two parties; that it gave the plaintiff more challenges than she would have had in one case, treating the causes of action as distinct, and the plaintiff entitled to her three challenges in each case, with the result that each defendant, without its consent, and against its protest, was compelled to try its own cause before a jury to which it was given only one-half as many peremptory challenges as were given to the plaintiff. The consequence was that each defendant was prejudiced by the fact that every additional peremptory challenge allowed to the plaintiff beyond three makes arbitrarily a vacancy which may be filled in spite of the defendant by a juror, whom it might and would have challenged if it had an opportunity to do so. The substance of the argument is that, it having been held upon the former hearing here, that each defendant lost no right by the consolidation, and was entitled to as many challenges as if no such consolidation had taken place, the plaintiff was not entitled to any more challenges than she would have been entitled to, in case the consolidation had not taken place. Quite a number of cases are cited in support of this proposition: *Savage* v. *State*, (18 Fla. 909;) *Wiggins* v. *State*, (1 Lea. [10 Tenn.] 738;) *Mahan* v. *State*, (10 Ohio, 234;) *State* v. *Earle*, (24 La. Ann. 38;) *Schoeffler* v. *State*, (3 Wis. 823;) Thompson on Trials, sec. 45; Proffatt on Jury Trials, sec. 164. The case of *Spies* v. *The People* (122 Ill. 1,) is to the contrary.

Conceding that the great weight of authority supports the proposition of the defendant, we are still of opinion that it is not entitled to take advantage of it, inasmuch as it made but two peremptory challenges, waiving its right to a third, and thereby acquiesced in the composition of the jury. The only effect of allowing the plaintiff six peremptory challenges was to put three additional men upon the jury, which the defendant could not challenge, and if it had exhausted its peremptory challenges it might perhaps claim to have been prejudiced by the fact that three men had been put upon the jury which it was not entitled to challenge; but having failed to exhaust its peremptory challenges, it stands in no position to complain that it was deprived of the right to challenge others. (*Stout* v. *Hyatt*, 13 Kan. 232, 241; *Atchison &c. R. R. Co.* v. *Franklin*, 23 Kan. 74; *Florence &c. Railroad Company* v. *Ward*, 29 Kan, 354; *Atlas Mining Co.* v. *Johnston*, 23 Mich. 36; *Grand Rapids &c. Co.* v. *Jarvis*, 30 Mich. 308.)

2. Error is charged in the refusal to instruct the jury that "the statement signed and sworn to by John H. Brown on the 4th day of Septem-

ber, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown, and may also be considered as affecting the credibility of said Brown as a witness."

In lieu thereof the court charged the jury that Brown's statement, signed and sworn to by him, was not affirmative evidence of the truth of any matter therein contained or mentioned, and that it should not be considered by the jury except as affecting the credibility of the evidence of Brown in his deposition. To determine the correctness of this construction it is necessary to consider the circumstances under which the evidence was produced. The alleged death of Hillmon was said to have occurred in March, 1879. Upon the trial plaintiff offered and read in evidence the deposition of John H. Brown, taken on December 30, 1881, who swore generally that he was employed by Hillmon driving a team, and afterwards in taking care of and feeding hogs; that he started with him from Lawrence for Wichita for the purpose of locating a cattle ranch, and that Hillmon was accidentally killed by the discharge of a gun in the hands of Brown. To contradict this testimony William J. Buchan, a witness put upon the stand by the defendants, swore that in the spring or summer of 1879, but a few months after the alleged death, he met Brown by appointment at Lexington, and was told by him that he was uneasy about the affair; that it was not Hillmon that was killed but another man, but that Hillmon had got away and they were hunting for him; that he wanted to get out of it himself and to turn State's evidence, and that he wanted witness to see the attorney for the insurance company and let up on hunting for him if he would go on the stand and tell the truth about the whole affair. Upon the cross-examination of Buchan the *plaintiff* offered in evidence an affidavit made by Brown on September 4, 1879, in which he repeated the substance of the conversation testified to by Buchan, and stated that instead of Hillmon being killed it was another man whom Hillmon shot. This affidavit had already been produced, though not formally put in evidence by the *defendant* on the cross-examination of Brown. It was under these circumstances that the court ruled that the affidavit was not affirmative evidence of any truth or matter contained in it, and should not be considered, except as affecting the credibility of the evidence of Brown given in his deposition.

It is insisted in behalf of the plaintiff that, as no exception was taken to this part of the charge, its propriety cannot be questioned at this time; but as an exception was properly taken to the refusal of the court to charge that the statement having been introduced in evidence by the plaintiff may be considered in connection with Brown's deposition, as evidence of the facts therein stated under oath with like effect as his deposition, we think there

was sufficient to raise the point that the affidavit was not to be treated merely as affecting Brown's credibility, but as substantial evidence in favor of the plaintiff. Having excepted to the refusal to give a certain instruction, it was not necessary to repeat such exception when the contrary of such request was given in the general charge. As defendant had raised the point in one form, it was not necessary to repeat it in another.

As this statement of Brown's had already been produced by the defendant upon the cross-examination of Brown, to impeach his credibility as a witness, and he had been cross-examined as to its contents, it is difficult to see why it was introduced by the plaintiff in connection with the cross-examination of Buchan. It was evidently put in for some purpose, and it is difficult to assign any other than to make it a piece of independent testimony, since, in view of Brown's deposition to the contrary, the plaintiff might still have argued that the statement or affidavit, if ever made, was false. As now claimed, it was introduced for the purpose of explaining why the plaintiff consented to release her claim against the insurance company, though it seems to have been quite unnecessary in this connection, since its statements were already in evidence as part of Brown's cross-examination. Conceding that as a piece of independent testimony, a mere affidavit was not admissible, it was competent for the defendant to waive this objection and to treat it as other testimony in the case offered by the plaintiff. Under such circumstances it is something more than an admission by the witness that he had made statements inconsistent with his testimony upon the subject. For whatever purpose it was introduced, and in view of the fact that it was offered generally and without limitation as to its purpose, it became a piece of plaintiff's evidence to be weighed and considered like any other testimony in the case. We do not undertake to say that the plaintiff was absolutely bound by it and estopped to deny its truth, in view of Brown's deposition to the coutrary, but we think it was giving it too little effect to charge the jury that it could only be considered as impeaching the credibility of Brown; and we do not think defendant was asking too much in instruction number 44, that it might be considered in connection with the deposition of Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition. (1 Greenl. Ev. sec. 442.) The words "with like effect" were evidently intended to instruct the jury that the deposition and the affidavit were each independent of the other and each affirmative testimony—not, however, that they were of equal weight.

Suppose, for example, the only evidence of the identity of the body found had been the testimony of Brown. It doubtless would have been correct to charge that the utmost effect of his affidavit, if it had been formally introduced upon cross-examination, would be to destroy his testimony as given in the deposition. His credit as a witness being thus destroyed,

the fact of Hillmon's death would be regarded as not proven, and the plaintiff would be considered as having failed to establish her case. But upon the other hand, as the affidavit had not been put in upon the cross-examination of Brown, and the plaintiff read it as part of her case, it must necessarily be considered as a piece of independent evidence to be weighed in connection with the deposition, and the jury was necessarily left to consider which of the two, when taken in connection with the other testimony in the case, was to be considered as the more credible. The general rule undoubtedly is that, when a party offers a witness, he thereby generally represents him as worthy of belief, and while under the peculiar circumstances of the case this rule would not apply any more to the affidavit than to the deposition, the plaintiff, by putting both in evidence, without restriction as to the purpose of so doing, places them on the same level, and cannot be heard to say that the affidavit may not be considered as testimony of the facts therein sworn to as well as the deposition.

3. Several assignments are based upon the exclusion of the testimony of the witnesses Phillips, Blythe, Crew and Carr, as to acts performed and declarations made by the alleged co-conspirators John W. Hillmon, John H. Brown and Levi Baldwin, after evidence had been introduced establishing such conspiracy. That considerable evidence of a conspiracy between these three parties had been introduced and at a very considerable length is not denied, and the main objection to the introduction of the acts and declarations of the above witnesses was based upon the ground that the plaintiff, the wife of Hillmon, was not alleged to have been a party to such conspiracy.

The proposed testimony of Phillips, who was a physician, and had been called professionally by Baldwin to his house in the summer or fall of 1878, related to certain inquiries made by Baldwin as to the effect of death upon bodies. In this connection defendant offered to prove that Baldwin asked the witness if he had any insurance upon his life, and said he had been thinking about taking out some himself, and in the same conversation asked Phillips how long a dead body would decompose after it was buried. He further asked if it "would not be a good scheme to get a good insurance on your life and go down South and get the body of some Greaser and pawn it off as your body and get the money."

The witness Blythe, a lawyer and fire insurance agent, an acquaintance of John W. Hillmon and Levi Baldwin, testified that they had called at his office in the autumn of 1878, asked him concerning life insurance, how to get it, what were good companies, how they should make application, whether a person could travel in different countries without forfeiting the insurance, what proceedings were necessary to collect insurance upon death, what length of time would be required, &c., and that a week or ten days before this conversation he had met Baldwin alone on the street. Defendant

thereupon asked what was said by Baldwin at that time, and offered to prove that Baldwin asked the witness if he knew anything about life insurance and about the companies; and that a friend, a relative or connection, wanted to get some insurance, and he wanted to know if witness could recommend some good company to him. Whereupon witness told him how to do it.

By the witness Crew the defendant offered to prove the following testimony, all of which was excluded by the court, namely, that witness resided in the spring of 1879 in Lawrence, Kansas; was acquainted with both Mrs. Hillmon and Baldwin, and that as receiver of a local bank he had several notes of Baldwin's for collection, all of which were overdue. Two of the notes were secured by mortgage on real estate and one by chattel mortgage; that he had talked of foreclosing the mortgages, as he had been unable to collect either principal or interest; that Baldwin told him a part of the money represented by his indebtedness had been furnished to insure the life of John W. Hillmon; that in the latter part of March of that year (the conversation having taken place a few days before the first of March) he had heard of Hillmon's death; that at this time he had a conversation with Baldwin regarding the latter's indebtedness to the bank, in which Baldwin told him to let his matters rest, as he was then on his way West after the body of Hillmon; that he had arranged for a portion of the insurance on the life of Hillmon, and that as soon as he got it he would be able to straighten up all his affairs; that Baldwin stated that he was to have $10,000 of this insurance; that witness had acquainted himself thoroughly with Baldwin's financial condition and found him in very straitened circumstances, having some property but all mortgaged, and mostly all mortgaged twice, and that his indebtedness was pressing him severely.

The witness Alexander Carr testified that he knew both Baldwin and Hillmon, and that in March, 1879, he and Baldwin were out together buying stock some time after the 10th of March. The witness was then asked what conversation he had with Baldwin in regard to any business transaction between him and Hillmon, and offered to prove that witness was talking one day to Baldwin about himself and Carr going into a sheep ranch together; "and one day he was speaking about that he was under 'brogue' with John W. Hillmon, and he said he and Hillmon had a scheme under 'brogue,' and he said that if that worked out all right he was all right."

All this testimony was ruled out apparently upon the ground that declarations made by Baldwin were not admissible against the other conspirators to prove the existence of the conspiracy if not made in their presence; that these declarations were mere admissions or narrations of what had already taken place and were not made in furtherance of a common

design, while it was under way or in process of execution so as to form a part of the *res gestæ;* and for the further reason that the testimony was not admissible against the plaintiff, who was not alleged by the insurance company to have ever become a party to the alleged combination to defraud the insurance company, either by an original participation in the scheme or by subsequently adopting it.

While we are not called upon to express an opinion upon the question whether the mere proof of a conspiracy to defraud the defendant by the procurement of an insurance upon Hillmon's life with the view of ultimately collecting the amount of the policies by a false pretense of his death would be sufficient to avoid the policies as having been obtained by fraud, without proof that such conspiracy had been consummated by compassing the death of another party and passing off the body of the deceased as that of Hillmon, the fact still remains that there was evidence of a conspiracy to procure a large amount of insurance upon the life of Hillmon and to procure in some way the body of another man to pass off as that of Hillmon, and thereby to obtain the amount of these policies, nominally, at least, for the benefit of Hillmon's wife. It is true the plaintiff is not alleged to have been a party to such conspiracy, although she was named as beneficiary in the policies, but her husband is alleged to have been a party, and any fraud perpetrated by him at the time the policies were taken out was available as a defense by the company in an action by her.

These questions and declarations of Baldwin to the four witnesses above stated were made either just before or just after the policy was taken out. They were not so much narratives of what had taken place as of the purpose Baldwin had in view, and we know of no substantial reason why they do not fall within the general rule stated by Greenleaf, (1 Greenleaf on Ev. sec. 111,) that every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. The conspiracy then existed and was still pending. (*Smith* v. *N. B. Soc'y*, 123 N. Y. 85.)

These declarations taken together tend to show that Baldwin, who seems to have taken the most active part in the transactions connected with this policy, was heavily indebted, and being pressed by his creditors; that he expected in some way to obtain a large part of Hillmon's insurance, and that he was also desirous of going into a sheep ranch with Hillmon, with whom he declared he had a scheme under consideration by which they could raise the necessary funds; that such scheme consisted in obtaining insurance upon Hillmon's life, and then going South and getting the body of some other person and pass it off as the body of the insured, and thus recover the amount of the policy. This testimony was certainly corrobor-

ative of other testimony in the case, which both courts below agreed as establishing *prima facie* evidence of a conspiracy, and which was to the effect that Baldwin and Hillmon had been intimate acquaintances for eight or ten years prior to 1879; that Baldwin, who appears to have been a man of considerable means, had employed Hillmon in various capacities connected with his farm, and that during his visits at Lawrence Hillmon generally stayed at his house. Hillmon there first met his wife, who was a cousin of Baldwin's, and worked at his house. Hillmon was a man of no property, and after his marriage he and his wife occupied a single room in the house of one Mary Judson, and did their cooking upon her stove. Baldwin and Hillmon became interested in life insurance, and consulted various agents as to their companies and about methods of collection in case of loss. In a conversation with one Wiseman in February, 1879, Hillmon stated that he was going West on business and might get killed; asked about proofs of death; what the widow must do to get her insurance money and what evidence she would have to furnish if he were killed. Under these circumstances he took out insurance for $25,000, the annual premium for which amounted to $600. There were various other items of testimony of the same character, which the courts below regarded as sufficient *prima facie* evidence of a conspiracy.

Under the circumstances we think the evidence of the four witnesses in question should have been submitted to the jury, and that such testimony was admissible as against the plaintiff, though she was not alleged to be a party to the conspiracy, upon the theory that any fraudulent conduct on the part of the insured in procuring the policy, or in procuring the dead body of another to impersonate himself, was binding upon her. It is well settled that the fraud of the insurer's agent in the procurement of the policy is binding upon the principal. (*Millville &c Ins. Co.* v. *Collerd*, 38 N. J. Law, 480; *Nat. Life Ins. Co.* v. *Minch*, 53 N. Y. 144; *Oliver* v. *Mut. &c Ins. Co.*, 2 Curt. 207; *Burruss* v. *Nat. Life Ass'n*, 32 S. E. Rep. 49.)

A number of other alleged errors are embraced in the assignments, but we see none to which we find it desirable to call attention. For the error in the instruction regarding Brown's affidavit and in ruling out the declarations of the four witnesses named, the judgment of the Court of Appeals is reversed and the case remanded to the Circuit Court for the District of Kansas with instructions to grant a new trial.

Mr. Justice BREWER and Mr. Justice WHITE dissented.

True copy.

Test:

Clerk Supreme Court, U. S.